MALAYSIAN LAW

An Introduction to the Concept of Law in Malaysia

MALAYSIAN LAW

An Introduction to the Concept of Law in Malaysia

R.H. HICKLING

Pelanduk Publications
www.pelanduk.com

Published by
Pelanduk Publications (M) Sdn Bhd
(Co. No. 113307-W)
12 Jalan SS13/3E
Subang Jaya Industrial Estate
47500 Subang Jaya
Selangor Darul Ehsan, Malaysia

Address all correspondence to
Pelanduk Publications (M) Sdn Bhd
P.O. Box 8265, 46785 Kelana Jaya
Selangor Darul Ehsan, Malaysia

Check out our website at *www.pelanduk.com*
e-mail: *mypp@tm.net.my*

First edition originally published in 1987 by Professional Law Books Publishers, Malaysia. Second edition, revised, updated and published in 2001 by Pelanduk Publications (M) Sdn Bhd, Malaysia

Perpustakaan Negara Malaysia Cataloguing-in-Publication Data

Hickling, R.H.
Malaysian law: an introduction to the concept of law in Malaysia / R.H. Hickling. - 2nd ed.
Bibliography: p. 231
Includes index
ISBN 967-978-754-0
1. Jurisprudence—Malaysia—History. 2. Law—Malaysia.
I. Title.
349.595

Printed and bound in Malaysia by
Print Source

Dedicated with affection
to the memory of Azmi Khalid

CONTENTS

PREFACE TO THE SECOND EDITION

MOST SECOND EDITIONS of law books tend to be much longer than their original editions. However, this cannot be said of the present edition, which I have sought to keep to more or less the same length as its predecessor.

What I have sought to do in this book is to give a broad picture of a fascinating system of law in the course of rapid change under the varying influences of religion, technology, morality, fashion and necessity.

This book was first published in 1987 and in seeking to bring the original edition up-to-date, I have benefited tremendously from the help and advice of Associate Professor Khoo Boo Teong of the University of Malaya, Puan Hendon Mohamed of Messrs Hendon, Yeow and Chin, S. Ramaswamy of International Law Books Services, and Khalid Yusoff, Director of the Legal Profession Qualifying Board, and from the kindness and hospitality of Woo Kum Wah. Any errors or imperfections remain my own. I can only hope that the reader will share my own delight in the reading of Malaysian law.

I would also like to thank Professor G.W. Bartholomew for kindly allowing me to reproduce his lengthy review of the first edition of this book. Although originally written as a review for the *Malaya Law Review* (30 Mal LR 497), the publisher believes it offers a useful, indeed penetrating, introduction to the second edition.

R.H. Hickling

PREFACE*

IN ENDEAVOURING to teach jurisprudence in Kuala Lumpur I came to the opinion that law students should be given the opportunity to acquire a little knowledge (albeit of a basic character!) of the more important influences at work in the evolution of the concept of law in Malaysia. A few writers, notably Hooker, have touched upon the subject, but it has not been dealt with in the broad and simple manner which, as a casual teacher, I would have wished. Gradually, there grew within me the awful thought that I would have to tackle the matter myself.

My reluctance was due to a lack of detailed knowledge of both the principles of jurisprudence and history of Malaysian society itself. The two subjects are vast, and one lifetime inadequate for their study. For a lawyer of my generation, jurisprudence ended with the precepts of Austin and the insights of Salmond; we saw the subject as a handmaiden in the temple of the blind goddess herself (why *blind*, I now ask myself) and sought a practical purpose to our studies. Everything mattered. We brooded over concepts of *ownership* and *possession*, the nature of rights, obligations and duties, but all to a practical end. Well do I remember the confusion of the late Storr J., sitting in the High Court at Johor Bahru, when an Indian lawyer of my own generation argued (his arguments fortified by *Salmond on Jurisprudence*) that his client, the defendant, a young Chinese member of the Malayan Communist Party, did not "possess" the rounds of ammunition referred to in the charge. "But they were in a belt round his waist," exclaimed the judge,

---

* "The preface to a book is a device invented to allow an author to explain why he has made an ass out of himself in public." John Curtis Gowan, *Trance, Art and Creativity* (1975), xv.

seeking to hold on to reality, "that you admit. How can you argue that he did not possess them?"

In this book I do not deal with matter generally available in, for example, Salmond; indeed, I have endeavoured to cut myself off from Western sources of jurisprudence as much as possible. And we have moved on to another level today, when the study of such concepts as *possession* has been abandoned and the student is taught to admire the verbose idiosyncrasies of Kelsen, Weber, Pound, Olivecrona, Hart, Rawls and those others who haunt the texts of modern jurisprudence. Here it is, I believe, that the trouble begins. Compelled to view jurisprudential thought as originating and developed in an exclusively Western environment, the Malaysian law student is seldom referred to Asia as a source of legal theory and, when he is so referred, the reference is usually in slighting terms. The basic concept of law seems to be that it is a kind of gift from the West to the East, originating in European philosophy, practice and politics. This is an absurd fallacy, and it is time the boundaries of Malaysian jurisprudence were altered, to put Malaysia at their centre.

This preface is written primarily for the critical law student in Malaysia. May he forgive me for my diffuseness and obscurity, and take from it whatever may be of use or interest—bearing in mind that it is meant to stimulate, rather than to inform. For it is the *zest* for law that matters, and imparts life and understanding.

It is presumptuous for an Englishman to embark on a quest for a Malaysian jurisprudence. Here, I seek to scale no academic heights, but simply to carve out a rough track for my juniors and betters to improve upon. May the reader therefore forgive the shortcomings of this elementary work, full of errors and omissions as I know (in spite of my efforts) it must be. What I have sought to do is to outline, as simply as I can, those vague, popular legal ideas, as persistent as fairy tales and the myths of childhood, which haunt Malaysian law. As confused as a nebula, they yet represent a popular, traditional wisdom, and they have given birth to the present legal system. Dim, virtually indefinable, these influences, rooted in folk memory, in the ancient lore, superstitions and customs of distant ancestors, emerge from the darkness of the past into the fitful light of the present. And they persist. We catch glimpses when reading, say Maxwell on Malay land tenure, and sup-

pose that we have captured for a moment some certainty; but then, the mist descends, a twilight falls, and we are left to interpret the strange things we have seen, and to deduce a pattern of behaviour and progress, from all-too-scanty evidence.

The time is still not ripe, I suspect, for a history of Malaysian law, for there are great gaps in our knowledge of the past. Yet if, in struggling with concepts and perspectives, the reader can be encouraged to an interest in the legal history of Malaysia, then perhaps that same reader may find a light of sorts to assist him along the unmapped road of the future. And if this modest contribution to legal literature imparts a little of the enthusiasm I feel for Malaysia, its people and its laws, I shall be content. Here, then, is a picture of law as part of the necessary poetry of life.

I am grateful to the authors of the academic exercises cited in the text, writers whose work merits recognition. I am grateful, too, to my old students and colleagues at the Faculty of Law of the University of Malaya for the enlightenment they have given me; to the former Dean of Law, Professor Dato' Dr Visu Sinnadurai, whose scholarship is matched only by his sense of the aesthetic, for his active encouragement; to Professor M.P. Jain for his helpful advice; and to Dr Jon Summers and the Asia Foundation for supporting this study; to the staff of the Law Library in the Faculty of Law for their unfailing help; and to Puan Saaidah Bajuri, who managed to decipher my illegible handwriting. However, the faults and prejudices in this work are all my own and I hope that nothing I have written here will offend; what I have sought to do is to encourage thought on a subject full of wonder.

R.H. Hickling
Faculty of Law
University of Malaya
June 9, 1987

BY WAY OF INTRODUCTION

G.W. Bartholomew

THERE IS ONLY ONE THING wrong with this splendid book: and that is the title (of which more anon). If that be the first comment, the second must be that Hickling has written it in a style which one thought had disappeared from legal writing with F.W. Maitland: it is a joy to read. Not only is the book a joy to read, it is also important because of Hickling's approach to his subject. He commences in a critical vein and writes:[1]

> Compelled to view jurisprudential thought as originating and developed in an exclusively Western environment, the Malaysian law student is seldom referred to Asia as a source of legal theory and, when he is so referred, the reference is usually in slighting terms. The basic concept of law seems to be that it is a kind of gift from the West to the East, originating in European philosophy, practice and politics. This is an absurd fallacy, and it is time the boundaries of Malaysian jurisprudence were altered, to put Malaysia at their centre.

Now this is well said, and long overdue. Moreover, not only are the boundaries of Malaysian jurisprudence to be altered, but warning is given to "Western" jurisprudes to learn their place:[2]

> A writer such as Hart considers law entirely within a European context. Primitive societies may merit a footnote, and overseas legal systems wise enough to derive their inspiration from European

---

1 On p. xii.

2 On p. 4.

> sources earn a mention: but the reader will look in vain in Hart's *Concept of Law*, or even in such an admirable work as Friedmann's *Legal Theory*, for reference to any Asian or African legal system. Law is, it seems, a gift of Western civilisation to the rest of the world. The fact that law as a concept was known in Asia long before it developed elsewhere is unobserved, unregarded. Were such a book simply a study in analytical European jurisprudence, well and good; but when the author suggests that it is also an essay in universal principles, then its limitations soon become apparent.

Now the relevance of English law to Malaysian society has frequently been doubted (of which, again, more anon) and Hickling is naturally one of the doubters. His thesis in this book, however, goes much further than that; he is not concerned with the relevance of this or that piece of substantive law: he is questioning the relevance of the English concept of law, of English notions of the function of law and its place in society. In short, this book is a call for a Malaysian jurisprudence, that is, a jurisprudence which draws upon the earlier and older traditions which constitute the palimpsest which is the Malaysian legal system. Now since this involves changing the paradigm, as it were, it is an inherently difficult task. The difficulty was pointed out by Ruth Benedict who, speaking of culture in general, observed:[1]

> In culture too we must imagine a great arc on which are ranged the possible interest provided by the human age cycle or by the environment or by man's various activities. A culture that capitalized a considerable portion of these would be as unintelligible as a language that used all the clicks, all the glottal stops, all the labials, dentals, sibilants and gutterals from voiceless to voiced and from oral to nasal. Its identity as a culture depends upon the selection of some segments of this arc. Every human society everywhere has made such a selection in its cultural institutions.

It is obvious, of course, that cultures and civilisations have been exerting influence on each other, with varying degrees of compulsion, for rather a long time now. Gordon Childe used to explain several millennia of prehistory as "the irradiation of European barbarism by Ori-

[1] *Patterns of Culture* (1961), on p. 17.

ental civilization",[4] and it is a good many years now since Juvenal complained that the Orentes was flowing into the Tiber.[5] Over the last few hundred years, the waters have, as it were, reversed their flow. What Hickling is exploring is the possibility of mixing the waters; drawing on the accumulated experience of two separate traditions without producing a Benedictine cacophony. Hence the difficulty of his task and the importance of this book, whose title should be something like *The Concept of Law in Malaysia* or *Introduction to Malaysian Jurisprudence*, for no less than that is the task that Hickling has set for himself.

So far so good. Precisely what is involved here, however, needs careful consideration, for the significance of Hickling's perspective should not be allowed to go unappreciated through over-enthusiastic enunciation. Thus when we read, as in the above passage: "the fact that law as a concept was known in Asia long before it developed elsewhere is unobserved", we are inclined to wonder. If *ubi societas ibi ius*, which seems a reasonable proposition, then assertions as the origins of law are as futile as assertions as to the origins of language.[6] When we further read that: "I have endeavoured to cut myself off from Western sources of jurisprudence as much as possible" one is inclined to wonder whether this is not a case of throwing the baby out with the bathwater, for if this means that insights are to be rejected merely because they are of Western provenance, then the approach seems somewhat unnecessarily austere. Hickling is critical of a tradition in which:[7] "the student is taught to admire the verbose idiosyncrasies of Kelsen, Weber, Pound, Olivecrona, Hart, Rawls and those others who haunt the textbooks of modern jurisprudence". That some at least of the writers mentioned should be placed upon the index of Malaysian jurisprudence would not necessarily raise much *angst*; but why Weber? One would have thought that the Malaysian legal system cried out for somewhat rather like Weberian analysis.[8]

---

4 "Retrospect" (1958) 32 *Antiquity* on p. 70.

5 *Iam pridem Syrus in Tiberim defluxit Orontes.*

6 As Hickling himself points out on p. 15.

7 On p. xii.

8 To which one might add F. Tonnies, *Gemeinschaft und Gesellschaft* (1887) trans. C.P. Loomis as *Community and Association* (1955) or E. Ehrlich *Grundlegung der Soziologie des Rechts* (1913) trans. W.M. Moll as *Fundamental Principles of the Sociology of Law* (1936).

The point which Hickling is making is akin to that which perturbed historians some years ago. The charge was that the history of Southeast Asia was being written from a Eurocentric point of view. The charge appears first to have been laid by van Leur who, in a review first published in 1939, complained that, after the arrival of ships from Western Europe:[9] "the Indies are observed from the deck of the ship, the ramparts of the fortress, the high gallery of the trading house". Hall, in the first edition of *History of South East Asia*, inveighed against the practice.[10]

> What is attempted here is first and foremost to present South-East Asia historically as an area worthy of consideration in its own right, and not merely when brought into contact with China, India or the West. Its history cannot be safely viewed from any other perspective until seen from its own.

Subsequently, Bastin entered a *caveat* and thereafter the pages of the *Journal of South East Asian History* were enlivened with many contributions on the subject.[11]

---

[9] *Indonesian Trade and Society: Essays in Asian Social and Economic History* (1955).

[10] See the fourth edition (1981) on p. xxix.

[11] See D.P. Singhal, "Some Comments on 'The Western Element in Modern Southeast Asian History'" (1960) 1 JSEAH 118; J.R.W. Smail, "On the Possibility of an Autonomous History of Modern Southeast Asia" (1961) 2(2) JSEAH 72 and G.I.T. Machin, "Colonial Post-Mortem: A Survey of the Historical Controversy" (1962) 32 JSEAH 129. Yet a further example of much the same point which I encountered only the other day is the following passage from Anthony Burgess, *Language Made Plain* (2nd. ed., 1975) on p. 111: "The smugness of scholars like J.S. Mill, who saw in the 'eight parts of speech' fundamental categories of human thought, required, and still requires, the cold douche of contact with an Asiatic language. There is nothing universal about our Western grammatical compartments, and, at best, they are somewhat shoddy and makeshift when applied to the languages for which they were formulated. There are too many assumptions, too little desire (there never is much where vested interests are involved) to look facts in the face". An insight which all lawyers, as Hickling would agree, need to bear in mind.

Hickling makes much the same point complaining that the legal history of Malaysia has tended to start with the arrival of Captain Francis Light in 1786, and he adds:[12]

> What is important to note, perhaps, is that there were kingdoms and sultanates long before the common law arrived in the Straits Settlements between 1786 and 1824, and that Malaysia possessed its own legal systems long before any Westerners appeared on the scene.

Again the point is well made, and although Hall's *apologia* is not without force:[13] "the *apparatus scholaticus* required by the researcher into the earlier period takes a lifetime to acquire", the need for such research is undoubted.

Underlying much of the criticism, as it is applied to law, appears to be the notion that there exists a "western" (or European) idea of law which is different from an "eastern" (or Oriental or Asiatic) idea of law. This is a notion which needs closer examination than it has hitherto received. Any consideration of the history of "Western" legal philosophy reveals a great diversity of schools and it would be difficult to determine which should be regarded as quintessentially "western". Hickling has written:[14] "For a lawyer of my generation, jurisprudence ended with the precepts of Austin and the insights of Salmond". That may be so but it is a judgment which reflects on the inadequacies of the English legal education, and there seems to be no reason for identifying "western" notions of law with positivism, which is but one of many approaches thrown up within the "western" tradition.

By the same token one may doubt whether there exists any monolithic "eastern" (or Oriental or Asiatic) legal tradition. One would, one suspects, be hard-pressed to identify that which was common to the Hindu and the classical Chinese approach to law by which they could both be distinguished from some sort of postulated "western" tradition. Furthermore, even within the classical Chinese tradition, there is a clear distinction between the Confucian approach and that

[12] On p. 28.

[13] Op. cit., on p. xxiii.

[14] On p. xi.

of the *Fa Chia*, and one suspects that Han Fei-tzu would have more in common with say, Hobbes (for all that he is "western") than with a Confucian scholar (for all that they were both "eastern").

The fact that some of these oversimplistic antitheses stand in need of re-examination does not affect Hickling's point, for it remains true that there are more concepts of law than one—indeed there are more than two—and a study of jurisprudence which is to avoid the charge of provincialism must in effect be comparative,[15] and this remains the fundamental thrust of Hickling's argument.

The cardinal fact about contemporary Malaysian legal system is, nevertheless, the notion of the reception (or imposition)[16] of English law. Starting from that premise generations of lawyers have looked no further. Hickling is pleading for Malaysian lawyers to widen their vision and to see their law not wholly in terms of reception, but also in terms of their own culture, and to rethink the problems confronting contemporary Malaysian society in a wider perspective.

The notion of reception of law, whilst of long standing, remains mysterious. Montesquieu made the point many years ago:[17]

> the political and civil laws of each nation ... should be adapted in such a manner to the people for whom they are framed that it should be a great chance [*un grand hazard*] if those of one nation suit another.
>
> They should be in relation to the nature and principle of each government: whether they form it, as may be said of politic laws; or whether they support it, as in the case of civil institutions.
>
> They should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandment, huntsmen, or

---

[15] This is implicit in Austin's notion of general jurisprudence. See his *The Province of Jurisprudence Determined*, ed. H.L.A. Hart (1968) on pp. 365 *et seq*.

[16] The term "imposition" is borrowed from Tedeschi: "On Reception and Legislative Policy of Israel" (1966) *Scripta Hierosolymitanca* 11. See now S.B. Burman and B.E. Harrell-Bond, *The Imposition of Law* (1979).

[17] *Esprit des Lois* (1748), trans. by T. Nugent as *The Spirit of the Laws* (1949) on pp. 6-7.

> shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs. In fine they must have relations with each other, and also to their origin, to the intent of the legislator, and to the order of things on which they are established; in all of which different lights they ought to be considered.

Were this to be so, it would be difficult to understand how reception of law could ever occur; yet it did. Thus Sir Paul Vinogradoff has commented.[18]

> Within the whole range of history there is no more momentous and puzzling problem than that connected with the fate of Roman Law after the downfall of the Roman State. How is it that a system shaped to meet certain historical conditions not only survived those conditions, but has retained its vitality even to the present day, when political and social surroundings are entirely altered? Why is it still deemed necessary for the beginner in jurisprudence to read manuals completed for Roman students who lived more than 1,500 years ago? How are we to account for the existence of such hybrid beings as Roman Dutch Law or the recently superseded modern Roman Law of Germany? How did it come about that the Germans, instead of working out their legal system in accordance with national precedents, and with the requirements of their own country, broke away from their historical jurisprudence to submit to the yoke of bygone doctrines of a foreign empire?[19]

Lawson's answer to that particular problem was clear:[20]

> There is little or nothing that is purely national in the Roman law contained in Justinian's *Corpus Juris*. It was ready for reception by

---

[18] *Roman Law in Mediaeval Europe* (1909) on p. 11.

[19] Written, of course, eighty years ago.

[20] *A Common Law Lawyer Looks at the Civil Law* (1953) p. 96.

> any people that had reached a state of civilisation which demanded it and was capable of using it.

Koschaker was equally uncompromising:[21]

> Foreign law is not received because it is considered the best. What makes a legal system suitable for reception is rather a question of force [*eine Machtfrage*].

Certainly the answer to the question of why there was a reception of English law overseas is straightforward: colonialism, that is, imposition by the imperial power. And yet the relationship between law and society is not a purely one-way street, for whilst society undoubtedly influences law, it is equally true that law influences society, for as van Caenagam has stressed:[22]

> It is possible that national character, a vague but nevertheless real thing—that the Normans were different in type from the English is clear enough—may just as well be the product of the legal system as the other way round. There is little doubt that living for centuries under the Common Law must have produced many 'Anglo-Saxon attitudes'.

Nevertheless there is sufficient substance in the view that law should in some way reflect some sort of Savigean *Volksgeist* to cause one to ponder. And in pondering it is as well to be clear as to who are the *Volk* with whose *Geist* one is concerned. For a Malaysian lawyer sitting in his air-conditioned office in Kuala Lumpur with his fax on one side and his telex on the other negotiating syndicated loans, aircraft leasing agreements or multinational construction contracts, the *Volk* whose *Geist* he is concerned with is that of other lawyers sitting in other offices negotiating the same sorts of agreements, that is, he is not likely to find much joy in the *Undang-Undang Melaka*. Yet quite clearly there are other areas of law in which the *moeurs* of the local community are crucial. Both aspects need to be taken into consideration, and Hick-

---

[21] *Europa und das romische Recht* (1947) on p. 138.

[22] *The Birth of the English Common Law* (1973) on p. 87.

ling is claiming that the balance, as it were, needs to be held with a more even hand.

Approaching jurisprudential problems from the perspective from which he does, Hickling is able to bring new insights to bear on many an old problem, only some of which can be touched upon here.

Hickling thus raises the issue of sovereignty, that *pons asinorum* of jurisprudence and comments:[23] "It is impossible to understand the concept of sovereignty in Malaysia except in Malaysian terms", in which he is surely correct. For a Muslim, for example, there is no real problem: sovereignty is vested in Allah, and the courts of Pakistan needed no Western jurisprude to tell them that. And whatever Allah may be He is not *grundnorm*. Here again we see the clash of two distinct approaches to the problem. The Roman imperial position was clear: *quod principi placuit legis habet vigorem*. For Bracton, however, *Rex non debet esse sub homine sed sub deo et sub lege quia lex facit regem*. Who is to be boss? The all too palpable *rex* or the impalpable *ius*? Antigone had no doubts on the matter, and paid for her conviction with her life. Are there principles of law which control even the legislative sovereign, and if there are, where are they to be found? Ah! there's the rub. For if there are such principles they are *in gremio judicis*, and for the positivist this is drifting perilously close to the shoals of natural law.

The matter may be approached from a different angle. Sir Carlton Allen has spoken of "two antithetic conceptions of the growth of law":[24]

> In the one, the essence of law is that it is imposed upon society by a sovereign will. In the other, the essence of law is that it develops within society of its own vitality. In the one case, law is artificial: the picture is that of an omnipotent authority standing high above society, and issuing *downwards* its behests. In the other case, law is spontaneous, growing *upwards*, independent of any dominant will.

Now whilst it is undoubtedly true that the centre of gravity of most contemporary legal systems has shifted towards the descending

---

[23] On p. 42.

[24] *Law in the Making* (7th. ed., 1964) on p. 1.

thesis of law, which in practical terms means legislation, the spontaneous development of rules continues albeit in a subordinate role: not, of course, *contra legem* but *praeter* or *secundum legem*. Hickling provides an example drawn from the field of mercantile custom, a concept which would indeed support a much greater weight than judges are normally prepared to put upon it. Gower has provided yet a further example when he wrote:[25]

> Although we like to pretend that only Parliament and the judges make law, the fact is that the legal and accountancy professions by their interpretation (or misinterpretation) of it and by their practices and standards, do so too.

whilst the "practice of conveyancers" has long been recognised as a seminal field of legal development.[26]

One of the keys to any understanding of legal history—and possibly even one of the keys to an understanding of jurisprudence—is the recognition that despite the dominant role that legislation has assumed in recent years, the fact remains that all legal systems are the result, at any given time, of the operation of both modes of development. If the so-called historical school of jurisprudence is but the intellectual rationalisation of the ascending thesis of law, positivism is but the intellectual rationalisation of the descending thesis, and no legal system will ever be adequately explained save in terms of both.[27]

The centre of gravity of legal systems may have shifted towards legislation as the preferred mode of legal development, but Hickling stresses that "little attention, if any, is paid to the limits of legislation", that is,[28]

---

[25] *Review of Investor Protection* (1982), cited in D.R. Miers and A.C. Page, *Legislation* (1982), on p. 177.

[26] See J.T. Farrand, *Contract and Conveyance* (2nd. ed., 1973) Cap. 1.

[27] The term "ascending thesis" and "descending thesis" are, of course, borrowed from W. Ullmann: See, *inter alia*, "Law and the Mediaeval Historian" reprinted in *Jurisprudence in the Middle Ages* (1985) on pp. 136-7 and *A History of Political Thought: The Middle Ages* (1985) on pp. 12-14.

[28] On p. 196.

> to the extent to which a policy requires, and can successfully be implemented, by a law put on the statute book. Indeed, at times it seems as if the lawmakers suppose that the mere incantation of a few legal spells will, in themselves, create a world that corresponds more exactly to the Utopia of the lawmakers' dreams.

The limits of the legislative process have, of course, often been commented upon. Thus Shu-hsiang wrote[29] to the Prime Minister of Cheng on the publication of the Cheng "code" (traditionally the first of the Chinese codes) in 536 B.C., as follows:

> Originally, sir, I had hope in you, but now that is all over. Anciently, the early kings conducted their administering by deliberating on matters [as they arose]; they did not put their punishments and penalties [into writing], fearing that this would create a contentiousness among the people which could not be checked. Therefore they used the principle of social rightness (*yi*) to keep the people in bounds, held them together through their administrative procedures, activated for them the accepted ways of behaviour (*li*), maintained good faith (*hsin*) towards them, and presented them with examples of benevolence (*jen*).

"But", he continued:

> when the people know what the penalties are, they lose their fear of authority and acquire a contentiousness which causes them to make their appeal to the written words [of the penal laws], on the chance that this will bring them success [in court cases] ... Today, sir, as prime minister of the state of Cheng, you have built dikes and canals, set up an administration which evokes criticism and cast [bronze vessels inscribed with] books of punishment. Is it not going to be difficult to bring tranquillity to the people in this way? ... As soon as people know the grounds on which to conduct disputation, they will reject the[unwritten] accepted ways of behaviour (*li*) and make their appeal to the written word, arguing to the last over the tip of an awl or knife. Disorderly litigations will multi-

[29] D. Bodde and C. Morris, *Law in Imperial China* (1967) on pp. 16-7.

> ply and bribery will become current. By the end of your era, Cheng will be ruined.

He concluded ominously:

> I have heard it said that a state which is about to perish is sure to have many governmental regulations.

More recently Macaulay wrote:[30]

> The circumstances which have most influence on mankind, the changes of manners and morals, the transition of communities from poverty to wealth, from knowledge to ignorance [*sic*], from ferocity to humanity—these are, for the most part, noiseless revolutions. Their progress is rarely indicated by what historians are pleased to call important events. They are not achieved by armies, or enacted by senates. They are sanctioned by no treaties, and recorded in no archives. They are carried on in every school, in every church, behind ten thousand counters, at ten thousand firesides ... But we must remember how small a proportion the good or evil effected by a single statesman can bear to the good or evil of a great social system.

All contemporary evidence suggests, despite the blind faiths of politicians, that the way to the millennium is not likely to be paved with pages from the statute book, nevertheless, it seems reasonable to assume that the writing down of the laws is perhaps the most significant event in the legal history of any nation, for thereafter law begins to change in nature:[31]

> Their historical significance lies in the fact that with written law changes become distinctly perceptible, and when made have to be made consciously and intentionally, and when they have been made once they can be made again. 'The law' is no longer some-

---

[30] "History" (1828) *Edinburgh Review* reprinted in F. Stern, *The Varieties of History* (2nd. ed., 1972), on p. 84.

[31] *An Introduction to Greek Legal Science*, ed. F. de Zulueta (1944) on p. 22.

> thing immutable, intangible, inviolate: it has become a product and instrument of human thought and purpose.

To the extent to which law assumes a written form, then to some extent its spontaneous development ceases and in so far as it changes, the changes tend to be deliberately introduced reflecting purely external factors at the expense of internal considerations.

Curiously it is the common law, of all contemporary systems, that has remained closest to its customary origins. Thus Plucknett has written:[32]

> It is easy to demonstrate, if demonstration be needed, that the common law of England is just such a custom, alive and vigorous, growing and changing. Both king and people desired amendments from time to time, and achieved them. The theorists were laying down that custom derived its force from the consent of the prince *or* of the people, and this unresolved disjunctive is full of significance.

The disjunctive remains unresolved even today.

Plucknett continues, however:[33]

> Once it is realized that what [statutes] say is important, there will soon be some keen disputant to point out that it is also important to note the things that they do not say. And so to study a text carefully soon leads to a minute textual study. Hence the whole attitude changes, and verbalism is inescapable. Our statute law has therefore become a very special sort of law, studied in a special way, and manifestly different from the common law.

and once that change occurs a vital problem is raised:[34]

---

[32] *Legislation of Edward I* (1949) on p. 8.

[33] Ibid., on p. 14.

[34] Ibid., on p. 14. For the jurisprudential position of the Common Law see A.W.B. Simpson, "The Common Law and Legal Theory" in A.W.B. Simpson (ed.), *Oxford Essays in Jurisprudence (Second Series)*, 1973, on pp. 77, *et seq.*

> As soon as that position is reached, questions of fundamental importance and considerable difficulty become apparent. The simple conception of English law as unwritten custom is replaced by the admission that there are two sources of law instead of one. The relation between these two must be settled.

The relation between them is by no means clearly settled even now.

There are many other problems upon which Hickling touches upon in this book, amongst which his contrast between the confrontational approach of the common law with the consensual approach of other systems is notable, but all reviews must come to an end, and it is hoped that enough has been said here to indicate the importance of this book.

I began this review by quoting a passage from Hickling's preface: let me, as I close, quote a passage from the end of this book:[55]

> So the Malaysian legal system must be interpreted in Malaysian terms. This should be obvious, self-evident: but the temptation to refer to the great scholarship of English and American texts, is, for much of the time, too great to be resisted. They sit there on the library shelves, the majesty and wisdom of past and present generations of faithful common law lawyers, and every course of training in the common law draws us to them, as moths to flame.

The temptation to do so is, of course, all the greater if there are few, if any, other texts to refer to. The existence of an independent legal literature is not some sort of optional extra for a legal system, it is one of the necessary conditions of the development of a vigorous and independent body of law. Hickling's book will, I have no doubt, occupy an honourable place in the still small but growing number of works devoted to the Malaysian legal system.

Having said that, however, it is necessary to stress that the use of the adjective "Malaysian" in the title should not mislead anyone into thinking that this book has relevance only to Malaysian lawyers. Much of the material may be drawn from Malaysia, but the problems that that material is used to illuminate are perennial, and the insights

[55] On p. 213.

that are obtained by viewing those problems from the perspective Hickling has adopted are of general significance. *Ex oriente lux*.

Malaya Law Journal
30 Mal LR 497

TABLE OF CASES

TABLE OF STATUTES

Chapter 1

CONCEPT

NECESSITY FOR LAW

If we could stand off from our world and view it at this moment, yet in the perspective of time as well as of space, what would we see? Would we observe a society in the early infancy of Man, or would we see already signs of degeneracy, decay? Conditioned as we are to the myth of progress, we are likely to adopt a notion of Man as being in his early infancy, with the hope of a bright future spreading out, with universal peace, in a few million years or more before him: the sort of vision Olaf Stapledon offers in his book, *Last and First Men*,[1] in which he foresees a succession of civilisations, of which ours is but the primitive first.

Yet, while this may be so, it is not for us, who are their creation, to despise the peoples of the past, and to suppose that their primitive social structures, peculiar customs and simple ways of thought are to be condemned. As the Chorus says at the end of Sophocles' *Antigone*:[2]

Of happiness the crown
And chiefest part
Is wisdom, and to hold
The gods in awe
This is the law ...

Those gods came down to us from the remote past, and in early days men worship power, as manifest in natural forces which they personify, to which they give names and form, and seek to understand,

---

[1] Methuen, 1930.

[2] Watling (trans.), Penguin Books.

placate. When power is assumed by a ruler, it still has an almost supernatural content: and then, by instinct, men realise that it must be tempered by wisdom. All this the old Hindu kings and Malay rulers understood. Wisdom seeks righteousness, and righteousness (exploring that part of our understanding of ourselves and the world around us which we now call *natural law*) seeks certain stable values, principles. We aspire to justice, but the best we can contrive, and all we can hope from any legal system we may invent, is to minimise injustice, no more. As Del Vecchio, a wise Italian jurist once wrote,[3] "the evil in this world has roots so vast and deep that law (as jurists themselves must recognise) cannot be sufficient defence against it."

So, men long to discover and understand something of that sublimity which is at the heart of all things, all life, all nature. A well-behaved society, one whose enlightened members live and practise Auden's plea, *We must love one another or die*,[4] can reject the letters of a thousand laws; but, for the rest of us, some rules for the avoidance of physical and emotional collision are necessary. It is in the evolution of these rules that the history and rationale of our legal system can be found: and they themselves have grown out of the truths of religion.

CONCEPT DEFINED

In embarking upon a study of jurisprudence, the student discovers that the subject is haunted by concepts; indeed, the essence of the subject lies in a series of concepts, and in the theories that go to their construction. Yet on investigating the word *concept* itself, the student will find that vagueness which invests all definitions of law. Having its origin in the Latin sense of *taking with*, or of *making a comparison*, we can say that the word means a general *notion*, a basic but not especially well-defined *idea*. This takes us as close we are likely to get to the meaning of a word that is seriously overworked, and much abused, in the realm of legal theory.

Yet, concepts are indeed the foundation of law, itself another concept. As men began to develop a civilised society—that is to say, as soon as they began to live in houses, farms and cities, in close contact

[3] Del Vecchio, *Justice* (ed. Campbell, 1952), 187

[4] *September 1, 1939.*

with each other—they found that their private concepts of right and wrong and the like were often in conflict with those of their neighbours, and that it was necessary, in the interests of peace, order and harmony, to work out agreed principles of behaviour. The notion of *law* emerged, at first sometimes so closely identified with the supernatural that it became so formidable as to become rigid: like the Ten Commandments brought down by Moses from Mount Sinai, or like, perhaps, the old Constitution of Johor, it could in no way be changed; it was clothed with divinity, it represented the word of God, and no human authority was competent to alter or revoke it. When this happened, a new concept was necessary, and had to be devised, given a name and defined. Philosophers began to consider the nature of truth and justice, and to claim that the law of man must strive to be just, and in harmony with the law of God.

In this fashion we may suppose that notions of *ownership* and *possession* emerged, arising out of the need to distinguish *meum* from *tuum*, what is mine from what is yours. Gradually, more complex concepts evolved, consisting of notions of obligations and rights, ideas of loyalty, a definition of the ideal good neighbour. With the acceptance of the family as the basic social unit, there evolved concepts of marriage, legitimacy, guardianship, adoption and succession, and these carried society into the realm of more complex law, relating to property, settlements, wills, intestacy and so on. At the same time, the concept of kingship gave birth to theories of sovereignty and allegiance, and with the birth of the state (a late development, a sophisticated notion) came concepts of citizenship and treason. The notion of conciliation merged into that of arbitration, and this in turn gave birth to a creation of formal judicial power, with concepts of oaths, evidence and procedure, of formalised confrontation. Criminal law became sophisticated, developing out of the concept of criminal liability that of *mens rea*, guilty intention; and sometimes this in turn changed to one of absolute liability, a situation in which culpability was implied whatever the intention of the doer. Political concepts developed; doctrines such as those of the separation of powers, of federal government and constitutional supremacy arose; and, as society progressed, ever more subtle concepts emerged, like those of status and legal personality.

The process continues, as we see an ever-increasing number of laws on the statute book, creating a labyrinth of rights and duties in

which the ordinary citizen quickly becomes lost, and longs for a sight of first principles. These are now difficult to discern: but perhaps an understanding of the principles of jurisprudence can offer a guide, and take us some way out of our dilemma. The young lawyer should not despise knowledge, however simple its source. One of the best Malaysian judges[5] kept a few "nutshell" guides to the law in his chambers, to make sure that he never lost sight of first principles. It is a wise practice; often we cannot see the wood for the trees.

SURVIVAL AND LAW

Before World War II, jurisprudence was primarily concerned with abstract ideas, basic concepts within which ideas of law and justice were to be, albeit dimly, perceived. The contemporary fashion in jurisprudence—and jurisprudence is, like ladies' dresses, subject to spectacular changes[6]—is for a study of the ideas of particular writers on jurisprudence, each of them arguing the merits of his own concept of law, usually to the disadvantage of that of his predecessors and contemporaries. In consequence, the student can all too easily acquire a false notion of the subject; suppose it to be simply a digest of the opinions of particular writers, such as Hart, Kelsen and so on; and begin to believe that his opinion has equal authority with the acknowledged masters of the subject—in which context he will note that women sensibly give jurisprudence a wide berth.

And after all, why not? A writer such as Hart considers law entirely within a European context. Primitive societies may merit a footnote, and overseas legal systems wise enough to derive their inspiration from European sources earn a mention: but the reader will look in vain in Hart's *Concept of Law*, or even in such an admirable work as Friedmann's *Legal Theory*, for reference to any Asian or African legal system. Law is, it seems, a gift of Western civilisation to the rest of the

---

[5] Buhagiar J. See Tun Mohamed Suffian, "Four Decades in the Law—Looking Back", in Trindade and Lee (eds.) *The Constitution of Malaysia* (1986), 224.

[6] We now have "*Critical Legalism*", "the latest discovery of progresive jurisprudence, which announces that it wants to bring down capitalism and its law" (Shirley Robin Letwin, "Law as Integrity", *The Spectator*, August 2, 1986). Marxism takes many forms.

world. The fact that law as a concept was known in Asia long before it developed elsewhere is unobserved, unregarded. Were such a book simply a study in analytical European jurisprudence, well and good; but when the author suggests that it is also an essay in universal principles, then its limitations soon become apparent.

Yet in approaching the subject it is necessary for the Malaysian reader first of all to have a reasonably accurate perception of his own society and its own particular concepts of law, before he seeks to formulate any model of law. This is indeed difficult. There are, as it were, layers of law to be seen, like strata of sedimentary rock, revealing events from which the thoughtful geologist may discover untapped resources, the skilled archaeologist clues to an understanding of past and present. In approaching that perception, the law student brings his own, personal concept of law, one already formed by reading, observation, teaching and thought. Most of us think of law simply as a set of rules of conduct: yet as soon as he turns to the authorities, the student finds that definitions of law (that subject which to him seems so simple) know no end: and soon he grows either disheartened or enchanted by their variety and confusion, representing as they do the prejudices of their creators. It seems that in the end every definition of law must be, like history itself, traditional and subjective.

Since the reader is here invited to consider the origins of Malaysian law, it is but proper that he have some idea of the writer's approach to the matter. So, while I see law itself as virtually beyond any satisfactory definition, I can at least endeavour to put my own concept of the subject into a personal context, in the hope that this will offer a starting point, as it were, and a basis for criticism: for the object of this work is, after all, to stimulate the reader into a more intimate knowledge of Malaysia, and to compel that reader to formulate a personal view of law and justice in a Malaysian context.

First, then, the kind of law here dealt with depends upon the existence of a settled community of people, bound together by ties of kinship and proximity, and having common interests to be furthered and protected. Their primary objective is survival, and the rules they observe are not at first consciously devised as rules. Only with the passage of time is the great discovery made, that rules can be changed. In consequence, there emerges at an early stage an understanding of law

as an instrument of change and reform, of what is now called "social engineering". The invocation of the mechanical is here ominous, for as an English aesthete, Lord Clark, has said, "machines are, from the Maxim gun to the computer, for the most part means by which a minority can keep free men in subjection." We can take the analogy of engineering too far.

Rules emerge, of different kinds. Some have origins in the nature of humanity itself, and these we call, loosely and collectively, *natural law*. They are at the core of our existence. Llewelyn Powys, one of three distinguished brothers, wrote that "in every strong and healthy human being there is an inner knowledge of what it is good to do and what it is not good to do". Out of this inner knowledge emerge the basic principles of law, and to seek to understand them we must turn to the great religions of the world, for it is their philosophies that nourish these, our primary laws. They lie at the heart of our humanity; break them, and we cease to be human; and as long as we remain human beings (which in the general drift of contemporary society may perhaps be not much longer) they remain constant, seemingly as eternal as the nature from which they take their title.

Such rules, based on an instinctive respect for life, truth, harmony and justice, are at the core of all human law. They are surrounded by a cluster of secondary, essentially man-made rules, rules that are subject to constant review and change. In this aspect, law can be compared with an amoeba as seen under the microscope, animated by a core of intense energy, constantly in movement, sometimes creating something new, sometimes destroying, falling back upon itself, but seeking ever its own survival.

In this view of what, for want of a better term, can nevertheless be called law, each person carries with him, with a greater or lesser degree of awareness, his or her own law, whose nature, quality and character is derived from birth and environment. Just as the student of private international law (or *conflict of laws*) will seek to attach to each individual his or her own personal law: so we can usefully enlarge that concept and observe that by using the so-called *connecting factor* of domicile or nationality (under which the law of a person's home or country will determine what law applies to him) we have a key to an understanding of the nature of law itself. In the realm of private interna-

tional law the jurist selects personal law as a guide to the personal relations of life; but if we pursue the idea further, it is possible to adopt the view that all law as we know it is personal law. True, we can note that the principles of, say, public law have no apparent personal content; yet in their operation they must inevitably take what force they possess through known human understanding and behaviour. The law known to lawyers cannot exist without living creatures cognisant of their own being, condition and will.

Such being the case, the object of that group of persons forming a particular community or society is, that all live together in harmony. Just as health is the natural condition of the body, so is harmony the natural condition of the community. Instinct and reason will be allied in formulating those principles which make for harmony in society. Inevitably, they cannot minister to all occasions, for we are all subject to that random element of life, known to the lawyers as act of God, which can disturb, destroy, create. In the Brahman trinity we find Siva, both creator and destroyer; in that deification we can recognise a particular force within nature, capable of producing a tyrant or a saint: an unpredictable, elemental force indeed, yet one necessary to our existence as human beings.

BRIDGE TO HEAVEN

In adopting such a concept of law as that here outlined, it will be seen that there are certain core elements originating in what is eternal and immutable. Law is, in other words, the bridge between Heaven and this world. Out of these elements emerge certain beliefs such as that relating to the sanctity of life: and this belief gives birth to rules of law which admit the kind of refinements known to most scriptures. You must not kill, yes: but that particular principle, as pure in its doctrine as when (according to *Deuteronomy*) God spoke to Moses "out of the midst of the fire, of the cloud, and of thick darkness, with a great voice", has been modified by the circumstances of modern life, by sophisticated rules relating to warfare, abortion, genocide, punishment and so on. In human law there is a constant urge to refine the principles of natural law, a continuous debate between say, Man and Nature.

Yet while we hold on to certain basic beliefs, we note that even that which might once have been said to be fixed and unchanging is in

truth subject to change: even the laws of genetics are no longer safe from experiment. As the Buddhist notes, all things are in a state of flux: and this is as true of law, as of those whom law affects.

It is, alas, the modern fashion to think of law only as positive law, law posited, laid down by some sort of patriarchal figure or authority: and positive law is often at odds, or at least in a state of tension, with the concepts of natural law. We may read a constitution, note that a particular Act must be *in accordance with law*, and consider whether the Act must conform with the letter of the relevant written law, or whether it must conform to those principles which we significantly term *natural justice*, those principles of fair play and decency which maintain the basic harmony of society. So the law student discovers that the word *law* can mean something wider, different, deeper than the simple notion of a law agreed to by a particular group of people (usually men) on behalf of the rest of society. When we seek to define *law* there is no solidity, no firm definition, it is as if we picked up a handful of water.

Again, attempts are from time to time made, to define *law* by relation to its functions, its agents. If a man is found in possession of a dangerous drug, a positive law may state that he is to be hanged. That, we may say emphatically, is the law: but exactly what is it that constitutes such a law? In practical terms, law can be seen at this level as a statement of the consequences of certain actions, culminating in a State execution. Who has given the State (itself a myth) and its officials the authority to arrest, try and kill a human being, possibly a stranger in their midst? They themselves: the citizens of the state have devised a theory of law, erected a legislature, endowed it with authority and, by means of a positive law, an enactment of the legislature, have conferred a power of controlled violence upon some of themselves; set up a judicial system to seek out and sentence the guilty; and activated the administrative machinery to achieve a penal, in this case lethal end, in the furtherance of what those in authority see as the public welfare.

That is all, nothing more, but nothing less. Law in this situation is, as those Americans of the so-called *realist school* would affirm, simply a set of instructions addressed directly to officials, indirectly to the public. We can dignify such instructions with the name of Act of Parliament, Ordinance, Enactment, decree and so on, but in practice they

are orders to groups of civil servants to behave in a particular fashion; and the consequence of disobedience, that is to say, in legal terms the *sanction* of these orders, will be some sort of punishment for the civil servant or other individual involved.

Such is the system we can readily observe in action: a system which requires the existence of a sophisticated concept of law and of lawmaking and law-enforcing agencies. Once such a system is established, it virtually creates and evolves new law; the longer it persists, the greater its authority, the more it proliferates, adapts itself to new technology. Of old, the invention of printing led to the institution of law reports offering useful precedents, guides to behaviour; now we have such extraordinary inventions as *Lexis*, in which, with the aid of a computer and a satellite, the researcher has access to a mass of printed legal material, to find in a few seconds the answer to a question that would otherwise take perhaps a lifetime of research.

ORIGINS OF MORALITY

Morality, the mother of law, is a word that compels our curiosity, fruitless though our inquiries may be. Edmund Burke, author of *Reflections on the Revolution in France* (1790), once observed:[7]

> Dark and inscrutable are the ways by which we came into the world. The instincts which give rise to this mysterious process of nature are not of our making. But out of physical causes, unknown to us, perhaps unknowable, arise moral duties, which, we are able perfectly to comprehend, we are bound indispensably to perform ... We have obligations to mankind at large, which are not in consequence of voluntary pact. They arise from the relation of man to man, and the relation of man to God, which relations are not matters of choice.

Burke was of course writing at a time when

> the school of Rousseau, which dominated on the Continent in the last half of the 18th century, represented mankind as a being

[7] Quoted in Charles Parkin, *The Moral Basis of Burke's Political Thought* (1956, repr. 1968), 30.

> who comes into existence essentially good, and it attributed all the moral evils of the world not to any innate tendencies to vice but to superstition, vicious institutions, misleading education, badly organised society.[8]

Such ideas had been anticipated by Chinese philosophers, notably Confucius. Yet, as a Buddhist writer has noticed,[9]

> the recognition of the difference between right and wrong is not the same in all nations, and has changed considerably during the ages ... Morality arises when the intelligence develops sufficiently to recognise the social value of certain habits, which will then be considered moral. Thus not God forms the basis of morality, but life in society. And to be 'out of society' is sufficient sanction for this moral law, and has a much greater restricting influence than any threat of hell.

Whether morality is merely fossilised habit, objective and utilitarian in its origin, is a nice point for debate. Van Zeyst takes the view[10] that

> the pricks of our conscience, the remorse after committing sin, are no signs of the existence of a supreme legislator. The so-called dictates of conscience are merely forms of social traditions, and dependent on social conditions, social reforms, heredity, education and environment.

Such a pragmatic view would no doubt satisfy most contemporary legislators, particularly the agnostics and atheists amongst them, and most especially those dedicated to the use of law as an instrument of what is called "social engineering": yet ever there lurks in the background a notion of something divine in Man, of those obligations arising from that relation of man to man and the universe at which Burke hints.

---

[8] Lecky, *The Map of Life* (rev. 1900), 72.

[9] Henry van Zeyst, *Towards the Truth* (Colombo, 1979), 40.

[10] Ibid., 39.

In the study of an apparently primitive society, the self-styled civilised observer may well be surprised. The old man in the backwaters of a Malaysian *kampong* may well have a better notion of law than the western sociologist who patronisingly observes him. Owen Rutter, once a magistrate with the British North Borneo Chartered Company in Sabah, wrote in 1929[11] that:

> The closer study one gives to [the native law of Sabah], the more one realises how the pagans, whom so many Europeans regard contemptuously as 'savage' are entitled to respect. The sympathetic investigator who is sufficiently broadminded to set aside the conventional standards of ethics and morality to which he himself has grown accustomed, and to examine native customs, not by his own standards, but having in mind local conditions and judging them purely from the angle of equity and common sense, may well view with amazement the elaborate and equitable body of law which these primitive peoples, with no writing, no learning, no past civilisation, have built up. These fundamental principles of pagan justice are not at variance with our own, and it is interesting to note that in North Borneo married women obtained the right of holding property and equal rights of divorce with men, centuries before the women of Great Britain obtained theirs.

In such a way did the ethics and morality of the people of Sabah give rise to a legal system which gained the respect of a scholarly observer.

In some fashion or other a tribe or a people learn to survive over the centuries. This survival is founded in the unselfconscious development of a set of rules of behaviour which we term, loosely, morality (the word itself having its root in custom) and which often develops into custom and law, once it has been tested by experience and found to be of enduring value.

Yet, fashions change, in morality, in law. Any society is, like any individual, constantly colliding with novel situations requiring a decision for their resolution. Habit, custom or precedent will in most cases provide a satisfactory answer: but on occasion no solution is available

[11] *The Pagans of North Borneo* (1929, repr. 1985), 133.

from memory or the past, and it is necessary to contrive one from reason. An individual faced with a personal crisis either breaks down, or survives; as human beings, we meet such crises almost every day; similarly, society itself, when faced with an extraordinary situation, must survive by finding a solution, or fall into anarchy. In such a situation law is novel and necessary, for probably most would agree with Goethe, that disorder is worse than injustice. Such, too, is the theme of many of Shakespeare's plays: there may be no price too high for order, harmony, stability.

Let us suppose that a wave of drug addiction sweeps through a state, threatening the health of the young, the future of that society. What to do? The wise men devise rules to eradicate the addiction, or at least, to minimise its worst excesses. Here, they collide with the principles of human behaviour, with the principle that personal pleasure is the primary objective of a majority of human beings; so that the law they devise must represent a balance between what is ideal, and what is possible. What is essential, is that the foundations of society itself must somehow be kept intact.

If, then, we think of law as a sort of bed of Procrustes, into which everyone must fit, we shall err. There are limits to the lawmaking process: and in any case, not all citizens will obey the positive law of the state, either through ignorance (which curiously enough is never accepted as a defence to, but may go to the mitigation of the penalty prescribed by a criminal law) or deliberately (in the hope of escaping, or possibly of courting punishment). Positive law, then, the sort of man-made law that monopolises our general concept of *law*, has its limitations, its weaknesses. It is not as effective an instrument of social justice as the majesty of its name suggests: but it is the great weapon of the modern lawmaker.

TOWARDS THE *RUKUNEGARA*

The evolution of Malaysia can be seen as a history of various kinds of people coming together into groups, forming political societies and adopting certain procedures for the effective ordering of those societies. This is a pragmatic process, moving hesitantly by means of experiments that may or may not develop into precedents. Mankind's history is one of a diffusion of ideas, of knowledge growing out of an un-

known number of cultures, founded in habits dictated by the chance circumstances of residence, climate, necessity and belief. In the course of time, all such societies develop customs, ways of behaviour that are accepted as generally valid and proper. To call these customs *norms* or *primary rules* (to turn to the vocabulary of a Kelsen or a Hart) is to seek to impose one's own concepts of order upon them: but in any case, the words used to describe these phenomena are themselves often endowed with ambiguity. What we see is coloured by what we wish or expect to see, and in expressing ourselves we are limited by a vocabulary which, as yet, can seldom interpret our thoughts with accuracy. Even for the most nice and exacting of writers, words are crude instruments for the transfer of thought.

Yet assuming that out of a particular group of men and women there emerge rules of behaviour that can be called *custom*, in the sense of their being rules of human action established by long usage and regarded as binding on their legatees, there seems to be little doubt that they acquire their authority by the momentum of general acceptance. While the word *adat* itself has a variety of meanings, when combined with the word *law* the term acquires a more limited and concise meaning. Yet its secret lies in its consensual nature. It derives its power and authority not from some supreme lawmaker, sitting in a position of authority, but from the people themselves.

Out of the concept of consensus the notion of government itself has also emerged: a concept in turn giving rise to the theory of government by a group of people elected, not by all but by a majority of the members of society. Malaysia has adopted this form of government, a style called *democratic*, that is to say, a form of government based on the principle that political power lies in the will of the majority, and that the elected representatives of the people can give effect to that will, often to be expressed in positive laws. Such a form of government can degenerate into a tyranny, for it depends upon the willingness of the minority to accept the will of the majority; and since mankind is, fortunately, not so constructed as to attain to a general conformity of opinion on each and every social issue, a constant state of tension must be tolerated and accepted in any democratic society. Furthermore, due to the vitality of the contemporary media—television, radio and the press—small "pressure groups", bands of individuals dedicated

to limited political objectives, can often be highly effective in persuading the majority of the virtues of those objectives.

When we turn to the area of government, then, we find the concept of positive law of such value, that political principles themselves are embodied in a special law, often given a degree of supremacy over all other law, and termed a constitution. Here, the concepts of law and politics meet: but law itself can achieve nothing, it requires activation. So it is, that the engines that move, say, the Federal Constitution of Malaysia itself are political parties, groups of men and women bound together by political objectives on which they all agree.

Oddly enough, without the existence of at least one political party, the provisions of the Constitution become meaningless. One provision of the Constitution requires that the Prime Minister, the most powerful figure within government, must in effect be the member of the House of Representatives (*Dewan Rakyat*) who is likely to command the confidence of the majority of the members of that House. His appointment is therefore related to a practical ability to obtain the support of that political party, or group of political parties, which can muster a majority from the total number of members of the House of Representatives. Add to this the fact that the appointment is in the discretionary power of the King (*Yang di-Pertuan Agong*) (although obviously the King must himself have regard to political realities), and we encounter another, necessary area of certainty. For there is no mention in the constitution of the necessity for the political parties: an extraordinary omission in a law intended to provide the basic principles and machinery for orderly government. Political parties are the very engines, the motive power of the Constitution. Even in the realm of so-called *public law* there are, then, significant, even serious gaps.

For, to go a little further into the matter and as a necessary digression, political parties depend for their existence not only upon a law under which they can be formed, but upon a healthy active membership and supply of funds. Elections, those periodic expressions of the people's will, are not fought without the expenditure of money, as well as of time and effort, and it is in this dark area of democracy that seeds of corruption can germinate, take root and flourish. A large political party requires massive financial provision; that provision often comes in the form of gifts from wealthy individuals and corporations; and

once the party is in power, those who have contributed to its success naturally look to it for a suitable recompense. The roots of democracy lie in muddy waters indeed: and yet, it is out of our elected assemblies that our written laws emerge, like the lotus from the mire. It may be, then, that the law produced by custom is in general closer to the people than any rule of law posited, laid down, by a legislature.

And there are factors at work within Malaysian society peculiar to Malaysia. Unhappy civil disasters arising in May 1969 led to a meeting of representatives of various national organisations within the country. Anxious to reach a broad general consensus on those principles regarded as essential to the future of a peaceful Malaysia, they agreed upon a basic national ideology known as the *Rukunegara* (*rukun* meaning principle, *negara*, nation). The resulting document runs to some twenty thousand words, and has as its objective racial unity within a just and democratic society. While it is in no sense a legal document it is, as has been pointed out by a distinguished observer,[12] "a constitutional document because it expresses the spirit of the Constitution which would make the Constitution workable in the Malaysian society." Its essence is set out in five brief principles stressing belief in God, loyalty to the King and the nation, loyalty to the Constitution, the rule of law and good behaviour and morality. No study of contemporary morality in Malaysia can neglect this particular document (even if from time to time it appears to fall into eclipse) since it offers a profile of the model citizen: monotheist, patriotic, submissive to authority, obedient to the dictates of morality and the law. Fragile as it may seem, simplistic though it may appear, neglected though it often may be, the *Rukunegara* is a necessary foundation of national unity in Malaysia.

KNOWLEDGE OF LAW

Whatever its origin, however (and he would be a bold man, who could identify the origin of law) the significance and effectiveness of any law depends upon the extent of popular knowledge of its existence, and acceptance of its consequences, by those to whom it applies

[12] Tan Sri Dato Haji Mohd Salleh bin Abas, *Constitution, Law and Judiciary* (1984), 231. See also Syed Hussein Alatas, "The Rukunegara and the Return to Democracy in Malaysia", *Pacific Community*, Vol. 2, No. 4 (July 1971).

or to whom it is directed. Such a cognitive jurisprudence (as we may call it, since it depends upon recognition, or knowledge) depends, not necessarily on an appreciation of any articulation of the law or its exact wording, but rather upon an understanding of its general principles. For example, the ordinary citizen will understand and accept the fact that homicide that is not justifiable is a crime; he will know that killing a human being is in most instances murder; but the refinements of the relevant law will not be known to him in any detail. In a vague fashion he will know what the law is, but its exact content is likely to remain unknown to him until he dies; and even if he is enmeshed in the law as, say, an accused on a charge of murder, he will view the proceedings without, in most cases, really understanding the nature of the charge, the character of the evidence, or the behaviour of all those agents of the law entrusted with a power of life or death over him, save in the most vague, diffuse way.

After all, his understanding is conditioned by his life, and that will have been lived in ignorance of the details of the law: and contemporary law has become a sort of arcane science, an understanding of which can be acquired only after training in its own peculiar principles and logic. For the average citizen law itself is virtually unknown, perhaps even irrelevant: but he has an intuitive sense of right and wrong, and no doubt believes, or at least hopes, that the law known to lawyers is consonant with that sense.

In the more obscure areas of law, such as property law, company law, revenue law and the like, where the ordinary citizen is unlikely to venture, his understanding is even more vague. He trusts that the law will work to honesty, fair dealing and upright behaviour but tends, as he gets older, to become sceptical: and when the possibility of enrichment arises he becomes cynical, believing the more complex the law, the more easily it can be manipulated to the advantage of the rich who can employ the best—and therefore, it seems, the most expensive—of lawyers.

Much of the confusion attendant upon a knowledge of law arises from the fact that the concept of personal responsibility for individual actions emerges but slowly in the evolution of a legal system. At first, law is but dimly perceived as an instrument of justice. Addicts of Gilbert and Sullivan will remember the Mikado's observations when Ko-

Ko explains that he and his colleagues beheaded the heir to the throne of Japan by mistake:

Ko-Ko: We had no idea.
Pitti-Sing: I knew nothing about it.
Pooh-Bah: I wasn't there.
The Mikado: That's the pathetic part of it. Unfortunately, the fool of an Act says 'Compassing the death of the Heir Apparent.' There's not a word about a mistake—or not knowing—or having no notion—or not being there ... There should be, of course—But there isn't. That's the slovenly way in which these Acts are always drawn. However, cheer up, it'll be alright. I'll have it altered next session. Now, let's see about your execution—will after luncheon suit you? Can you wait till then?[13]

Apart from the slow evolution of the concept of *mens rea*, guilty intention, in early days the agent or instrument of a crime was sometimes blamed. "Only as recently as 1846 there was abolished in England the law of deodand, whereby not only a beast that kills a man, but a cart-wheel that runs over him, or a tree that crushes him, were *deo dandus*, or 'given to God', being forfeited and sold for the poor."[14]

"It is," says Hobbes, "peculiar to the Nature of man to be inquisitive into the Causes of Events they see, some more, some less."[15] In the early days of a legal system, however, there is little of the inquisitive, much of wonder: only with the enlargement of knowledge of the laws of nature comes a beginning of understanding of the laws of man.

---

[13] W.S. Gilbert, *The Mikado*, Act II.

[14] Edward Clodd, *Animism* (1905), 44.

[15] *Leviathan*, "Of Religion", chap. xii, pt. 1. Cited in Clodd, op. cit., 46.

Even in a reasonably sophisticated society, knowledge may emerge but slowly. A modern historian writes[16]

> Until 1945 [Japan] had no system of fixed law. It had maxims, behaviour codes, concepts of justice expressed in ideograms—exactly as in ancient Egypt. But it had no proper penal code; no system of statutory law; no judge-controlled code of common law either. The relationship between authority and those subject to it was hidden, often on important points. The constitution itself was uncertain. It did not impose a definite system of rights and duties. Prince Ito, who drew up the Meiji Constitution, wrote a commentary on what it meant; but this book was a matter of dispute, and often out of official favour. The law was not sovereign.

To this extent Malaysia has been and is in advance of Japan: the sovereignty of the law has never, from earliest days, been in dispute.

FAITHFUL STREAM

With the evolution of the law comes not only a formalised legislature, but the institution of the office of judge, sitting in a court as the custodian and interpreter of the law. He is served by the specialists now termed *lawyers*; with industry and skill, all combine to produce judicial decisions; and these decisions emerge in an unending stream, a

[16] Paul Johnson, *A History of the Modern World* (1984), 179. But the Japanese were not unacquainted with law. "[I]t is common knowledge that the T'ang penal code was readily incorporated into Japan during the Nara and Heian periods, especially in the *ritsuryo* (*ritsu*, the criminal code, *ryo* administrative regulations in Japanese, or *lu-ling* in Chinese). The T'ang panel code, with Confucian morals as its basis, was one of the most advanced penal codes of its time. While there was much modification of these codes, the unwritten tradition of the laws remained as strong as the Confucian teachings themselves in Japan. The Neo-Confucian tradition, especially the Chu Hsi school, started to attenuate during the early Tokugawa period, but it continued to co-exist with the Japanised laws, and in the social structure of Tokugawa society it often preceded legal codes. Only when there was a breach of the tradition was the legal code invoked against an offender." (*Tales of Japanese Justice*, Ihara Saikaku, translated by Thomas M. Kondo and Alfred H. Marks [1980], xvi.)

stream constantly changing its course, but faithful to the character of the people. Society may from time to time disapprove of a particular ruling of a judge, and then seek improvement by legislative reform; but such cases are rare. So, the river of Malaysian law flows on towards a distant ocean of world law.

Yet the courts we know are courts of law, not justice: for justice is divine, and in a study of law justice itself (even in the curious disguise of *natural justice*) has little or no relevance. Justice is as the sun, shining on a stretch of land: or, as the proverb says, *menyeladang bagai panas di padang*. Law is one of the means by which we strive for justice: but even as we strive, we know that seldom do we succeed, and that the best we can hope for is that harmony of the *li*, that balance between the *yin* and the *yang*, that is the object and glory of old Chinese law. Law, we may say, is like a glass, sometimes clear, sometimes obscure, through which passes the light of justice. It is an imperfect instrument, but the best we can contrive, as we hold on to the thought that any law is better than no law.

LIGHT ON THE JOURNEY

In a universal context, the world in which we live and have our being is but a speck of dust. When life first emerged on this blue and graceful planet we do not know, and our ancestry is hidden in the mists of unrecorded time. From a brute condition, man has emerged to the poor degree of civilisation he knows today, and in that emergence has worked out vague theories of religion and law to sustain and assist him in his pilgrimage to some distant and unknown goal.

But man-made law is an uncertain, flickering candle to lead us out of the darkness and confusion of our society, and it is to be doubted whether, in the end, it will prove of lasting value. After all, it is in our hearts, in the conduct shaped by the dictates of our sympathies, in the sense of conscience that comes upon us as a divine gift, that the only true law comes. As Justinian's lawyers said, to live honestly, to injure no man, to give every man his due, these principles comprise the whole of the law, and the rest is but artifice, entertainment for lawyers, but of little interest to others. To love God, to love one's neighbour as oneself: so taught a great prophet: and perhaps, again, this is another expression of the whole of the law. We can find many definitions of

law, we can even contrive definitions of justice: but in the end, the prophets of the world's great religions have given us all we need to guide us on our journey.

For law, like religion, tries to place man at the centre of things. Whether this is an accurate interpretation of the world, still less of the universe, is to be doubted; but it is the principle on which the lawyer looks at law and society, seeing in man the latest glory of evolution, and finding man's greatest strength in his discipline of thought. With the skilful imagination he inherits from his childhood, man can concentrate upon and exploit the nucleus of a thought, pursue it with unflagging tenacity until the thought is exhausted and a new one takes its place. Much that we learn has to be unlearnt under the stress of new situations; indeed, half a lifetime is spent in learning, and the other half in unlearning: such is the manner in which men progress. Man is the Monkey of Chinese legend, woman the Pandora of Greek myth. We are full of zest and curiosity, but our passion for order, for the expression of even a crude form of justice, has taken us on the great journey of mankind, to the present recognition and creation of man-made law. This is a start. In years to come law may perhaps be seen, as the old Confucianists saw it, as something for the barbarians, as rules no civilised man will need, for he will observe them by instinct.

Whether that golden age will come is to be doubted, for the varied appetites of man have created so complex a series of systems of laws, so costly an apparatus for the imposition of order and the control of the environment, that the laws of men seem likely to grow more involved year by year. The armies of lawyers increase. In this situation, a wise student will see merit in considering the nature of jurisprudence, when he is called upon to interpret the details of any written law.

Chapter 2

EQUALITY

WHEN WE USE the word "law" we invoke a concept of equality. Even to legislate for men and women by means of rules implies, in a curious way, that all are to be treated equally. And this concept of equality is given a firm foundation in Article 8(1) of the Constitution itself, which confidently proclaims that "all persons are equal before the law and entitled to the equal protection of the law."

This modern expression of the principle of equality owes much to the influence of an English writer, Dicey, who by the rule of law "understood, amongst other things, 'the idea of legality or of the universal subjection of all classes to one law administered by the ordinary courts'."[1] This idea of the rule of law retains a buoyant popularity and has coloured the evolution of modern concepts of fundamental rights: yet as an English writer observes:[2]

> What is to be understood by treating producers and consumers, officials and non-officials, farmers and manufacturers, soldiers and civilians, married men and bachelors, adults and minors, all alike or imposing the same burdens on all, when their situations, capacities, duties, and obligations are different and ought to be so?

A Singapore writer, Huang-Thio, points out,[3] truly enough, that "the courts have interpreted 'equal protection of the laws' to mean the 'protection of equal laws'." In the making of laws it is often necessary

---

1 Marshall, *Constitutional Theory*, 137.

2 Ibid., 136.

3 S.M. Huang-Thio, "Equal Protection and Rational Classification," (1963) *Public Law* 412 at 413.

to discriminate; in one law legislators may deal with the duties of employers, in others with those of manufacturers, landlords and so on, so that to the casual eye there is a constant stream of discriminations that are in no way consistent with the principle of equality. The law seeks equality, yet it imposes different burdens upon different classes of persons: how is it possible to reconcile the objective of equality with the necessity of discrimination?

"Impaled on the horns of this dilemma," writes Huang-Thio,[4]

> the courts have sought to reconcile these conflicting interests by evolving the doctrine of reasonable classification, i.e. a classification will be sustained if it is reasonable. The basis of this doctrine is that the guarantee of equality before the law and equal protection of the laws does not require all persons to be treated alike, but that only persons in like circumstances must be treated alike. Thus, a classification is reasonable if it treats persons similarly placed in a similar fashion, and the measure of reasonableness depends on the degree of success in dealing with those similarly situated.

Things are not, then, always what they seem, and even noble sentiments can be couched in what the English call weasel words or misleading terms. In *Animal Farm* (1945), Orwell shows how, in a political society, the principle that "All animals are equal" can be transformed into a paramount principle that "All animals are equal but some animals are more equal than others".[5] It is not difficult to satirise the principle, yet it is an important and perennial one. Aristotle noted[6] that

> it is thought that justice is equality, and so it is, though not for everybody but only for those who are equals; and it is thought that inequality is just, for so indeed it is, though not for everybody, but for those who are unequal ...

---

[4] Ibid., 413-414

[5] *Animal Farm*, chapter X. George Orwell also illustrates the manner in which another absolute principle, "No animal shall kill another animal" (The Sixth Commandment, chapter II) becomes (chapter VIII) "No animal shall kill any other animal *without cause*".

[6] *Politics*, III, Vol. 8.

His words find a reflection in Article 153 of the Constitution, which provides for certain special privileges for Malays and natives of Sabah and Sarawak: the rationale of the provision being, that these peoples set out from a position of disadvantage and inequality of opportunity, as compared with other citizens. On this assumption the law therefore interposes in a rough and ready fashion a sort of machinery to redress the inequality so perceived.

A consideration of the application of the principle of equality indicates that it is far more difficult to achieve than the legislator may at first suppose. It is easy enough to reserve, say, a quota of scholarships, university places, trade licences and the like for one no doubt deserving section of the community, but the question remains, will such action achieve that equality which is the object of the privileges so conferred? Sadurski, an Australian writer, has remarked[7] that:

> Since it is absurd to postulate identical treatment of people irrespective of characteristics such as age, sex and profession, we must conclude that equality before the law requires equal treatment of relevantly equal people. What characteristics of people are relevant depends on substantive value-judgments about the justice of a particular practice. It is not that we believe that the law is just by virtue of its being equal but rather, we believe that it is equal on the basis that it is just. The judgments about equality (and about discrimination) derive from prior moral judgments which are not based on the value of equality itself.

Admirable in its intention as Article 153 may be, it is based upon a curious classification, in which policy may clash with objective. To adopt the words of another contemporary writer[8]

> in order to treat all persons equally, to provide genuine equality of opportunity, society must give more attention to those with fewer native assets and to those born into the less favourable social posi-

---

[7] Wojciech Sadurski, "The Morality of Potential Treatment (The Competing Jurisprudential and Moral Arguments)", *Melbourne University Law Review*, Vol. 14, December 1984, 572-600 at 572-573.

[8] Rawls, *A Theory of Justice*, 100-201, cited by Wojciech Sadurski, op. cit.

tions. The idea is to redress the bias of contingencies in the direction of equality.

All this is reasonable enough, but the nature of the handicaps suffered and the price to be paid by the rest of society, rich and poor alike, for their removal is not so easy to assess. The Constitution of India refers[9] to "backward classes", but the task of identifying such classes proved difficult indeed. What are the bases of identification of these handicaps: poverty, apathy, ignorance or what? And what authority has society, through the agency of the State, to seek to alter human personality? These questions cut deep. What does seem clear (to quote the Australian writer Sadurski again) is that "preferential treatment does not cure causes, it operates only in the sphere of consequences."[10]

One can write at length on the subject of equality, and yet say little. For a due discussion of the subject, the reader is directed to works on public law, where theory and practice enter into conflict. Sufficient here, therefore, to observe that Brennan J., an Australian judge, has summed up the matter,[11] by capturing the essence of the problem:

> Formal equality before the law is an engine of oppression destructive of human dignity if the law entrenches inequalities 'in the political, economic, social, cultural or any other field of public life'.

---

[9] Article 16(4).

[10] Discussion of Article 153 of the Constitution is unfortunately inhibited by an emergency amendment to the Sedition Act (see Act 15 as amended by the Emergency (Essential Powers) Ordinance 1970 [PU (A) 282/1970]). It is seditious, in consequence, "to question any ... privilege ... established or protected by Article 153", except "in relation to the implementation" thereof: see section 3 of the Act, as amended. The prohibition extends even to parliamentary proceedings.

[11] In *Gerhardy v Brown* (1955) 59 ALJR 311, quoted in Sadurski, "Equality before the law: a conceptual analysis" (*Australian Law Journal*, Vol. 60 (1986), 131). For a useful commentary on Article 8 of the Constitution, see the observations of Suffian LP in *Datuk Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155 at 165-166.

Chapter 3

PERSPECTIVE

RIVERS AND HISTORY

Such principles of human behaviour as we are familiar with are the invention of people living in society. Exactly when the principles of law were discovered, exactly when it was seen not to be immutable, these are mysteries beyond our knowledge, for the history we know is, in its furthest reaches into the past, only tradition, hearsay at its most distant remove. Nevertheless, out of the drifting communities of the past comes our knowledge of law: and when we look at a map of Southeast Asia we can see that three or four vast river systems have dictated the pattern of history and imposed a way of life upon all the peoples of the region. And, whether we like it or not, our rules of behaviour, and therefore our laws, in large part are the product of our environment.

Far to the north of Malaysia, flowing out of the great range of mountains that culminates in the plateau of the Himalayas, rise the great rivers that have shaped, and continue to shape the history of India, Southeast Asia and China. Of these, the nearest to Malaysia is the Chao Phrya in Thailand, which waters a great plain rich in alluvia, serving as the rice-bowl of Asia. And it is by no accident of history that Malaysia is as yet not self-sufficient in rice, for the character of its land is different; and it is that character which has dictated, and continues to dictate, the history of its people.

The Malay peninsula is a narrow strip of land extending from the south of Thailand and the Asian mainland, to the shallow waters of the South China Sea: a peninsula dominated by a great ridge of mountains running as a backbone down the peninsula for some three hundred miles. Sometimes these mountains climb to six or seven thousand feet in height; and all are covered in the tropical rainforest that

lives on the rhythms of the monsoon rains and tropical suns. Between the mountains and the sea—the Indian Ocean and the Straits of Malacca on the west and the South China Sea on the east—are strips of lowland, broken by rivers and estuaries: and it is on these strips that men have settled, laboured and developed a civilisation.

Being in the tropics, Malaysia knows no extremes of cold, no large variations in temperature. Within its equatorial climate one can look at the vigorous green foliage of trees and shrubs and be unable to assess the time of year: whereas in, say England, the home of the common law, the progress of the seasons is matched by annual growth and decay, a cycle of birth and death, a round of confrontations with the rhythms of the turning year. It is not surprising that in such a climate as that of England the adversary system of law developed: a system of which the essence is confrontation, ritual argument, humiliation: a system described by the Chief Justice of the United States, in an address to the American Law Institute in 1985, as "costly, painful, destructive, inefficient."

Stripped of its common law influences (to which we will return) Malaysia would have developed long before now its own legal system, one based on compromise rather than confrontation. For the climate in which men live affects their way of life and therefore their way of thought. The sea and the northeast and southwest monsoons modify the climate and, in turn, weather the soils of all Malaysia. Rainforest still occupies some six-tenths of the surface area of West Malaysia, mangrove and swamp forest almost another tenth, so that much less than a tenth of the land can be regarded as chemically fertile. Not for Malaysia such great padi areas as those of the Thai or Java plains.

Similarly, East Malaysia is another elongated strip of land, almost seven hundred miles long and a hundred and fifty miles deep, bounded by the shallow waters of the South China Sea and a land boundary of almost a thousand miles with Kalimantan, Indonesian Borneo. A range of mountains dominated by Mount Kinabalu (13,455 feet) cuts across the great island of Borneo, from northeast to southwest, and this range waters its great forests; the tropical rains have created great rivers like the Rejang of Sarawak and the Kinabatangan of Sabah, each over three hundred miles long, and navigable for well over a third of their length. As in West Malaysia, the soil

is poor; only in Sabah is there an appreciable area of fertile land; and rainforest, foothills, lowlands and mangrove haunted by such strange characters as the orang-utan, the hornbill, the honey bear, and that small, shy delicate and solitary vegetarian, the mousedeer, so beloved of Malay fable, offer bleak prospects for harvest. Fishing and shifting cultivation rule the lives of most of the inhabitants, an economy fortified by such crops as rubber, pepper, palm oil, sago, vegetables and fruits, anything that can be sold for cash.

Yet just as a child may enjoy a fortunate status by being wise enough to select happy and prosperous parents, so a country may be lucky by reason of its position in the world. The Malay peninsula lies between and controls the main trade routes to and from China and the Far East on the one side, and India, Arabia and Europe on the other. Out of the accidents of geography flows the creation of the Malaysian nation.

That nation is, then, the consequence of a destiny imposed by geography and history. Under the annual rhythms of the monsoon great forests developed on the granite and limestone mountains, providing benefit to a world hungry for timber. Following in the wake of the Industrial Revolution in the west, in the 19th century, an increased use of tin gave a violent impetus to tin mining, although tin has now lost its earlier importance. Tin had been mined in Malaysia since the 9th century, but not until modern times did Malaysia spring to the fore as the world's leading producer of tin. Not only tin. Malaysia is also one of the world's largest producers of rubber, and the world's leading exporter of palm oil. Rubber, tin, timber, palm oil, together with oil and natural gas: all these, products that can be sold for cash, have affected the development of Malaysian history and its law, as well as its economy.

INLAND JUNGLE

For many lawyers, Malaysian legal history begins with the arrival of Francis Light in Penang in 1786; and the sense of "legal chaos", noted by Braddell as existing in that settlement until the first Charter of Justice brought enlightenment and the rule of law, haunts the mind seeking to look to the more remote past.

The traveller in Malaysia will sometimes encounter banks of heavy mist obscuring the ridges, hills and valley, of the inland jungle, and these give him a sense of unease, rendering his whereabouts uncertain, his destination unclear. To a large degree, the legal historian of today is in the position of such a traveller. In some areas of research, there is light and a clear view; but in other areas all is dark and vague, and he can proceed only by guess, intuition and, perhaps, an occasional inspiration. The annals of history will tell him of the movements of people, of the careers of rulers, of the rise and fall of empires: but to what extent there was law, to what degree anything other than caprice regulated human relationships and society, remains as deep a subject as that of death, in the great dialogue to be found in the *Katha Upanishad*.

What is important to note, perhaps, is that there were kingdoms and sultanates long before the common law arrived in the Straits Settlements between 1786 and 1824, and that Malaysia possessed its own legal systems long before any Westerners appeared on the scene. Speaking to the Federal Council in 1927, Sir Hugh Clifford referred to the old law of Malaya, as it was before the arrival of the British: the *hukum shara'*, Islamic law; the *Kanun*, traditional law, sometimes written, sometimes not; and the *hukum adat*, customary law "enshrined only in the memories and the hearts of men." But these were then in decay and the country was in a transitional phase out of which would emerge, in less than a century, an independent Malaysia. In the course of that evolution, law was the tool of the politicians who created independence, and its importance to that end probably cannot be overestimated.

Even so, it is difficult to assess the accuracy of many legal records of the past, especially in relation to Malaysia, for it is uncertain whether, and if so to what extent, these records reflect reality with any degree of accuracy. Accustomed to a large corpus of published materials, the western historian can proceed by slow but definite degrees towards an ascertainment of truth. In Malaysia things are different. A hostile climate destroys the written word in short time; heat, damp, the depredations of insects, to say nothing of the ordinary hazards of life, work against the perpetuation of testimony; so that in the end we

are often left only with an oral tradition of what once was. In that oral tradition, history and literature merge, fact and fancy combine.

MISTY ORIGINS

Exactly what are the origins of the Malay people remains obscure—as does, in spite of the activities of legislative draftsmen, any adequate definition of a "Malay". The Malay peninsula has been inhabited for at least 6,000 years, and in that time wave after wave of immigrants has arrived. Some came from Yunnan in the north, others from Sumatra in the west, Java in the south, each wave tending, in the universal fashion of immigrants, to drive its predecessors further inland.

After the aborigines and the Malays came Arab and Indian traders, their ships taking advantage of the monsoon winds. With them came Hindu influences that persist to the present day, and with them, too, Hinduism and Buddhism. On the trade routes came Islam, a religion addressing itself to the common people, simple, vigorous and direct in its rules, authoritative in its tenor, a useful ally of government. Chinese seamen were aware of the existence of the peninsula for centuries, but not until the middle of the 19th century was there any large scale immigration by the Chinese. After them, with the opening up of plantations for rubber, came Tamils from southern India. Out of a total population in West Malaysia of around 18 million (1999), perhaps half are Malay, a third Chinese, a tenth Indian. In East Malaysia, the dominant groups in a population of two million or so in Sarawak are Iban and Chinese; while in Sabah, out of almost three million inhabitants most are Kadazan, Chinese and Malay.

In spite of much that is obscure, it seems that the basic type of government in the old Malay world was one based on the notion of a god-king. Winstedt tells us[1] that "the early missionaries of Islam found Hinduised courts, officials administering a system of Hindu and customary law..." Soon after A.D. 1400, the same writer observes,[2]

1 *The Malays: A Cultural History* (1961), 35.
2 Ibid., 70.

> Malacca embraced Islam. The old Sri Vijaya title, Sri Maharaja, was exchanged for Sultan. The Sultan though still entitled *Sri Paduka* was no longer an incarnate Hindu god but the shadow of Allah upon earth.

In this fashion a new concept of government emerged, with the ruler somewhere between god and man. "Politically Islam substituted the Sultanate for the Hindu Kingdom," writes Ryan,[1]

> and in so doing continued the concentration of political and religious authority in one person, the head of the state. In this way Islam upheld the position of the ruler and founded a political system which combined religious prestige with political power. However, the basic Hindu idea of kingship still survived, and even today, for example, the coronation ceremony of the Sultans of Perak contains a great deal of ritual that is of Hindu origin.

Eclipsed though it be today, the cultural heart of peninsular Malaysia was over many decades Malacca. Indeed, "Java was converted in Malacca": so runs the proverb. The town was a cultural centre for the region, for the quiet tourist town of modern times was once a thriving emporium, a cosmopolitan meeting place for traders and others from all the civilised world. The Javanese, the Chinese and others had founded colonies there; in 1450 the Muslims had taken it; and in 1511 the Portuguese, the first of the European powers to find a foothold on the peninsula, captured the town, to remain there until their displacement almost a hundred years later by the Dutch.

From Malacca emerged much in the way of maritime law and custom of traders, as well as certain basic features of government. Though neither the Portuguese nor the Dutch law survived, the influence of the agreeable Portuguese, prepared to mix with and merge into the local population, remains in the customs of their descendants; and while in the realm of law it has offered nothing novel (apart from a few land problems) in its political influence Malacca has known no boundaries. Fallen though it be from its once eminent position, a monument for

[1] *The Cultural Heritage of Malaya* (1971), 43.

modern Singapore to meditate upon, Malacca has passed on to the present day something of its once great spirit.

It seems, too, that the Christianity of the Portuguese in Malacca accelerated the spread of Islam: but the Islam of Malaysia, shot through with Sufi teachings, was like Buddhism tolerant of other doctrines, which it quietly absorbed. Out of the various philosophies of the people of Malaysia, Hindus, Muslims, Buddhists, Taoists and Christians, has emerged a unique society. All these philosophies, and the legal systems to which they contributed or gave birth, originated outside Malaysia and tended to arrive there in a diluted form. They lacked the intensity of their places of origin. Like an incoming tide flooding up a river, they represent the period just before slack water, when the incoming energy is almost spent, and there is a stillness before the next mingling of forces, influences and pressures.

The sultanic form of government came as a useful instrument to the hands of the British when, in 1874, they came into the Malay States. Familiar with the Malay lands since 1786 and the cession of Penang from Kedah, they knew of the rise and fall of the empires of Sri Vijaya in Sumatra and Malaya, of Majapahit in Java and of Ayutthaya in Thailand. "Empires wax and wane": so the wise Chinese author opens his great *Romance of the Three Kingdoms*. Just as the Moghul empire in India gave way to the British, so the British in their turn would give way to self-government and independence.

With independence in 1957, it was time to begin the great task of evolving a truly indigenous legal system. That system, like any other legal system, had to be expressed in a particular language, one whose vocabulary would shape its concepts, to give them form, meaning and expression, however imperfect that expression might be; for some very peculiar ideas haunt the imaginations of those who practise and teach law.

Chapter 4

LANGUAGE

THE FACT THAT HUMAN BEINGS can communicate with each other is one of the most astonishing of the many phenomena that surround our lives—although it may be that insects, birds and animals are more expert in communication than ourselves. That we communicate only imperfectly, that the words, nuances and gestures we use are inadequate to reveal with exactness the mysteries of our own thoughts: that is but a measure of our imperfect ability to communicate, and in no way derogates from the wonder of the fact that we can communicate at all. A few scattered designs on a piece of paper can convey, somehow, a sense of the writer's thought, a fact which brings writer and reader together. And without language, there can be no law.

Most of the languages spoken in Southeast Asia stem from three language families, the Sino-Tibetan, the Mon-Khmer and the Malayo-Polynesian language groups. Their variety is endless. In Burma, well over a hundred languages are spoken, while in Indonesia over two hundred are in use. Certain languages such as Thai and Vietnamese may not belong to any of the three groups mentioned, and again, there are various Chinese dialects, Hokkien, Hakka, Cantonese and so on, which (although belonging to the Sino-Tibetan group) are not indigenous to the region.

The Malay language itself, belonging to the Malayo-Polynesian group in use not only in mainland Southeast Asia, but also in the great archipelago running out of that region and into the Pacific, has acquired the status of a *lingua franca*, and is as lively within the area as is English elsewhere. English itself is a sub-branch of the Teutonic languages, themselves a branch of the Aryan language that includes the Indian, Persic and Slavonic languages: so a diligent reader may at times have a curious sense of the common origins of all mankind, and

in investigating the nature of language find himself approaching a deep mystery.

All languages tend to borrow from and to be linked with each other, as part of the ordinary pattern of human intercourse. The Malay peoples have borrowed—or perhaps *adopted* is a better word—many words from the Sanskrit. Take the English word *father*. In Sanskrit this is *pitri*, in Latin *pater*, in German *vater*, and in Malay *bapa*. Or, again, the English word *goose*. The Sanskrit for *goose* is *hansas*, the Latin *anser*, the German *gans* and the Malay *angsa*. Such simple examples illustrate the affinity between languages; and since words convey ideas, the affinity suggests, not only a common knowledge of such agreeable characters as *father* and *goose*, but a common vocabulary extending from the physical into the realm of the abstract.

Until recent years the very liveliness of the Malay language had fettered its development. Adapted to the expression of simple ideas, and adopted as a basic means of communication throughout the Malay archipelago, it was ill-attuned to the incorporation of such legal concepts as, for example, the *voluntary liquidation of a company*; but this is not to suggest that the language lacked a general refinement. Indeed, such writers as Raja Ali Haji, the original author of *Tidhfat al-Nafis* (*The Precious Gift*),

> in his own writing ... emphasized that as far as possible Malay should model itself on Arabic syntax and endeavour to eliminate accretions which had crept in through exposure to other languages ... Neglect of language, he argued, meant neglect of an established tradition, which would inevitably destroy "the arrangement of the world out of the Kerajaan".[1]

Raja Ali Haji, an author who obviously knew that his words could shape the nature of sovereignty itself, was writing before the British came into the Malay States, and his fears were well-founded. With the advent of the English, Malay passed into eclipse as an official language; the long rolls of the government gazettes unfold through the

[1] "Islamic Thought and Malay Tradition," by Barbara Watson Andaya and Virginia Matheson, in *Perceptions of the Past in Southeast Asia*, ed. Reid and Marr (1979), 122.

decades of British administration wholly in English, save in those States outside the original federation—Perlis, Kedah, Kelantan and Terengganu—where laws were published in Jawi, a graceful, local form of Arabic script, and so made intelligible to those to whom they were addressed.

With independence came the quest for a national language and, given the political origins of Malaysia, that language had to be Malay or, as it now called, *Bahasa Malaysia*. A year before independence a government report had advocated the use of Malay as the primary medium of education, and in 1957 the new Constitution provided (in Article 152) that "the National language shall be the Malay language". The use of English for official purposes and proceedings in the superior courts was preserved for a period, until the National Language Act 1963 to 1967 (Act 32) laid down more specific policies for the adoption of Bahasa Malaysia. Furthermore, in 1970 it was made seditious to question the status of Malay as the national language, even within the normally privileged walls of Parliament.[2]

The present position is regulated by the National Language Act 1963 to 1967. Coming into force on September 1, 1967, the Act provides that the texts of all Acts of Parliament and federal subsidiary legislation, ordinances of the *Yang di-Pertuan Agong*, State enactments and State subsidiary legislation, Federal and State Bills shall be in the national language and English: the text in the national language being authoritative, unless the *Yang di-Pertuan Agong* otherwise directs. Under the Act the *Yang di-Pertuan Agong* can permit the continued use of English for such official purposes "as may be deemed fit", and under that power has permitted the use of English for certain specified purposes.[3] These, set out in a notification of September 1, 1967, are as follows:

(a) legal advice or opinion and correspondence pertaining to such advice or opinion relating to any law the authoritative text of which is English;

---

[2] See Constitution, Articles 10(4) and 63(4) and the Sedition Act 1948, as amended by the Emergency (Essential Powers) Ordinance 1970 (No. 45).

[3] PU 410 of 1967 as amended by PU 58 of 1963.

(b) communication with foreign Governments or international bodies where the use of English is unavoidable;
(c) communication with international experts or consultants serving or under the employ of any Government or statutory body within Malaysia;
(d) training or examination where the approved course or the approved text of any subject is English;
(e) training carried out by foreign experts;
(f) communication with locally recruited staff of Malaysian embassies;
(g) in the Ministry of Health, report or instruction in respect of patients, prescription and post-operative instruction;
(h) policy instruction or directive to the delegates of Malaysia while abroad where the use of English is unavoidable;
(i) in the Internal Revenue Department, work in connection with assessment, computer and accounting, collection and investigation.

The policy behind Article 152 of the Constitution and the National Language Act is clear enough, linked as it is with the objective set out in the preamble to the Education Act of 1961, which sought "the progressive development of an educational system in which the national language is the main medium of instruction." What is important in this context, however, is to ascertain whether the national language can take the place of English in a common law legal system dominated by the English language. According to a newspaper report of 1981,[4] the president of the Malaysian Bar Council then considered that "only ten per cent of its 1200 members had some knowledge of the national language." Since 1983 every candidate for admission to the Malaysian Bar has been required to pass an examination in Bahasa Malaysia, unless exempted by reason of a pass in the Sijil Pelajaran Malaysia Bahasa Malaysia (both written and oral). In the examination "oral questions are asked on everyday matters like applying for bail or how to make a plea in mitigation" it was reported at the time:[5] the first candidate in fact failing the test, a doubtful distinction indeed.

[4] *The Star*, February 28, 1981.

[5] *New Straits Times*, January 24, 1984.

Much progress has been made in the evolution of a comprehensive legal vocabulary in the national language. In 1970, Dewan Bahasa dan Pustaka published *Istilah Undang-Undang*, a dictionary of English legal terms with their requirements in the national language: so that a major step was taken towards the full practical use of the national language for legal purposes. Even so, so rapid is the rate of change that in 1998 a new edition of the *Istilah Undang-Undang* was published.[6]

Yet the legislative roots of contemporary Malaysia and the common law of Malaysia are English, a fact which has led to the import of English words into the Malay language with, in many instances, a change of spelling to conform to the structure of the Malay language. "According to the Chief Librarian of the Law Library (University of Malaya) Bahasa Malaysia textbooks constituted only about one per cent of all the legal materials in the library",[7] the rest of the materials being almost overwhelmingly English.

In fact, the language of Malaysian law has been English for less than a hundred years. If a Malaysian jurisprudence is to develop, then the national language—the medium from which the nation itself draws life—must effectively be adopted. In certain states, such as Kedah, Perlis, Kelantan and Terengganu, some proceedings in the High Court are (according to the Lord President, speaking in July 1979) already conducted entirely in the national language: and this tendency will inevitably continue. Yet the obstacle of the English common law remains formidable, as the long and ever-increasing rows of English law reports confirms. While the speedy retrieval of case law is now possible with computerisation and new technology, the problem for Malaysia remains, and can only be resolved by a confrontation between English and Malaysian common law, and a change in the structure of the legal profession itself—a profession originally dominated by English-trained barristers.[8]

---

6 Published by Sweet & Maxwell Asia.

7 Voon Ah Kam, "Bahasa Malaysia in the Malaysian Legal System," University of Malaya, Faculty of Law, LLB Academic Exercise, 1981/2, 68.

8 In the mid-1980s the Malaysian Bar consisted of about 1,300 members, of whom some 900 had been called to the English Bar. The remainder consisted of University of Singapore law graduates, University of Malaya law graduates, and some Australian and New Zealand law graduates. But see below, chapter XI. Things have changed much since then.

Chapter 5

SOVEREIGNTY

WATER FISH AND SOVEREIGNTY

One of the most interesting problems of jurisprudence, and indeed one that lies at the core of the concept of law, relates to the question of sovereignty. Few law students escape the awful issues posed by a quest for the distinguishing marks of this rare and elusive creature.

Unfortunately, as is the case with most of the content of taught jurisprudence, that content looks to western writers for enlightenment in the realm of legal theory. Natural law is examined in opposition to positivism; the mummy of Bentham (and, for that matter, of each of his successors in the west) is rolled out annually for inspection and reverence, like Kelsen and his "Great Mystery" to be made the object of pilgrimage, study and worship.

The notion of sovereignty assumes that within every political and legal system, there is some authority—the sovereign—whose decision on all issues is final. Based as it is upon an instinctive desire for order and certainty, sovereignty takes many forms. One of the fathers of English law, Blackstone, affirmed that there must be in every state a supreme authority in whom the *jura summa imperii*, the right of sovereignty, exists. In England, he saw this right as vested in the King in Parliament. Hobbes, observing the matter in the context of the English civil war, saw sovereignty as founded on power and affirmed that "covenants without the sword are vain". Bodin, who produced a theory of sovereignty in 1576, at a time when France was torn by wars of religion, saw law as the command of the sovereign. Later writers have varied and refined the theory, according to the culture, traditions and structure of the society in which they live.

It is strange then that the sovereign spirit within Malaysian law is not the subject of more intensive study. The significance of the Malay

proverb, *biar mati anak, jangan mati adat*, better the child die, rather than the custom, is seldom appreciated: indeed, there are, it seems, those who prefer to murmur *biar mati adat, jangan mati anak*, let the custom die, not the child, so powerful is the influence of what is conceived as natural law. Yet that natural law has its importance in the folk-memory contained in such proverbs as *air di tudang hambongan, tunamnya di cucur atap* (water on the roof falls to the eaves). Authority, too, flows from top to bottom.

So be it. *Ada air, adalah ikan*, in water there are fish. We must accept that all things go according to nature, in accordance with known and unknown natural laws. Of these laws, sovereignty has a special immortality for, as the Constitution of Perak tells us,[1] "The sovereign never dies". Some supreme authority must exist to create order out of chaos: in the religious sense God, the First Cause, the Life Force and so on, whatever name the philosopher may devise; in the political and legal sense the sovereign, the *grundnorm* and more, the source of all order, the antagonist of chaos. And men, shaped by the rhythm of the seasons, the cycle of the turning years, hold on to order, in the midst of an apparently chaotic universe.

In the opening words of his first lecture on jurisprudence, the English teacher Austin stated that "the matter of jurisprudence is positive law: law, simply and strictly so called: or law set by political superiors to political inferiors". He then sought to elucidate the relationship between political superiors and political inferiors, and in doing so developed a famous theory of sovereignty, the essence of which resided in the notion of "the habit of obedience to a determinate and common superior."

For Austin, then, law was the command of a sovereign, of an authority who required obedience from those who habitually thought it proper to render it to him. In the words "no sovereign, no law" lay the essence of his doctrine. Inevitably, his theories have been much criticised, most effectively, perhaps, by Maine, who took a wider view of the development of society, and saw the manner in which individual rights could emerge, an emergence expressed in the phrase for which he is famous, that "the movement of progressive societies has hitherto been a movement from status to contract."

[1] Second Part, Article XI.

Still, whatever criticism be levelled at Austin, the fact remains that his analysis of the nature of law and sovereignty has had a profound influence upon the development of English law. Bentham had offered a principle of utility based on the idea that the purpose of legislation lay in working towards the greatest possible happiness of the greatest possible number, and offered a theory of the objectives of legislation; and Austin developed that theory, with a rare, clinical skill. Yet the trouble with virtually all theories of law is that they tend, in their quest of the legal, to overlook the moral. This is the basis of the criticism levelled at Austin's "imperative theory of law" and of the school of legal positivism that has emerged from it, to take root in many places. The term *positive law* comes from the Latin *ius positivum*, law that is posited, laid down, imposed by a political superior; and it runs through legal philosophy from Bentham and Austin to Kelsen and Hart.

With these august philosophers we need not concern ourselves overmuch, for the opinion of the thoughtful student of Malaysian law, one emerging from his own unique culture, is likely to be at least as valid for him and his circumstances, as any offered by a western writer. As with *law*, so with *sovereignty*, we can discover countless definitions, each of which may give an insight into the meaning of the word: but the insight is always partial and incomplete. What does emerge, in most instances, is one of the paradoxes of law: that law as the modern observer understands it requires the existence of some sort of sovereign authority, coupled with the maintenance of machinery that will keep that sovereign authority in check and responsible to some sort of lawmaking assembly that is representative—or is thought to be representative—of the will of the people.

Here we enter a world of illusion. Being human, men desire to see the head of a state personified in human form, in the person of a king, sultan or president: and it is he who gives the final approval, on behalf of the people of the state, to all laws that have been approved by the lawmakers. Even when masquerading in the democratic form of a president, there is still a sort of magic attendant upon the office itself: so that we may say that the monarchical form of government is perhaps more honest that the republican. There is a divinity of sorts in any position of power, be it that of wife, mistress or emperor: and it is a

wise people who recognise the link between power and pageantry. Not for nothing did the *Undang-Undang Melaka* decree that the Ruler alone could wear yellow garments, clothes made of transparent materials and kerises with golden handles. Even today, the observant student will note the proliferation of titles, orders and decorations which serve to satisfy human vanity and support the interests of that group popularly known as the *Establishment*[2] a term now applied to the ruling class in any society, be it democratic, communist or fascist.

It is impossible to understand the concept of sovereignty in Malaysia, except in Malaysian terms; and it would seem that Malacca offers a useful point of departure, since the Malacca Sultanate has had a profound influence upon the development of the concept. Once devised, the office of sultan conferred almost absolute authority, an authority derived partly from pedigree, descent from earlier Rulers (this in itself giving rise to the notion of legitimacy) and in part from religion, from the Muslim theory that the Ruler was "God's Shadow on Earth". In Dayak culture a dichotomy can be seen, with two officials, the *Tuai Rumah* as the secular authority, and the *Tuai Burong* as the religious authority for the longhouse. In early Malacca, however, the office of Ruler combined both temporal and spiritual elements, as today it still does in the Malay States. These elements were strengthened by a traditional Malay concept known as *daulat*, and according to Zainal Abidin bin Abdul Wahid,[3]

> *Daulat* can be interpreted as sovereignty. The sovereignty of a Malay ruler is not merely a legal concept; it is a cultural and religious one as well. And it lies in the person of the Ruler. The *daulat* endows him with many rights and privileges, places him above his society, beyond reproach and criticism. The *daulat* also entails unquestioning loyalty from his subject.

---

[2] The word *Establishment* is now used to refer to those who are said to control public life and are regarded as supporting the *established* order of society. It should not be confused with the right of establishment under European Community law, under which a national of a member-state may establish a business in another member-state.

[3] "Sejarah Melayu", in *Asian Studies*, Vol. 4, No. 39 (1966), 446.

Law and culture thus combined to create a bond in which loyalty was fortified by religious teaching: for the Koran itself (like the precept, that one should "Render unto Caesar the things which be Caesar's, and unto God the things which be God's")[4] directs, "O you who believe, obey God and obey the Prophet and those charged with authority over you".[5] Yet, seeking to trace the origins of Malaysian sovereignty, the observer can sense its existence in pre-Muslim times, when Hindu and other outside influences were at work in the peninsula. These influences appear in the words used to describe the phenomena of authority. In a foreword to a book on the eighth *Yang di-Pertuan Agong*, Ungku Abdul Aziz writes:[6]

> Linguistically, it is both symbolic and symptomatic of Malaysian history and the Malaysian way of life, that we have been able to draw on several sources for terminology to express the monarchical concept. There is the word *Raja* which is of Sanskrit origin. There is *sultan* which is derived from Arabic. This is sometimes associated with the suffix Shah, which is Persian. Of even greater interest, is the possibility that the term *agong* is of Javanese origin.

These words illustrate the composite nature of the concept, invoking as it does a myriad of influences. On the slopes of Kedah Peak are relics of an Indianised state; the state is forgotten, its influence remains, mixed with Muslim and Buddhist traces; Sumatra, Java and Thailand added powerful energies that waxed and waned; and the resultant confusion and fusion of cultures survives to modern times, in language, ritual and behaviour. Out of the past has emerged the present, extremely complex concept of sovereignty in Malaysia.

---

4 Luke, XX. 25

5 *Surah* IV, 59.

6 *The Monarchy in Malaysia*, by Tan Chee Koon. For a contemporary view, see Raja Tun Azlan Shah, "The Role of Constitutional Rulers: A Malaysian Perspective for the Laity" [1982] JMCL 1. See also Tan Sri Dato Haji Mohd Salleh bin Abas, "Traditional Elements of the Malaysian Constitution" in his *Constitution, Law and Judiciary* (1984), 37.

RICHES IN POLITICAL TERMS

Whilst the word *kedaulatan* is today generally adopted as the Malay term for sovereignty, the word *kerajaan* was at one time used to indicate "the condition of having a *raja*"; but the latter word is now used to denote "rule, dominion or empire" and, sometimes, to denote governmental authority, as in the *Warta Kerajaan*, government gazette, the official record of government acts that is accepted as evidence in all courts. Even so, the "condition of having a *raja*" is an important aspect of the word for sovereignty, for it might well be said to stress the condition of "habitual obedience" regarded by Austin as a necessary, indeed essential feature of sovereignty.

Austin inevitably fell into difficulty when he considered the nature of customary law, although his arguments on the matter are not so unsatisfactory as modern critics affirm; it is, after all, by virtue of the authority vested in the judge by the state that the tests of custom—certainty, reasonableness, antiquity, continuity and consistency with written law—are defined and adopted. The recognition of the judge, is, then, as effective in translating custom into law as is the assent of a Ruler to a measure passed by a legislature.

But I digress from the theme of sovereignty. What can be asserted with a reasonable degree of confidence is that political communities developed, initially as small colonies within Malaysia, and that as they grew, so the ambit of custom was extended. For there are in practice no barriers to the evolution of law; it develops out of morality into habit, from habit into custom; and out of custom emerges that degree of consensus necessary to establish and develop a formal legislative procedure. In the course of this process, the necessity for a political superior becomes increasingly obvious.

Maxwell makes the point[7] that "monarchical government was introduced amongst the Malay tribes by Hindu Rulers from India." This probably contains an essential truth, although it is not difficult to suppose other and more complex influences at work; but it does seem clear that the development of the concept of sovereignty was linked with the tenure of land, itself seen as a source of wealth, and therefore

[7] "The Law and Custom of the Malays with reference to the Tenure of Land," JSBRAS No 13 (1884), 89.

power. As Milner notes,[8] "Malays conceptualised riches in political terms." The peaceful occupation of land required protection against the depredations of others, and the price of protection came to be assessed as a tithe, one-tenth of the produce of the land; so that, according to Maxwell[9]

> it is not difficult to see the rights of the Raja to demand a proportion of the produce, on pain of forfeiture of the holding, and to dispose of waste land, tended by degrees to create the doctrine that the right to the soil was in the Raja. Such a doctrine did in fact grow up ... it has received complete acceptance in Malay States.

Maxwell sought to impose a certain logic on the past, a not uncommon desire for any historian. Swettenham, that dour and practical man, knew differently. "There was not," he wrote in 1890,[10]

> in the Pre-Residential period any system of payment by tithes, or, indeed, any recognised system of native tenure of any kind. The people occupied and cultivated such lands as they chose, and paid nothing for them, but the authorities, Sultan, State Officer, local headman, or *anak Raja*, whoever had the power or might, dispossessed the occupants at pleasure, or helped themselves to any produce that they thought worth having whenever they felt able and inclined.

The words "whoever had the power or might" tell us much. Whatever the real situation—and Swettenham's words convey a greater ring of truth than those of Maxwell—"the presumption of a Malay Ruler's paramount ownership in land was," as David Wong says,[11] "certainly turned into a *fait accompli* with the establishment of colonial government under the Residential system in the Malay States." Government required sovereignty, and this invoked the ultimate ownership of the

8 *Kerajaan, Malay Political Culture on the Eve of Colonial Rule* (1982), 27.

9 Op. cit., 90.

10 Perak Administration Report for 1890.

11 *Tenure and Land Dealings in the Malay States* (1975, repr. 1977), 20.

land, however irrelevant that doctrine might have been when government was haphazard, disorganised and capricious. On the basis of the doctrine of such paramount ownership of land is the modern state constructed.

In this manner, then, sovereignty developed. The theory is to be seen in the evolution of land tenure (although the concept probably much precedes such a manifestation) and is based, therefore, on an essential element of reciprocity: an agreement to confer protection on the occupation of land in return for a share of the produce of the land. Out of this simple consensus emerged not only a complex system of conveyancing and real property law, but also a sophisticated theory of government.

The idea of a "social contract", under which men surrender their rights to a Ruler in return for his protection, is generally regarded as false, yet it is astonishing how persistent it is, even today. In various forms, it appears in different cultures, the Chinese concept of a "mandate of Heaven" being another way of viewing the authority of the sovereign and his relationship with his people. Treating it as a special kind of legal fiction, it has considerable value in assisting in the interpretation and development of the principles of public law. For Hobbes, the sovereign was never, however, a party to the contract, and was not to be bound by it: and however objectionable such a proposition might appear to the democrat, vestiges of Hobbes' doctrine persist in modern Malaysian law. As a notable example at the federal level the doctrine is explicit, in a fundamental law relating to the interpretation of statutes:[1]

> No written law shall in any manner whatsoever affect the rights of the *Yang di-Pertuan Agong* or the Government unless it is expressly provided or it appears by necessary implication that the *Yang di-Pertuan Agong* or the Government, as the case may be, is to be bound thereby.

To the casual reader the principle may well appear to be extraordinary; to a constitutional lawyer, it is one of orthodoxy, although few, even amongst lawyers, ever effectively grasp its significance. It finds further

[1] Interpretation Act 1967 (Act 23), section 63. See now Act 388.

elaboration in Article 181 of the Federal Constitution, which provides that "no proceedings whatsoever shall be brought in any court against the Ruler of a State in his personal capacity," although this was in 1993 modified. While prior to 1993 no proceedings, whether civil or criminal, could be brought against the Ruler of a State in his personal capacity, the immunity was removed by an amendment in 1993 (Act A848). Under the amendment a Ruler can, if the Attorney-General consents, be sued or tried by a Special Court set up under Article 182 of the Constitution. It has been held, however, that under the 1993 amendment, a non-citizen has no right to sue a Ruler in his personal capacity: see *Fatimah Begum bte Abdullah v Sultan Haji Ahmad Shah Al Mustain Billah* [1996] 1 MLJ 617.

Even so, the thread of inviolability runs through both federal and state constitutions. In this fashion, the proposition that "the Sovereign can do no wrong" (linked with the principle that "the sovereign never dies"[13]) has been accepted as a basis of sovereign infallibility: an infallibility still regarded (perhaps for reasons better explained by sociologists or psychiatrists, rather than lawyers) as essential to the due working of both federal and state constitutions.

PREROGATIVE AND SOVEREIGNTY

The immunity of the Crown from litigation at the instance of a subject was for immemorial years a sacred principle of English law, a splendid weapon in the hands of authority. It may be the principle developed out of an integration of royal authority, when all legislative, judicial and executive functions were embodied in, and proceeded directly from the individual person on the throne: an integration dating back, in England, to the 12th century, but in Asia to earlier times. In Penang, Malacca and Singapore, however, the Crown Suits Ordinance of 1876 gave the subject a right to sue the Crown in contract and tort: a right which he would not enjoy in the home of the common law until 1947. So, while the three Charters of Justice of 1807, 1826 and 1855 provided for proceedings by and against the East India Company, the Ordinance of 1876 was in fact a revolutionary piece of work which (although in part derived from the English Petitions of

[13] See, for example, Constitution of Perak, Second Part, Article XI.

Right Act of 1860) was—to quote Braddell's words in 1915—"in reality a very original piece of work which has stood the test of time."

In the Malay States the right to sue the government did not emerge until 1928 in the Federated States of Perak, Selangor, Pahang and Negri Sembilan, 1931 in Johor and 1938 in Kelantan. Until then, the doctrine that government could itself be sued was almost as unacceptable in the Malay States as it was in England. Seen as part of the attribute of sovereignty, as based on the theory that the king can do no wrong, it was a long time a-dying; and even today, the theory is still defended, in the area of evidence, by reason of the problems attendant upon a disclosure of official records and communications: where the public is regarded as superior to the private interest.[14]

To round off this disgression, reference must be made to the Government Proceedings Ordinance 1956 which regulates proceedings not only by, but also against, the Government. Yet even in that generous but technical measure there is a reservation, not only excepting proceedings in tort against a Ruler in his private capacity,[15] but also "powers or authorities" which are "exercisable by virtue of the prerogative of a Ruler."[16]

The word *sovereignty* inevitably invokes a consideration of the word *prerogative*; a word of Latin origin, derived from "asking before", voting first, exercising a privilege. In the course of time the word has acquired a special meaning, which might in simple terms be expressed as the informal residue of a Ruler's powers, after he has, in concurrence with his legislature, agreed that some of them (perhaps, indeed, a majority of them) be exercised in a formal way.

In discussing these words it is necessary to use terms of English law, and each of these terms possess a penumbra of meaning within an English, not a Malaysian, context. However, even in an English context the word *prerogative* has a hazy, diffuse meaning, and we can (provided that we are alert to its limitations) use it to illustrate those special attributes of a Ruler that are not limited or regulated by written law.

[14] Evidence Act 1950 (Act 56) sections 123 and 124.

[15] Government Proceedings Ordinance 1956, section 45(1) (see now Act 359).

[16] Ibid., section 15(1).

That said, is it to be assumed that the prerogatives of the Ruler of a Malay State are co-extensive with sovereignty? At one time in the past this may have been so, and even until *Merdeka* such a Ruler could be said to have had (in spite of the apparent limitations of an advisory treaty requiring him to take the advice of a British officer on all matters save those relating to Malay custom and Muslim religion) all the attributes of an Austinian sovereign.[17] What had occurred over the years was, however, the all-too-familiar phenomenon of the reduction of custom to written law and, in the realm of public law, the promulgation of a written constitution.

The advent of constitutional government in Malaysia marked the beginning of the end for the prerogatives of the rulers. While assiduously reserving these prerogatives by express savings in the state constitutions, the very act of defining rights and powers restricts them.[18] With the advent of formal constitutional government in Johor in 1895, limitations on arbitrary rule set in, and the pattern was set for progress to the modern concept of constitutional government: that is to say, not merely government in accordance with the provisions of a constitution, but government in accordance with the wishes of the elected representatives of the people.

At this point it is worth considering briefly exactly what authority issued the various constitutions of the Malay States, for their origins offer a vital clue to the nature of the political power out of which sovereignty grows. The Johor Constitution of 1895 was promulgated by the "Sultan and Sovereign Ruler" with "the advice, concurrence and assent of all the Members of Our Council of Ministers, and of our Council of State and other Chiefs and Elders of the country ..." In Perak in 1948 the "Sultan and Ruler" published a constitution "with the advice concurrence and consent of Our Major Chiefs and elders of Our State of Perak." The pattern is repeated. Sovereignty in the state is to be found in the Ruler: but he may himself be but one component of a State sovereignty. So, in Negri Sembilan in 1959 (a State Executive

---

[17] Or so it seemed to the writer, as legal adviser to Sultan Ibrahim Abu Bakar of Johor (the famous Albert Baker of Miss Mighell fame) prior to *Merdeka*.

[18] It is for this one basic reason that those who love freedom are reluctant to press for a formal Bill of Rights: seek to define freedom by law, and the result tends to slavery, rather than liberty.

Council and Council of State being already in existence) a constitution was promulgated "by the rights and powers of Our Prerogatives as *Yang di-Pertuan Besar* and Ruler of the State of Negri Sembilan and as Undangs of the Luaks of Sungei Ujong, Jelebu, Johol and Rembau and as Tengku Besar of Tampin, and after consulting the State Executive Council and with the advice and concurrence of the Council of State ..." In this manner everyone with sovereign authority is identified with its distribution: and this is a basic principle that emerges in Malaysian public law. To seek the apparent source of sovereignty, look at the sources of the Federal Constitution itself: an Act of the United Kingdom Parliament, a federal Ordinance and State enactments, all giving effect to a formal agreement of August 5, 1957, entered into on behalf of the Crown in the United Kingdom, the Rulers and the Federal Government established by the Federation of Malaya Agreement 1948.

Seldom is any attempt made to define the nature of particular prerogatives, but in the Laws of the Constitution of Perak of 1954 will be found an enlightening article on the "Royal Prerogatives".[19] While these provisions are to be found only in one other constitution, that of Kelantan, they express principles which are in fact implicit in the constitutions of all the Malay States. The Perak Article provides that

> In amplification and not in derogation of the Royal Prerogatives hitherto possessed or exercised by the Sovereign the following Royal Prerogatives among others are vested in the Sovereign:
>
> The Fountain of Honour,
> The Fountain of Justice,
> The Fountain of Mercy,
> The Head of the Religion of the State,
> The Protector of Malay Custom,
> The ultimate Owner of the Soil.

In reviewing these varied aspects of the Rulers' prerogatives, some changes due to the introduction of federal government are to be noticed. The aspect of honour can be seen in the statutes regulating the grant of honours and awards, by both the Rulers and the *Yang di-Per-*

[19] Laws of the Constitution of Perak, Second Part, Article 10.

tuan Agong. These are in fact promulgated under prerogative powers, that is to say, without statutory authority; and their conferment (and withdrawal) are powerful factors in maintaining the form of monarchical government in Malaysia.

In the realm of justice, in the federal courts, writs are issued in the name of the *Yang di-Pertuan Agong*. In the realm of mercy, the power to pardon, to reprieve and to grant a respite of sentence in respect of any offence committed within his State are, by the Federal Constitution, vested in the Ruler of the State,[20] although the Ruler must exercise that power after considering the advice of a State Pardons Board. By virtue of his constitutional position, the Ruler is the only authority competent to protect Malay custom in a State. As for land, that element essential to the life of the nation and government, under the federal National Land Code, "the entire property" in State land, minerals, etc., is vested in the Ruler of the State; he alone, acting on the advice of the State Executive Council, is competent to alienate land; the reversion of State land is vested in him; and no title to State land can be acquired by adverse possession.[21]

These, then, are part of the attributes of the Rulers' prerogatives, so assiduously preserved in so many areas of law. That they have survived is due in part to political necessity, in part to human vanity. Abolish the Rulers, and they would in all probability be replaced by others who, in course of time, would assert the same prerogatives: prerogatives perhaps wearing other names, and adopting other forms, but preserving the same substance.[22] In Penang, for example, the Governor has conferred *datos*hips without any legislative authority: an act fa-

---

20 Article 42. On the inviolability of the prerogative of mercy, see *Chow Thiam Guan v Superintendent of Pudu Prison and the Government of Malaysia* [1983] 2 MLJ 116, *Sim Kie Chon v Superintendent of Pudu Prison and Ors* [1985] 2 MLJ 385 and *Superintendent of Pudu Prison and Ors v Sim Kie Chon* [1986] [MLJ 494 (SC). The issue of natural justice in relation to a convicted offender, under the contemporary procedure of a Pardons Board, remains obscure.

21 National Land Code, sections 40, 42, 46, 48.

22 It is interesting to compare the situation in Russia under the Tsars with that under the Communist Party, and to discover the truth of the cynical proverb, *Plus ca change, plus c'est la meme chose*: The more things change, the more they are the same.

miliar to a Ruler, but at first sight astonishing for such a non-Sultanic head of State as a Governor. In Sabah, on the other hand, an enactment deals with the award of honours in the State.[23]

Yet in spite of effort, the nature of sovereignty, with its attendant prerogatives, in a Malaysian context cannot be defined with any degree of exactness. The constitutional history of the Malay States after British intervention illustrates the difficulty of identifying the actual seat of sovereignty in any part of Malaya. The advisory treaties recognised the sovereignty of each Ruler; but (as Braddell explains all too vividly[24]) on the conclusion of the Treaty of Federation of 1895 (that bare document of five or six paragraphs which is the foundation of Malaysia) things began to change. With the treaty, the increasing authority of the British tended to pull all power to the centre—a characteristic, centripetal consequence of a logical federation. At that time, there was no definition of federal or state powers. In 1909 an effort was made to re-assert the sovereignty of the Rulers, by bringing them personally into a federal council: but this peculiar effort at salvation was foredoomed, and in 1927 the Rulers withdrew from the council. Matters drifted on inconclusively. Only with the MacMichael treaties of 1946 (denounced by the 94-year-old Swettenham in "the strongest and bitterest terms") was there a tardy and hypocritical recognition of the Rulers' sovereignty; yet at that point, the sovereignty of the Rulers had become merged with, and has since that date been inextricably interwined with the sovereignty of the people. "We, the Ruler", became entangled with "We, the People": and the attendant confusion has bedevilled Malaysian politics ever since.

Given the evolution of a democratic form of government, the distinction between Ruler and ruled leads to the question, where lies sovereignty, once a federal structure has been created? Where in fact does sovereignty reside in Malaysia? Has anyone or anything supreme power? At this point we can dip into the Federal Constitution, and discover from Article 4 that the constitution is "the supreme law of the federation". How can such a confident statement appear in such a carefully-drafted document?

[23] Penang PU 26 and 27 of 1969, Sabah, State Honours Enactment 1963.

[24] *The Legal Status of the Malay States.*

The provenance of the constitution itself illustrates the nature of sovereignty. At the time immediately preceding *Merdeka* the Crown in the United Kingdom had sovereignty over Penang and Malacca: that sovereignty was subject to the control of an omnipotent parliament; in consequence, an Act of that parliament was necessary, in order to transfer sovereignty over the two territories. In the Malay States the Rulers already, in varying degrees, shared aspects of their sovereignty with their State legislature and the federal legislature established in 1948: so that State laws and a federal ordinance had to effect a transfer of power to the newly-independent state, its authorities and legislature.

Such, crudely put, was the origin of independence. Of course, there were certain conditions implied in, but never formally expressed on the transfer of power; one being based on the principle of equality, and implying that any future state admitted to the new federation would be admitted with the approval of all founder states, unless (probably) the admission of the new state was on the same terms as those attaching to the founder member-states. It was a breach of this implied condition that caused Kelantan in 1962 to question the creation of Malaysia.[25] The Chief Justice took a literal view of the constitution and rejected Kelantan's application: but there was, and is, much to be said for it, and it is to be hoped that the principle will never be breached again.

Still, let us return to the question of where sovereignty in Malaysia now resides. We can perhaps best answer the question by seeking to identify those authorities who can alter, amend or revoke the present "supreme law of the Federation". Who are these authorities? For a start, they are not the ones who promulgated and set in motion the present Constitution. If we study the amending provisions of the Constitution[26] we note that these authorities consist of Parliament, that is to say, the *Yang di-Pertuan Agong* and the two Houses of Parliament, together with, and as occasion demands, the Conference of Rulers. Yet even this brief but bold explanation is not adequate for, Malaysia being a federal state, the States have their own degrees of autonomy, under

[25] *Government of Kelantan v Government of the Federation and Anor* [1963] MLJ 355.

[26] Articles 38 and 159.

State constitutions guaranteed by the Federal Constitution itself. True it is that in any case of conflict between federal and state law, the federal law prevails: but a state may always appeal to the courts, if it considers that the federal legislature is trespassing into an area that is properly the exclusive concern of the state. In this fashion, the distribution of power, of sovereignty, is maintained in accordance with the consensus that is, after all, at the heart of the Federal Constitution itself.

Sovereignty, then, can be conceived as a whole, as being the sum total of all authority within a territory, although such authority is, even in the most developed of modern states, much fragmented. In Malaysia the Federal Constitution provides a complex and delicate balance of power in which—since the federation is the creation of the states—both federal and state authorities are each dependent on the other. The integrity of the Federation therefore depends upon the Constitution itself, whose consensual origin is the key to its understanding.

The constitution provides no machinery for secession or, say, a breach of sovereignty. The only instance of secession that has so far occurred related to Singapore, which in 1965 left the federation and began life as an independent republic. How long this particular experiment in independence will last is a nice question; in 1972 the Singapore Constitution (originally modelled upon and interlocked with that of Malaysia) was amended, to prohibit any "surrender or transfer, either wholly or in part, of the sovereignty of the Republic of Singapore as an independent nation, whether by way merger or incorporation with any other sovereign state or with any Federation, Confederation, country or territory or in any other manner whatsoever," unless supported in a national referendum by at least two-thirds of the votes cast.[27] This provision is likely to cause more problems than ever it purported to resolve; the phrase "either wholly or in part" carries the seeds of confusion; and the bitter necessity for survival will one day compel its review. The withdrawal of Singapore from Malaysia was effected by the same kind of federal law that had been used to amend the Constitution in order to bring Malaysia into being, and in spite of argument to the contrary, it does not appear to be lacking in legitimacy, being en-

[27] See Article 6 of the Reprint of the Constitution of the Republic of Singapore, 1999.

dowed by its foster-mother, Malaysia, with all the legal sustenance for survival.

There is, then, no express machinery in the Federal Constitution dealing with the secession of a member-state. In consequence, it can be said that secession can only be effected constitutionally by due amendment of the Constitution, and unconstitutionally by the unilateral act of the seceding state. Clearly, the philosophy behind the Constitution does not contemplate secession, entry into the federation being somewhat akin to the old-fashioned concept of matrimony, a condition the parties had to endure until death did them part. Still, since secession has already been effected by due amendment of the Constitution, in relation to Singapore, it could always be effected by further amendment, given the anxiety of the federal government to get rid of an awkward member-state.

A unilateral act of secession by a member-state or states would of course be a revolutionary event: but, as the experience of the United States indicates, there is nothing odd about such an act. Whether any such revolution will ever occur or be necessary in Malaysia is a question far beyond the scope of a brief survey of basic concepts of law: but any imposition of federal authority by force could lead to such an event, if the evidence of history means anything.

Sovereignty, then, is as much a political as a legal fact, and it does not imply the omnipotence of a god. Even for the most Austinian of sovereigns there are limitations on the exercise of power, arising from the nature and circumstances of man and of the political society in which he lives, as well as from the laws of nature itself. King Canute demonstrated to his courtiers that the tide does not obey the command even of a king. Sovereignty, like the diplomacy that serves it, is anchored in that which is possible: its limitations lie in impossibility.

REIGN OF LAW

The history of the evolution of sovereignty in Malaysia (although perhaps the word "devolution" offers a more accurate perception of events) illustrates the development of what can properly be called the "rule of law". Exactly when this process began is difficult to determine, but it is reasonable to assume that it was in no sense the peculiar gift of the British. What the British did was to adopt the term and give it, in

the light of their own parliamentary history, a particular meaning that is now accepted, almost without question, by common law lawyers throughout the world.

Yet the rule of law itself comes comparatively late in the day. There can be no law (in that wide, general meaning of the word common today) without some form of political superior exercising some form of sovereignty: and indigenous legal systems, appropriate to their own time and place, evolved in Malaysia at least as early as the 15th century, and perhaps earlier. At all events, the *Undang-Undang Melaka*, the laws of Malacca which appear on the scene between 1422 and 1458, provided a basic code of laws which seems to have been modified and adopted not only within the Malacca Sultanate itself, but beyond its boundaries. Those laws illustrate, too, a matter that has become one of increasing interest and importance, the manner in which Islamic principles can merge with those of customary law. The text of the laws of Malacca has been studied by various scholars, notably by Liaw Yock Fang, and an assessment made of their authenticity and validity. For our purposes we can note that the concept of codification (that "diluted Benthamism", as Maine said of the codes drawn up by the English in India) long preceded the codes of laws imported into Malaysia from India, by the British. The status of a Ruler as head of state, endowed with prerogatives of mercy, alone authorised to wear yellow robes, and requiring allegiance from his subjects: these concepts were familiar long before a Federal Constitution emerged in 1948 with the Federation of Malaya Agreement, and long before the Constitution of Johor of 1895.

The laws of Malacca are relics of what was perhaps a golden age, and with the fall of Malacca a period of unrest set in, with the advent of European traders and adventurers: a period continuing, it seems, until well into the 19th century. Clifford, in a memorable address to the federal council on November 16, 1927,[28] makes the point with characteristic clarity when, as a latter-day imperialist, he saw as the greatest of the benefits bestowed by Britain upon a long-suffering, non-European world

[28] de V. Allen, Stockwell and Wright (eds.), *A Collection of Treaties and other Documents affecting the States of Malaysia 1761-1963*, 1981, II, 76-77.

> the establishment and maintenance of a Reign of law, *viz.*, of codes that were made equally binding upon the rulers and upon the ruled, which were the charter of the liberty of the latter, and the iron fetters whereby the former, if tempted to misuse their power, might be effectually restrained. It was the absence of any such law in the Malay States, as they were in the seventies of the last century, that had produced ... conditions of perennial strife and anarchy.

Discounting the self-righteousness of the civil servant, Clifford's comments are indeed telling. The British are dedicated to that "rule of law" so concisely expressed by Dicey in 1885, in his *Law of the Constitution*. The rule implies, according to Dicey, several propositions:

> (a) that no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.
> (b) that no man is above the law, but every man (whatever this rank or condition) is subject to the ordinary law and amenable to the ordinary tribunals
> (c) that the general principles of the constitution (such as the right to personal liberty) are the result of judicial decisions determining the rights of private persons in particular cases brought before the courts.[20]

And the British who came to Malaya in the period following 1874 were brought up in a climate in which Dicey's concepts were no more than the expression of principles well-known to the ordinary Englishman, as the consequence of many bitter struggles by the common people. The concept of the rule of law was, then, no theoretical ideal but a living vision of what should be, in order to work to justice in society.

Given the evolution of a political society and a rule of law, the problem of supremacy is not easy to resolve. A Ruler is regarded as sovereign, omnipotent within his own area of authority. He makes a law,

[20] Of these three propositions, the first two are dogmatic, the third descriptive or explanatory.

say, imposing a tax: is he himself bound by that law? He says, no; and if he says no, who can gainsay him? Only one challenging his authority: and such a challenge may be tantamount to treason, and entail death. Only gradually, with the development of an increasingly complex engine of government, with a dispersal of sovereign power entailing the emergence first of an executive, then of a separate judiciary and a formal legislative assembly, does a notion of subjection to the law emerge.

At some time in this process a theory of constitutional government emerges. Such a government does not necessarily require a written constitution, and there are those of a liberal spirit who favour no formal document for the government of a unitary state. The rules of government are shaped by force of circumstance and precedent into *constitutional conventions*, principles nowhere reduced to writing, but accepted by all concerned as not only proper, but valid. Out of this development of law an acceptance of principles of constitutional law grows; and once that development has taken place, it is only a matter of time before the popular appetite, hungry for power, anxious for responsibility, finds it necessary to develop the idea that the law should be binding not only upon those ruled, but upon those who rule. This matter comes late in the whole process.

The latest concept, that the Ruler is bound by the constitution (if not yet by the law) develops out of a dynamic view of society. A ruling class will inevitably seek to perpetuate itself and to entrench, by all manner of devices, its privileges. This neo-feudalism (for want of a better term) persists in Article 181 of the Federal Constitution:[30] the vestige of an ancient ghost. Under this provision, "no proceedings *whatsoever* shall be brought *in any court* against the Ruler of a State *in his personal capacity*." While this provision is not expressly protected by the general provision on amendment in the Constitution[31] it is in fact clearly subject to Article 38(4), which affirms that "no law directly affecting the privileges, position, honours or dignities of the Rulers shall

[30] Article 181(2): the writer's italics. In 1993 this basic principle was dramatically eroded by adding the words "except in the Special Court established under Part XV." The Special Court consists of the Chief Justice of the Federal Court, the Chief Justices of the High Courts, and two judges or ex-judges appointed by the Conference of Rulers.

[31] Article 159.

be passed without the consent of the Conference of Rulers." In consequence, the subordination of a Ruler to the rule of law can only be effected by Parliament with the concurrence of the Rulers themselves, on the face of it an unlikely event. It seems likely to endure, therefore as long as, and no longer than, the Rulers.

Now as soon as a Ruler promulgates a constitution he sets in motion a particular vehicle, a sort of legal juggernaut: and whatever reservations he may have made in the matter, he is in practice estopped from denying its existence, or altering it in a reactionary manner. The 20th century, that so-called century of the common man, has seen a worldwide climate of opinion created in favour of democratic principles. Egalitarian ideas have, for good or ill, taken root, and cannot now be disregarded, whatever may be the logic of voices from the past. The terms of reference of the Reid Constitutional Commission of 1957 included a requirement to safeguard "the position and prestige of Their Highnesses as constitutional Rulers of their respective States." Clearly, in the eyes of an orthodox constitutional law lawyer, a constitutional Ruler is one who rules in accordance with a constitution; and a constitutional Ruler is, under a democratic, parliamentary system, a Ruler who does as he is told by the elected representatives of the people. Sovereignty is not always where it seems to be.

In 1957, then, every Ruler was, with the introduction of a democratic, parliamentary system, reduced to the status of a figurehead, so that (to quote the Reid report[32]) the "ultimate power" in the state would be the State Legislative Assembly, a body consisting entirely of elected members. Yet it was perhaps too much to expect that at the stroke of midnight on the eve of independence in 1957 the Rulers could immediately alter their outlook, their way of life, their accustomed attitudes. It would have been asking too much of mortal men, brought up to think of themselves as, in many respects, sovereigns in the Austinian mould. Looking back, there is a certain naivete in the belief, current at *Merdeka*, that in the blaze of independence the Rulers would lose all their authority and become the creatures of politicians. The credentials of some of those politicians were, after all, sometimes far from impeccable, and alas, they remain so. The public inter-

[32] Para 182.

est may well be served by a certain tension between a hereditary Ruler and an elected politician.

Since the 19th century, the position of the Rulers has changed, and is continuing to change. In 1937 an English observer[33] could write of "Tringanu" that

> the government must be pronounced aristocratical, for although the Sultan is nominally the chief authority, the whole power is vested in the *pangerans*, or lords ... The Sultan and the *pangerans* form a sort of commercial company, and monopolise the whole of the foreign trade.

Earl was not much impressed: but then, he was observing a state probably not so well advanced as others in the west of the peninsula: and the pattern of development varied from state to state. Only in 1948 came that element of uniformity which was a necessary prelude to federation.

In a way, the State Nationality Enactments of 1952 represented perhaps the last flowering of the Rulers' sovereignty: and although the enactments remain on the statute book, their influence is now negligible. Occasional events, such as the riots of May 1969, have tended for a time to restore the authority of the Rulers, and to consolidate the position of the Conference of Rulers: but the erosion of the vestigial sovereignty of the Rulers continues inexorably.

As for the position of the *Yang di-Pertuan Agong*, the office itself was created in 1957. Some jurists argue, with great force, that in consequence the powers of the Supreme Head of the Federation—that sum total of federal sovereignty—are limited by the Federal Constitution. Others affirm that the office is to be understood only in a historical, evolutionary perspective: the powers of the Supreme Head flowing from the disposition of existing powers made at the time of independence. The issue is important in academic eyes: does the Supreme Head of the Federation have prerogative powers outside the Constitution?

[33] Earl, *The Eastern Seas* (1837, repr. 1971), 185.

KINGS AND PRINCES

Yet the question of sovereignty is far from an academic matter, raising as it does profound political and indeed philosophical, as well as legal issues. Often it becomes so complex (especially when the student enters into the realm of international law) that one longs for a return to the simple certainties of the past. In a memorable passage, Richards, writing in 1961,[34] gives a vivid insight into the old link between land and sovereignty:

> When travelling in the Ulu Delok I asked a Penghulu who owned the land. After some discussion his reply was that God owned the land, the people who used it gained the right to it by clearing it and by obeying their customs.
>
> I then asked him where the kings and princes of this world came in. He said that they do not own the land except as ordinary people do, but they are in the position of rulers so that they may keep the peace and administer their areas. This was agreed to by Malays in Kuching and it has been stated elsewhere that, under the Mohammedan law, land is regarded as God's and no man may sell it.

Such are the echoes of an age of innocence, before the complexities of a Federal Constitution arose.

Apart from the problems raised by the federal structure of the Constitution, the self-declared supremacy of that Constitution, of its own bid for supremacy, is not as yet fully accepted. For, as heirs of a parliamentary tradition mingled with changing aspects of sultanic supremacy, there is still a dominant belief in some political circles in the doctrine of parliamentary sovereignty, as opposed to that of constitutional supremacy. One parliament cannot bind another, one ruler cannot bind his successors: this is the principle, amounting in some instances to an unshakeable belief, which has to contend with that affirming that the constitution itself is supreme.

This latter principle, so ingenuously declared in Article 3 of the Constitution is, after all, itself an illusion. A resolution could sweep away the federal and state constitutions overnight, and the surviving

[34] *Sarawak Land Law and Adat*, 15.

judiciary would have to come to terms with the situation, no doubt invoking Kelsen's *grundnorm* and all the other doctrines desperately sought by judges in Cyprus, Zimbabwe and Pakistan,[35] when overtaken by political realities. For in the end it is violence, the threat of violence and the fear of violence, both within the state and without, that is at the heart of the real mystery of government. A legal system, a constitution, is designed to distribute, regulate and control that violence which lies at the extremity of political argument. Pope, an English poet, was right to assert that it is fools who contest for forms of government, for in the end all forms of government, whatever their political colour or philosophy, are faced with the same problems of order and disorder, and react in more or less the same fashion: sometimes viciously, sometimes mildly, but always reacting. To understand the true nature of sovereignty, perhaps it is necessary in the end to study not simply law, but ambition, greed, hatred, prejudice, envy and all the other mainsprings of man and the modern political process.

[35] See *State v Dosso* (Pak. Leg. Dec. 1958 S. Ct. 533), *Asma Jilani v Government of Punjab* (Pak. Leg. Dec. 1972 S. Ct. 139) et al.

Chapter 6

CUSTOM

WRITING AND NO WRITING

It is sometimes the practice to classify law as either unwritten or written: the latter term embracing all such positive laws as Acts of Parliament, Ordinances, Enactments and subsidiary legislation that are the products of a particular lawmaking authority, expressing an intention or will in a formal manner, and to be interpreted in accordance with particular rules of interpretation. The rest of the law is gathered vaguely under that umbrella known as custom or, to use the Malaysian word, *adat*, and case law, those rulings of the judges interpreting written law or declaring unwritten law.

Within the urban areas of Peninsular Malaysia, customary law has to a large extent become the subject of written law, and so ceased to have the curious significance it once held. Matters of government, matters of family life, are the subject of legislation. For example, until March 1, 1982 a Chinese in Malaysia could be regulated in his personal life by Chinese custom as modified by any local modification of that custom, as interpreted by the courts; with the coming into form of the Law Reform (Marriage and Divorce) Act,[1] that custom vanished, to be replaced by statutory rules.

Yet for people further removed from, as it were, the power-centres of the law, written law is meaningless. Slowly—although the pace is indeed accelerating—do new ideas filter into those living in remote areas and backwaters: so that for them *adat*, customary law, remains a living tradition. Even so, custom can still regulate the lives of even the most sophisticated of people; so that within Malaysia there is a rich, unique, infinitely-varied tapestry of customary law affecting in greater

[1] Act 164.

or lesser degree practically all members of the population, whether they are indigenous to the country, or the descendants of immigrant settlers.

In West Malaysia it can be said that the first indigenous people are the Orang Asli, living deep within the forests and jungles of the peninsula. In Sarawak, the indigenous peoples fall into several groups living in virtually distinct areas. On the coast are to be found Malays and Melanaus, numbering about two hundred thousand in all and predominantly Muslim, although pagans and Christians are to be found amongst the Melanau. In the lowland areas are the Iban or Sea Dayaks[2] numbering over three hundred thousand: a people of many customs, many beliefs, with a great destiny. In these areas, too, live the Bidayuh, sometimes known as the Land Dayaks, numbering upwards of a hundred thousand. And far in the interior, in the great uplands, live groups of Kelabit, Kenyah, Kayan, Marut and Punan, perhaps numbering fifty thousand, many of them possessing living oral traditions rich in imagery, variety and wisdom.

HAP OF THIS LIFE

In 1908 one Ungku Lisut, a Malay headman made a speech in Naning. Such is the fortune of posterity that the speech was preserved by an Englishman;[3] and in his speech Ungku Lisut identified the sources of law as seen by a Malay Muslim of those days. Ungku Lisut said:

[2] The word "Iban" means "human", and also "wanderer". "Dayak" really means "inland person", from the root word *daya* or *aya*. "There is really no difference between 'Sea Dayak' and 'Iban', they are one and the same group": see Doris Suling Anding, *Native Customary Law and Adat of the Balau Iban*, University of Malaya, LLB Academic Exercise, 1982, 12-13.

[3] J.L. Humphreys, "A Naning Wedding Speech," JSBRAS No 72 (1916), 25. In this context it is perhaps worth noting that even as late as 1930 "very few Malays over the age of thirty in rural areas could read or write" (Mubin Sheppard, *Taman Budiman*, 28). Literacy is, however, a mirror phenomenon of intelligence, and a culture based on oral traditions may well prove stronger than one based on the written word.

And there is a saying runs,
First, the law of God,
Second, the law of the Prophet,
Third, the law of tradition,
Fourth, the custom of the land.

What is the law of God?
To eat the daily bread,
To wed the destined mate,
To lie beneath the heaped-up sod.

What is the law of the Prophet?
The saying, the commentary.
The text, the interpretation.

What is the law of tradition?
The pattern becomes the mould,
The example becomes the type,
Precept passing into usage,
Practice passing into custom,
The custom handed down by our forefathers from generation
to generation:
Transplanted it withers,
Uprooted dies.

What is the custom of the land?
Duty gives and receives again,
Courtesy repays kindness:
The lap of this life goes by turns,
Awhile to him, anon to me.

Homage, O Chief!

In this poetic summary of the law, the speaker defines law with great skill and wisdom, in terms corresponding (in western jurisprudence) to natural law (the law of God); Muslim law (the law of the Prophet); customary law (the law of the land). Yet of these terms, the word *adat*, custom, is, as countless writers have commented, fluid and varied in its meaning: and as the wedding speech of Ungku Lisut illustrates, it is

difficult, and probably dangerous, to seek an interpretation exclusively in western terms. For it is part of the life of the community, part of a pattern of behaviour constantly changing with the pressures of new times, new events, new personalities.

FLUIDITY OF *ADAT*

In 1927 Clifford observed[4] of the Malay States prior to British intervention that

> Theoretically the Malay Rajas and their chiefs were bound alike by the *Hukum Shara'*—Muhammadan Law: by the *Kanun*—viz, Traditional Law, which had in some instances been reduced to writing; and by *Hukum A'dat*, or Customary law, which was enshrined only in the memories and in the hearts of men, but which differed widely in various parts of the Peninsula and provided an inexhaustible subject for academical discussion and debate.

Of this three-fold classification, the *Hukum Shara'*, the *Kanun* and *Hukum A'dat*, the second is likely to cause some confusion. *Kanun* is probably best treated as a loose term for a body of written law, often based on customary law rather than (as Clifford suggests) one embodying elements of unwritten law: in other words, a code of practice based not only on custom and Muslim law, but on other objectives seen as desirable within the community. In those days, after all, there was a sense of intimacy about law; it was close to the people, it was a part of the people, it was an expression of the popular will. Gross simplification though this may be of a complex subject, for the purpose of such an introduction as this, let it suffice: for the Malay scholar will probably say that this is as close as an outsider can come, to the mystery of Malay law. And here, it may be that Ungku is our best guide.

Commenting on the *Undang-Undang Melaka* and the *Undang-Undang Laut Melaka* (the maritime laws of old Malacca) Mohammed Yusoff Hashim says[5] that in both texts

[4] Speech to the Federal Council, November 16, 1927.

[5] *Malaysia in History*, Vol 26 (1983) 84 at 87.

terms that were used to connote or indicate matters that were connected with laws and penalties are *mengikut adatnya* (according to the custom), *mengikut hukummya* (according to the law), *mengikut hukum kanun* (according to the *kanun* law), *mengikut hukum Allah* (according to the law of God), *itulah hukummya* (that is the rule) or *itulah kiasnya* (that is the analogy).

Here, then, is another merging of concepts, with the principles of Muslim jurisprudence influencing the development of customary law: and all these terms illustrate the essentially fluid character of *adat* law itself.

SHIFTING LANDING PLACES

On studying one of the main sources of Malaysian law, customary law, *adat* law, we find that many of its rules emerge from common sayings. Indeed, the student of Malaysian jurisprudence will be wise to begin his studies with a reading of, say, Winstedt's *Malay Proverbs* or Brown's *Malay Sayings* for here, summed up in pithy, concise sentences, is much of the traditional wisdom of the Malay people. On the subject of custom there is, indeed one especially famous proverb, already mentioned, *biar mati anak, jangan mati adat*, better that the child die than the customs and tradition die: of which a modern version is said to be, *biar mati adat, jangan mati anak*; let the custom die, rather than the child.

The reversal is significant, reflecting as it does a popular shift in values, not only in relation to the position of the individual in society, but in relation to the authority of custom itself; but this is a wide issue indeed. What we can observe is that, out of popular behaviour, folklore, myth and legend emerges a common philosophy. Out of such a proverb as *pagar makan padi*, the fence eats the crop it should protect, arises amongst other things a concept of breach of trust, of misappropriation of trust funds such as (to quote Brown) the property of a minor in the hands of a fraudulent guardian. The maxims of Malay life are more important than the maxims of equity in English law. *Kecil dikandung ibu, besar dikandung adat, mati dikandung tanah*, when young we are embraced by our mother, when adult by custom, when dead by the earth, such is the traditional view of the villager's life.

Popular sayings embody basic principles of behaviour and these, in their turn, regulate custom. So we discover that air *di tulang bumbungan, tumannya di cucur atap*, water on the rooftop must fall to the eaves, things must therefore act according to their nature. Winstedt quotes a number of Minangkabau proverbs, and notes that "all or any one ... may be heard any day from a Minangkabau discussing the circumstantial evidence for a crime."[6] And this is true, no doubt, of most so-called primitive societies. Lacking records, oral traditions preserve the standards of society and maintain at a colloquial level those principles which, in a more sophisticated society, are translated into lengthy and ambiguous statute law.

So, 'let the custom die rather than the child' reflects that increasing recognition of the importance of the individual which finds expression in Part II of the Federal Constitution, where the fundamental liberties of citizens and others are set down. Just as oral proverbs embody the *adat*, so now does writing embody much of the law; and as society develops, *adat* withers, to be replaced by other fashions of thought, other pressures on behaviour.

The value of *adat* lies, then, in its early vitality as living law. It belongs to, is part of the society in and by and for which it has been created, and like that society remains alive and active, changing as necessary with the needs of that society. Winstedt makes the point concisely:[7]

> ... while some European authorities speak of Malay custom as if it were fixed and rigid, native jurists know better and have embodied their experience in a legal saying: "every time a flood comes, landing-places shift: every time a chief succeeds, custom changes".

Or, as the seaman says, different ships, different eye-splices.

Much unnecessary confusion has been caused by attempts to classify *adat* law, and Malay *adat* law in particular. Western observers all too often like to extract a tidy pattern from a medley of custom: although had the distinction of "law areas" adopted by Van Vollenhoven and Ter Haar in Indonesia been adopted, Malaysia would have been

[6] Reprinted in *Malay Proverbs*, revised by Tan Chin Kwang (1981).

[7] *Start from Alif: Count from One*, 149.

spared a great deal of prolix analysis on such matters as the *adat teménggong* and the *adat perpateh*. Indeed, the *adat perpateh* of Negri Sembilan has been the subject of so many studies that its existence, founded in a matriarchal system originating in Minangkabau in Sumatra, has overshadowed the importance of *adat* in other areas: whereas the term *adat teménggong* has been used loosely to describe a variety of *adat* based upon a patriarchal system. In all, it seems best to treat *adat* as what it is, customary law limited to a particular area, and to be careful in the use of any adjective seeking to describe it further. And the whole of Malaysia is rich in *adat*.

And custom has a life of its own, independent of government. Winstedt writes[8] that "as late as 1878 the Perak State Council had to admit that most Perak law was still 'unwritten, though generally understood and appearing to differ little from the code of laws formerly in force in Malay Kingdoms.' " In any society unacquainted with durable records, human memory is all-important: a fact increasingly forgotten, as mechanical methods of retrieving information proliferate.

While the British in Malaya recognised the validity of *adat* and *adat* law, that recognition created problems of its own. In *Sahrip v Mitchell* (1871),[9] Sir P. Benson Maxwell C.J. said that

> it is well known that by the old Malay law or custom of Malacca, while the sovereign was the owner of the soil, every man had nevertheless the right to clear and occupy all forest and waste land, subject to the payment, to the sovereign, of one-tenth of the produce of the land so taken.

He noted that

> the Portuguese, while they held Malacca, and, after them, the Dutch, left the Malay custom or *lex non scripta* in force. That it was in force when [Malacca] was ceded to the Crown appears to be beyond dispute, and that the cession left the law unaltered is equally plain on general principles.

---

8 *The Malays: A Cultural History*, 114.

9 (1877) Leic 466 at 469.

He concluded that English law would "no more supersede the custom in question, than it supersedes local custom in England." In consequence of which, he gave relief to the plaintiff in the sum of three hundred dollars, for his wrongful ouster by various officials from land he had cultivated for some forty years.

Such a decision was consistent with a benevolent interpretation of the Charters of Justice which, although they had conferred jurisdictions on the courts they had established, had not directed what law those courts should apply. In India, parallel legislation had directed the use of Muslim law for Muslims and Hindu law for Hindus: and some guidance existed for those judges unfamiliar with the principles of those laws. In Malaysia there was none, and, regrettably, the English judges fell back upon English law: even holding, in *In re Abdullah*,[10] in 1835, that a Muslim could, contrary to Muslim law, dispose of all his property by will. Such a decision could be attributed not to ignorance, but to a belief in the principles of individual freedom enshrined in the common law and, for that matter, in the *laissez-faire* economics of 19th-century capitalism. Things are different now.

Maxwell referred to customary law as *lex non scripta*, unwritten law, an expression favoured by many lawyers, as indicating the popular origin of its rules. Custom is in its nature a matter of practice, ever-shifting, and a new custom can always be recognised. For example, in 1967 the Federal Court recognised a custom of trade between Sarawak and Singapore, that a mate's receipt (even if marked 'not negotiable') could be treated as a document of title to goods, in the same manner as a bill of lading.[11] In that case Wee Chong Jin C.J., delivering the judgment of the Court, offers a useful survey of the evolution of a local custom in relation to bills of lading and mate's receipts: and the arguments there dealt with are of peculiar interest to anyone concerned with the evolution of custom in the area of commerce and trade.

[10] (1835) Ky 8.

[11] *Wah Tat Bank Ltd v Chang Cheng Kum* [1967] 2 MLJ 263. See also [1971] 1 MLJ 177 PC.

CUSTOM AND THE WRITTEN WORD

Once reduced to writing, however, the spirit of the law within a custom can be lost. There is dilemma here, acutely noted by an Indonesian observer, Soerahardjo:[12]

> The codification of *Adat* law can result in the obscurity of the soul and the spirit of the law itself until it would become less flexible to accommodate the changes occurring in the community. On the other hand, without the written form, *Adat* law can result in side effects, apprehension due to the absence of certainty in the law may occur.

Such is the tension between written and unwritten law: yet the effect of reducing a custom to writing can, as it were, give it a dominance over the unwritten law. Folk in Negri Sembilan refer to Taylor, in Sarawak to Richards, in Sabah to Woolley, as if the records and interpretations of these informed writers were themselves as authoritative as statute law. The lawyer will recognise this at once for—whatever the contemporary merits of Austin and his concept of sovereignty—the average lawyer continues to see law as consisting of rules which can be enforced by the courts; and every court, itself endowed with jurisdiction by some supreme authority in the state,[13] is best impressed by law which has the express or implied blessing of that authority.

The codification of customary law carries its own hazards, for writing introduces an element of fixity into what was a fluid situation. Custom runs like a wandering river in the Borneo landscape; confine it within the rigidity of a made channel, and its effects are changed. One of the problems posed by this situation is illustrated by a Sarawak law,

---

12 "The law within the legal system to overcome legal conflicts between customary (*adat*) law, Islamic and Western laws in force in Indonesia," in Alfredo T. Tiamson (ed.), *Studies on Muslim Laws (Shariah) and Customary Laws (Adat)* (Manila, 1976), 343.

13 This may not be true of *El Tribunal de las Aguas*, "the Tribunal of the Waters", in Valencia in Spain. Said to be one of the oldest courts in the world, its three judges meet once or twice a year, in public, to settle disputes over the distribution of water.

the Native Customary Laws Ordinance.[14] In Sarawak, several codes of Iban customary law had been drawn up in the days of the Rajah. These codes were, essentially, simple declarations of offences accompanied by prescriptions of agreed penalties: and they had been drawn up at gatherings of the wise men from the longhouses concerned.

This in itself might have presented but a minor problem: but the code was reduced to writing, and then promulgated with the authority of the Rajah. To any student of Austin, the Rajah of Sarawak will appear as a sovereign, his regime possessing those characteristics favoured by Austin: the habit of obedience to a certain and common superior, by the generality of the members of a given society, whilst that superior is not himself subordinate to another. Haunted by this doctrine (which now runs through much of Malaysian law, archaic though it be) it was in 1953 realised that the codes of customary law so promulgated were now crystallised into positive law. The act of reducing them to writing and then investing them with the approval of the sovereign had transformed them into a different kind of law: customary law had become positive law, with all the advantages and disadvantages of this latter state.

What relief, then, was possible? Inflation and the passage of time had rendered the penalties trivial,[15] and it was therefore considered necessary to devise some machinery for the amendment of native customary law in Sarawak. In consequence the Ordinance of 1955 was enacted. Under this Ordinance the Governor in Council can, if "satisfied, after such inquiry as he may deem proper or expedient, that a general consensus of opinion in a community to which a native system of

[14] Chapter 51 of the Laws of Sarawak. This Ordinance has now been repealed (see Cap. 22 of 1996) but existing Orders and notifications have been saved.

[15] A common feature of any system of written law in these days is legislation designed to enhance pecuniary penalties and keep them in line with the diminishing value of money. See, for example, the United Kingdom Criminal Justice Act 1982, which prescribes a new method of determining fines for summary (minor) offences: five numbered levels on a standard scale, which can be altered to take account of changes in the value of money, by orders under the Magistrates' Courts Act 1980. Fines are levied at different levels: each level being from time to time prescribed.

personal law[16] applies favours an amendment of such system, and that effect may lawfully be given thereto consistently with the Native Courts Ordinance and any other written law," make an order accordingly.

In consequence Sarawak has seen a considerable amount of what is called "subsidiary legislation"[17] under the Ordinance, in the form of Orders of the Governor in Council giving effect to codifications of native customary law. Orders have been made in relation to the *Tusun Tunggu*, a code of Iban customary law, in several "divisions" (large administrative areas of Sarawak) together with *Orang Ulu* Customary Codes of Fines in particular areas and, for the Malay community of Sarawak, the *Undang-Undang Mahkamah Melayu Sarawak*. In addition two collections of *Dayak Adat Law* in the first and second divisions of Sarawak, prepared by A.J.N. Richards, were also published in 1963 and 1964: but these are not authoritative, being only declaratory of the then customary law.

In Sarawak the establishment of the Majlis Adat Istiadat (Council of Customs and Traditions) in 1974 gave an impetus to the codification of customary law, and in 1996 the Native Customary Laws Ordinance was replaced by the Native Customs (Declarations) Ordinance, which also enabled native customary laws to be codified. In consequence, codifications now exist of Adat Iban, Adat Bidayuh, Adat Kayan-Kenyah, and work is under way in relation to the *adat* of the Lun Bawang, Kelabit, Kajang, Penan, Bisaya dan Melanau Liko.[18]

---

16 Defined in the Native Courts Ordinance (Cap. 43) as "the system of personal law recognised by the general law of Sarawak as being applicable to the members of any racial, religious or other community because they are members of such community, and includes any rules or customary laws of such system which may refer the determination of any matter to another system of personal law." This Ordinance has been repealed by the Native Courts Ordinance 1998 (9 of 1992), but the definition is repeated in section 2 of the later Ordinance, under which native law and custom is to be administered "so far as it is applicable and is not repugnant to natural justice or morality or is not, in principle, in conflict with the provisions of any law in force in the state" (section 6).

17 "Subsidiary legislation" or subordinate or delegated legislation, has, if it is properly made, all the authority of law.

18 Empeni Lang, "Administration of Native Courts and Enforcement of Native Customary Laws in Sarawak" 25 JMCL (1998), 89.

Such codifications appear to assist development, which is, says Jayl Langub, "a powerful disequilibrating force ... it means a state of perpetual imbalance .... The critical challenge facing the *adat* is the ability of Dayak societies to adapt their *adat* to manage this imbalance."[19]

In Sabah, affairs have been managed differently. Probably because no Austinian sovereign in the person of Rajah had given his approval to the promulgation of such a code as the Sarawak *Tusun Tunggu*, no legislation on the lines of the Sarawak Ordinance of 1955 has been found necessary. A series of codes prepared by G.C. Woolley in the 1930s (and happily called "Woolley's Codes") in the form of small booklets issued by the government, set out basic principles of *Tuaran Adat, Dusun Adat, Murut Adat, Kwijau Adat* and *The Timoguns*. These codes have, like Richards' publications on Dayak law, no formal legislative authority: but, as any practitioner familiar with the law of evidence will appreciate, they offer invaluable guidance on the existence of a custom, provided their limitations are taken into account. For custom is not fixed and static: herein lies both its virtue and its weakness.

NATURE OF CUSTOM

One of the early problems posed by customary law lay, and indeed still lies, in its method of recognition and enforcement. Taylor in 1929[20] criticised those who imported "the technicalities and arbitrary distinctions of the English law of procedure, which are wholly unintelligible to an illiterate population" and which "made rational administration of the customary law impossible." It would not be desirable to introduce the often-absurd technicalities of the law of evidence into a native court nor, for that matter, be wise to permit a lawyer to appear there; but it does help, to have a record of major decisions.

Of course, from the point of view of the orthodox lawyer, the native courts are something of a mystery, to be avoided where possible. In 1962 Ainley C.J. noted[21] of the Native Court of Appeal in Sabah that it was, "for all its impressive constitution ... not ideally suited to

[19] "Ritual Aspects of Iban Customary Law in Sarawak" 25 JMCL (1998), 45 at 59.

[20] *Customary Law of Rembau* (1929), 13.

[21] In the case of *Re James Lee Kui Wah, Cases on Native Customary Law in Sabah*, 38.

answer questions which turn on the construction of written laws". There is a border between the two systems, and one often difficult to discover. *Adat* law has a spirit which is lost in the hair-splitting favoured by the legal mind; custom and written law make uneasy bedfellows: and of the two systems, custom seems to serve the poor man best.

In East Malaysia, then, both Sarawak and Sabah have native courts with jurisdiction over natives, in the same fashion as Muslim courts have, in the states of Peninsular Malaysia, jurisdiction exclusively over Muslims. Thanks to the initiative of a Sarawak judge, Tan Sri Datuk Lee Hun Hoe, there exist reports of cases on native customary law in Sabah and Sarawak. In this context, however, the definition of "native" requires reference to written law[22] and even then, the definitions available do not prove wholly satisfactory, as some of the cases reported on Sabah customary law indicate: for jurisdiction depends (as in the case of the *Syariah* courts of West Malaysia) upon the fact of belonging to a particular group. In each territory, a hierarchy of native courts exists, these being now "not the creation of custom, they are courts created by statute",[23] a distinction of critical importance, as the case of *Re James Lee Kiu Wah* illustrated in 1962. In consequence, the non-native (or, if the reader prefers it, the secular) courts can exercise a control over the native courts, through the agency of, *inter alia*, prerogative orders.

Such a control is important, since it is essential to have supreme authority in any field of human activity. As English history illustrates, two systems of courts with parallel authority cannot exist together in harmony, and in Malaysia the secular courts in 1970 asserted a final authority over Muslim courts and authorities.[24]

The question may, then, properly be asked, how are we to recognise custom as law? What characteristics give it the force of law? Al-

---

[22] For the basic definition of "native" see Article 161A(6) of the Federal Constitution, and then refer as necessary to local State legislation, e.g. the Sabah Interpretation (Definition of Native) Ordinance 1952 (12 of 1952) as amended, now Cap. 64.

[23] Ainley C.J., in *Re James Lee Kiu Wah, Cases on Native Customary Law in Sabah*, 38.

[24] See, for example, *Commissioner for Religious Affairs v Tengku Mariam* [1970] 1 MLJ 222. But the 1988 amendment of article 121 of the Constitution (i.e. the Syariah Courts) is now pertinent.

len, in his book, *Law in the Making*, deals with this issue in the realm of English law, and Sirau, obviously influenced by the common law, offers five criteria for the judicial recognition of *adat* in Sarawak.[25] These criteria, that is to say, tests for the validity of a custom in that State, are

(a) reasonableness;
(b) generality;
(c) antiquity;
(d) consistency with morality; and
(e) not contrary to public policy.

Sirau comments, truly enough, that the tests are less stringent than those imposed by the common law of England. These tests are probably valid for the recognition of *adat* in Malaysia generally; but the observer should bear in mind that *adat* is limited in its area and, often, in its application; its reasonableness has to be tested against the behaviour of those within whose area it operates; and its antiquity depends on the memories of the elders of the community. It is a powerful force within society, because of its very nature, of the gulf that exists between it and the written word.

What is significant here is that it is another system of law, in effect, which determines the characteristics of custom for the purpose of a general recognition, and then seeks to weave that custom into the tapestry of the law in a manner that is harmonious and acceptable. In this process a judge may sometimes appear to act illogically; but logic is not always a part of justice.

PRESSURES ON CUSTOM

Since custom grows out of, and is shaped by, the habits of society, it necessarily reflects the way of life of the community within which it operates. In Malaysia that society has since 1940 been subject not only to abrupt political change, but also to technological changes that have

[25] John Wayne Chamberlain Sirau, "The Bidayuhs of Sarawak: The People and their Adat—A Sociological Study," University of Malaya, LLB Academic Exercise, 1984, 142 *et seq.* For a record of the manner in which custom was treated in Sarawak under the Rajah, see the Appendix, Law of Sarawak Order 1928, and the Notes thereto.

radically altered the environment. Doris Suling Andang, writing of the Balau Iban,[26] reports "the increasing influence of Christianity and the tide of modernisation penetrating into the longhouse", and quotes an American writer[27] as stating that "headhunting is no longer practised. Position and prestige are now shown by bringing back money and other valuables such as outboard motors, radios, television sets and sewing machines." These items replace the jars and gongs of old and are significant not only in themselves, but for all the influences they invoke. The effect of television upon developing countries is in itself a subject of vast proportions, not yet observed, not yet understood, since television now embraces virtually the whole inhabited world, feeding its audience upon a diet of doubtful benefit.

One writer on the Kelabits of Sarawak, Medan Maya, has stated[28] that "the effect of Christianity and education on the Kelabit *adat* and *adat* laws has been very extensive. Because of Christianity many substantive *adat* laws as well as practice have been abandoned." Another writer[29] quotes a Paku elder, an Iban *penghulu*, as saying in 1972 that "when they (Christian converts) live in the longhouse they observe and maintain the customary laws and ritual prohibitions of the longhouse. It is just those beliefs and rituals that offend their Christian beliefs they do not participate and would leave the house for that period ..."

Sirau makes a similar point.[30] Writing of the Bidayuhs of Sarawak he notes that

> Most of the Daya Bidayuhs have been converted to Christianity ... When the teachings of Christianity conflict with *adat*, the former prevails and the latter is discarded. Where they do not conflict and can co-exist, the *adat* may be adopted, but in substan-

---

26 "Native Customary Law and Adat of the Balau Iban," University of Malaya, LLB Academic Exercise, 1982.

27 H. Vinson, Jr. in *The Iban of Sarawak* (Illinois, 1978).

28 *Kelabit Customary Law*, University of Malaya, LLB Academic Exercise, 1982, 45.

29 Peter Mulok Kedit, "Modernization among the Iban of Sarawak," University of Malaya, LLB Academic Exercise, 1980, 226.

30 Op. cit., 42.

> nally modified form. Suffice it to say therefore, that many Daya Bidayuhs live a double life, one according to *adat*, another according to the tenets of Christianity and the ordinary civil law of the country. Many of the rules of *adat* are therefore left in abeyance.

Sirau concludes that "in fact, the new generation of Daya Bidayuhs seldom consider themselves bound by *adat*."

An experienced observer of Sarawak *adat*, Richards, notes in writing of Sarawak[11] that "Christianity ... is more likely to be socially disruptive than Islam", presumably because it is less disciplined and comprehensive in its philosophy. Like not a few others with experience of the hazards of conversion, he comments that

> when a community has begun to adopt itself to economic change, it can turn Christian and advance more rapidly; but when a community has not begun to change, Christianity may destroy it by removing the old discipline, and not replacing it with a pervasion of the whole life and work of the community.[12]

For *adat* is woven into the texture of a community, as it were; remove it, and unless its disciplines are replaced by more dominant belief and behaviour, there is disintegration.

A long-term appraisal of *adat* law suggests that it will continue to be a force in shaping society, but that it will, as in the Western world, diminish until extinction. Where a custom expresses a particular belief, and the reason for holding that belief has gone, then the custom will disappear, in conformity with the old legal maxim, *cessante ratione legis, cessat lex*, when the reason for a law ceases, so does the law. A custom may dictate a fine for, say "entering another's house, that has signs of mourning, wearing finery"[13] but a later and more sophisticated community may view such behaviour as no more than a social solecism, not deserving formal punishment. In this fashion the pressures of education, the influence of radio, television and the printed word, and the

[11] *Land Law and Adat* (Kuching, 1961), 58.

[12] Ibid.

[13] An "offence concerning the longhouse and enquiring propitiation", under the Sea Dayak (Iban) Fines Code of 1952.

development of a kind of world culture based on a common diet of television series and newspaper features, videotapes and other fast foods, are bringing about a revolution in which local and national customs and boundaries are ceasing to retain their old significance.

Yet, human beings being what they are, let us hope that the old languages and dialects will persist, and some of the customs remain. *Biar mati anak, jangan mati adat* may be too extreme a view to take: let both child and custom live.

Chapter 7

WRITTEN LAW

NEED FOR RECORDS

Until the concept of the state emerges, with its definite boundaries and coercive apparatus, allegiance is a personal matter, a simple bond between one man and another. The state is a modern invention, a kind of political myth by now supposed—especially by those of a socialist persuasion—to be endowed with reality. Such is the magic of words. The theory of incorporation, another myth involving the invention of a fictitious person endowed with such attributes as expediency and convenience dictate, emerged only a little later. Not only human beings can now be possessed of a personality; a state can in law have a personality, and even a company or corporation created by the law of the state, a ghost created by a ghost, emerges as if clothed with all that is corporeal. Truly, the legal draftsman is a magician!

The concept of the state emerges at a late stage in political development: we can consider how recent a history has the modern passport. Before the state acquired its unreal existence, men were bound by individual allegiances; a network of personal loyalties sustained the Malay ruler. Virginia Matheson notes[1] that "the position of the Bugis ... in Riau was legally assured by a *sumpah-setia*, an oath of mutual loyalty and friendship which was sworn between the Sultan and the *Yang di-Pertuan Muda* and was binding on all Malays and Bugis." In the *Tuhfat Al-Nafis*, a Malay history compiled in the mid-1860s and recording the history of Johor and other areas from the early 18th century, sovereignty is enforced by the swearing of oaths and by dances of loyalty. The oath is vital to sovereignty, and survives as a remarkable feature of

[1] "Concepts of State in the *Tuhfat Al-Nafis*," in Reid and Castles (eds.), *Pre-Colonial State Systems in Southeast Asia* (1979), 13.

the Federal Constitution, whose schedules are littered with forms of oath prescribed for the king, prime minister and ministers, judges, members of Parliament and citizens. The personal allegiance exacted by an oath is now of paramount importance in the perpetuation of power.

From time to time debate occurs on the nature of a Ruler's authority in past days. There are those who affirm that the Ruler of a State enjoyed supreme authority, others, that he enjoyed little real power. As far as the ordinary peasant, fisherman or hunter was concerned, it seems likely that the Ruler was a remote figure; for him, the State was dominated by a ruling class, a group consisting of the ruler and his followers, chiefs who in their own areas exercised virtually supreme authority, but who themselves derived that authority from the Ruler. For with the emergence of a State identity, the ruling class needed the Ruler: as Gullick says of late 19th-century Malaya,[2] "the Sultanate and the ancient institutional forms of the State Government played their part in systems of symbolism and status. They were needed ... as a ... justification for the political system which gave power to others".

On the other hand, Milner[3] sees the Ruler at this time as "not only the 'key institution' but the only institution, and the role he plays in the lives of his subjects is as much moral and religious as political". It may be that, paradoxically, both views are correct: the argument is as sterile as that of whether King Harold had a palisade at the battle of Hastings. All in all, it seems likely that Swettenham's view of human nature as comprising political selfishness offers an accurate perception of the position; the Ruler and his supporters constituted a ruling class, sharing power amongst themselves according to their own characters and circumstances; for the *rakyat*, exactly who exploited them was a matter of indifference: their function was to survive, to take pleasure in the spectacle of luxury offered by their superiors, and to pay for their entertainment.

Still, however authority may emerge in any society, once the concept of the state, a political entity with a central authority, has developed, the commands of that authority will to an ever-increasing extent depend upon the degree of publicity that can be given to its edicts

2 *Indigenous Political Systems of Western Malaya* (1958), 3.

3 *Kerajaan: Malay Political Culture on the Eve of Colonial Rule* (1982), 113.

... from the stone tablet to the printing press and the television station. In particular, laws need to be recorded, copies distributed, so that from the capital to the furthermost province may run the writ of authority. For this purpose, the written word, unchangeable, more permanent than the fleeting words of a town crier or television announcer, is essential.

NEED FOR MODELS

It is not, therefore, uncommon for those writing of law to review the character of law itself as either written or unwritten, as *lex scripta* or *lex non scripta*, to use the terms of ancient, threadbare Latin. This is but one of the many divisions and classifications of law adopted by writers on jurisprudence, whose leisure hours have produced classifications based upon concepts (crime, torts, etc.), functions (partnership, arbitration, etc.), situation (road traffic, personal injuries, marriage, etc.) or consequences (damages, punishment, compensation, divorce, etc.). One useful purpose of classification lies in the convenience one method or another will provide in relation to an edition of statutes, of written laws. For example, in the Revised Edition of the Laws of Sarawak of 1958 all legislation on, for example, "Public Order and Security" is grouped under one heading, "Civil Law and Procedure" under another, and so on. Similarly, the Revised Edition of the Statutes of Singapore of 1970 in its first volume covers "Legislation", "Administration of Justice", "Civil Procedure", "Civil Law" and "Status, so offering in one volume a convenient collection of written law on allied subjects. Contrast this technique with, say, *Halsbury's Laws of England* (fourth edition) where in, for example, volume 34 will be found a summary of law on subjects ranging from "Negligence" to "Parliament": a strictly alphabetical sequence being adopted, which results in several unrelated subjects being collected in one volume—a practice which, when understood, in fact causes little confusion. After all, any sort of order is to be preferred to none.

Even the humble citizen, let alone the youngest of law students, understands the essential nature of written law: and indeed, for most people *written law* is what they understand by the term *law* generally; in other words, they think of law as consisting of statute law and subsidiary legislation made under statutes, as opposed to *adat*, customary

law and the law made by judges. And although customs and judicial decisions may be, and indeed often are set down in writing, they are not popularly regarded as *written law*.

In Malaysia, the researcher can trace a trickle of written law in the form of early digests, summaries of law such as the *Undang-Undang Melaka* of the 15th century, a Pahang *Kanun* or digest of the 16th century, a Kedah digest of the 17th century, Minangkabau digests and the *Ninety-Nine Laws of Perak* in the 18th century, and the *Undang-Undang Kerajaan* of the 19th century. The provenance of these early codes is inevitably mixed, and Hindu, Arab, Buddhist and Islamic influences are to be observed, with sumptuary rules much in evidence: fine clothes for fine people! And there is no reason to suppose that the technique of the legislative draftsman of five or six hundred years ago differed markedly from that of his contemporary who, faced with the task of drafting a law on any particular subject, will first turn to such models or precedents as are available. This, after all, is the manner in which the winds of necessity, passing over national and, often, cultural boundaries, cross-fertilise the flowers of the written law. Let the reader excuse this metaphor and appreciate the all-too-catholic nature of much contemporary legislation; it is not laziness but prudence which persuades the draftsman to seek an existing model for a law, just as a wise purchaser buys, say, an established, well-known product, rather than gambles on novelty.

Exactly what authority the early Malaysian digests had is obscure but their existence is certain, their influence perceptible. As noted, in the 15th century the trickle began, then seems almost to have dried up, for evidence of such activity in the 16th to 19th centuries is all too meagre. Nevertheless, it seems likely that small bodies of laws existed in the more developed areas of the peninsula; and what seems clear is that by the time the British appeared in the area in 1786 basic legal systems existed and offered a framework of order for largely static, isolated communities. There was, as it were, a pause, a silence before the storm.

When the British appeared on the Malaysian scene, they had already acquired much experience in India. Indeed, most of the officers of the East India Company who first served in the Malay peninsula had knowledge of Indian affairs: and they knew the importance of law,

even if they did not always understand the refinements of the concept of sovereignty familiar to the English lawyer. The reader may remember the events in Penang when the prickly John Dickens was judge and magistrate, between 1801 and 1808; and his letters as set out in the first volume of *Kyshe's Reports* illustrate the need for clarity in the concept of sovereignty—and it is not an idle concept. Again, the reader may recall the dislike of the English lawyers for Raffles' early regulations. Law must be promulgated by a supreme authority, if it is to have the authority of law: this was the cardinal principle of the English lawyers of the day, and it runs through the whole of Malaysian constitutional history. In this context it is necessary to observe that the Malay States were never Crown Colonies, as were Penang, Singapore and Malacca. For the British the Sultan was the sovereign: and the form was all-important, just as it is today, when it might be said that the elected politicians have replaced the British.

TERMINOLOGY

Written law, then, came but slowly to the peninsula. The climate is not kind to the written word, and in any case, how is the substance of the written word to be communicated to the people? In the old days in England a town crier would go through the streets of a town, ringing his bell and bringing important matters to the notice of the public; in the Isle of Man, the laws of the past year would publicly be read out; but until printing became common, it was not easy to bring to the general notice the purport of any law.

The present body of Malaysian written law is vast, complex, and ever-increasing. It reflects the constitutional history of the territory, but is perhaps best approached by the law student by way of terminology: adopting the terms used for principal legislation, or *statute law*, without regard to the mass of rules, regulations, orders, by-laws and the like that are made under the authority of laws made by the appropriate legislature, and known as *subsidiary legislation*. In simple sterms, then, there are the following:

Acts of Parliament: laws made by the federal legislature from 11 September 1959 to date;

Ordinances:[4] laws made by the federal legislature between 1 February 1948 and 10 September 1959; Ordinances of the legislature of the Malayan Union from 1 April 1946 to 31 January 1948; Ordinances made by the legislature of Sarawak, to date; Ordinances of the former Crown Colony of the Straits Settlements, insofar as they are still in force in Malacca and Penang; and Ordinances of the State of Sabah (when it was the Crown Colony of North Borneo) before 16 September 1963;

Enactments: laws of the Federated Malay States legislature prior to 1946; Enactments of the legislature of each of the Malay States; Enactments of the legislatures of Malacca and Penang since 1 April 1946; and Enactments of Sabah since 16 September 1963;

These Acts, Ordinances and Enactments are themselves subject to principles of interpretation contained in particular laws which seek to define terms and phrases in common use (so that they need not be repeated in every law that is enacted) and to lay down certain basic principles some of which are of paramount importance, not only to the legal draftsman and the lawmaker, but to lawyers generally. Before commenting on these principles, it is desirable to refer to two interpretation statutes formerly in force in Malaysia, since without a knowledge of these it is impossible to construe any earlier written law with any degree of confidence. These statutes are as follows:

Interpretation Act 1967 (Act 57). This came into force on 18 May 1967 and applied to all Acts of Parliament enacted after that date. It also applied to enactments of Kelantan, Selangor and Terengganu, which adopted the Act for the interpretation of State laws. The Act also applied to any revised version of any federal law, whether that law was made before or after 18 May 1967; such a law is prepared and published by the Commissioner of Law Revision (assisted by a Law Revision Committee) under the Revision of Laws Act 1968 (Act 1).

[4] The word "Ordinance" (not to be confused with "Ordnance") refers here to "an authoritative direction, decree or command" (*Shorter Oxford Dictionary*).

Interpretation and General Clauses Ordinance 1948 (Ord. 7) in force on 31 January 1948. This Ordinance applied to all federal laws (Ordinances and Acts of Parliament up to 18 May 1967) other than those revised under Revision of Laws Act 1968. It also applied to all State enactments in West Malaysia, other than Kelantan, Selangor and Terengganu.

The existing law is now regulated by the Interpretation Acts 1948 and 1967 (Act 388) as consolidated and revised on September 30, 1989. Furthermore, all nine states of West Malaysia have adopted Part I of the Act, pursuant to Article 76(3) of the Federal Constitution. Act 388 does not extend to East Malaysia, where the Interpretation and General Clauses Enactment 1963 of Sabah (34 of 1963) and the Interpretation Ordinance of Sarawak (Cap. 1) apply.

In tracing the development of the meaning of a term in a particular law, the diligent researcher will discover that the Federated Malay States possessed their own Interpretation and General Clauses Enactment; and Johor, Kedah, Terengganu and Kelantan had their own State laws on the subject, as did the old Straits Settlements. There are, therefore, many mysteries to be unravelled, before the reader can effectively understand the meaning of any particular Malaysian law. As the learned editors of *The Annotated Statutes of Malaysia* affirm, "there is no doubt that the interpretation jurisprudence of Malaysia is more complex, if not more complicated, than those of other common law jurisdictions. The day may come when there will be one concise enactment." Fortunately, most of the laws relating to interpretation follow a common pattern.

As a general rule (based on the principles set out in the latest law on the subject, Act 388) words used in any subsidiary legislation have the same meanings as in the law under which that legislation is made. This is no doubt a self-evident proposition, as indeed are many of the principles set out in any law relating to the interpretation of statutes. Such a law as the Interpretation Act contains a number of definitions of terms commonly used in legislation (e.g. *advocate, contravene, Malay, year, land, written law*) so that these require no further definition. A reference to the relevant Act, Ordinance or Enactment on interpretation will often solve a critical question of the construction or mean-

ing to be given to a particular word or phrase, and the wise lawyer will usually have a copy to hand, next to a good dictionary. However, such an Act, etc., goes much further than mere definition, by laying down basic general principles of law and evidence, some of them of considerable significance. Without going into the complexities of such a law—which tends to become more refined and complex with the passage of time—the following are amongst the more significant principles (bearing in mind that all are of importance):

(a) A law comes into operation on such date as it may prescribe, but where no date is appointed, on the date immediately following the date of its publication in the government *Gazette*.
(b) Subsidiary legislation can be made with retroactive effect (but in no case can it be deemed to have come into force earlier than the date of commencement of the law under which it is made); however, by reason of Article 7 of the Federal Constitution, no retrospective penalties are possible.
(c) Repeal of a written law shall not revive any earlier law, or affect anything lawfully done under such written law.
(d) Where a written law confers a power on a person to do anything, the power is presumed to include any power reasonably necessary for the purpose of doing that thing.
(e) A power to control or regulate any matter includes a power to license or prohibit.
(f) The powers of committees and other bodies established by law are not affected by any vacancy in their membership.
(g) A power to appoint includes a power to remove.
(h) The imposition of a penalty under any written law is not a bar to a civil action for damages in respect of the same matter.

The principles of interpretation—some of which are set out in interpretation laws, evidence acts and the like, and some of which are established by case law—are flexible, and are not as a basic rule to be applied, if their application is inconsistent with the obvious and reasonable meaning of the words used in a law. In a sense, they form a sort of safety net, to preserve meanings that might otherwise be lost by omission.

Much confusion has arisen on the subject of the basic principles of interpretation of statutes, and various rules have been developed. The law student soon discovers the "literal" rule, the "golden" rule and all the other refinements by which the judicial mind seeks to give effect to prejudice or policy, in the manner in which they interpret the written words of those who make the laws. Much debate has occurred on the matter of whether reference can properly be made to *Hansard*, that is to say, to the official reports of proceedings in Parliament, as offering assistance in determining the meaning ("construing") an Act of Parliament, one school of thought holding to the view that such a reference is desirable, another, that it is undesirable. Malaysia—unlike England—has a comprehensive Evidence Act based on the principle of relevancy, and providing rules for the proof of public documents. In these circumstances, it would be imprudent to follow the negative English practice on the matter, following what Lord Denning called "the old grammatical approach", and desirable to follow "the modern purposive approach". An Act of Parliament always has a purpose: seek to establish it, wherever that investigation may lead; and if this policy leads to what is called "judicial activism", with judges adopting a dynamic approach to the interpretation of statutes, so much the better.

When the Revision of Laws Act 1968[5] came into force on January 1, 1969, Acts of Parliament were numbered in sequence, without regard to their year of enactment, and classified under two headings:

(a) Acts considered as principal Acts, of a permanent nature; and
(b) amending Acts, Supply Acts (that is, laws voting money for particular purposes) and Acts of temporary duration.

In the case of amending Acts, etc., these carry the prefix "A" before their number, and are published as a series (the "A" series) separate from the main series.

As for subsidiary legislation, in the case of all rules, orders, regulations and other material having legislative effect (e.g. the *ex officio* appointment of, say, the District Officer of a particular district as a Marriage Registrar for that district would have legislative effect, since it would apply to all District Officers there, and not simply to one indi-

[5] Act 1.

vidual) these are published in a Legislative Supplement A to the government *Gazette*, other material in a Legislative Supplement B; and *Bills* (the fathers of Acts) are published in a separate Bills supplement.

It will be seen, then, that the Revision of Laws Act 1968 was a brave attempt to deal with a situation almost out of control. At one time, a decade earlier, there had been hope that the flow of statute law could be strictly channelled and disciplined: but an increasing flood of legislation swept away all hope of a revised edition of all the laws of Malaysia, at least for some time. While, therefore, the purpose of the Revision of Laws Act was "to authorise the preparation of a revised edition of the laws of Malaysia," the immediate object of work under the Act was, and is, the revision of all unrepealed pre-1969 statutes, in itself a major task.

More and more aspects of human life are embraced by positive law, law laid down by human authority, usually in the form of an elected legislature: for such statute law is now seen as a basic means of advancing the interests of society. This is an illusion cherished by many a politician who, elected on the basis of the promises he has made to the electorate, implements them by legislation, and supposes that there's an end of the matter. Whereas in fact, the matter has only just begun. Anyone can draft a law, and any group of people can agree upon the text of a law; but it is a wise man indeed who can implement it with success.

The Malaysian statute book is already choked with laws so ineffectual that their continued existence as law is not only a reproach to the legal system, but an impediment to the effectiveness of all law. Just as a wise man will, after every decade or so, clear from the shelves of his library all those books he no longer requires, so should a legislature from time to time make a review of all statute law in force, and repeal all those laws whose effectiveness is spent. For, just as pruning will improve a fruit tree and confer a better crop of fruit, so will a purge of the statute book make for a greater virtue in all written law. The discovery of written law was a great landmark in the history of civilisation, but that law should not be abused; it has its merits, but written laws are after all but words on paper: they are not, and must never be mistaken for, deeds.

Chapter 8

ORIGINS

LEGACIES

In this chapter an effort will be made to survey, albeit very superficially, the origins of Malaysian law. These origins are as varied as the Malaysian people, and reflect different cultures and influences. Seen in the perspective of history, the colonial period in which Malaysia was subject to the influence of the English and their common law was but a moment in time. True it is that many beneficent influences remain: but not all the influences that remain of that period are beneficent, and it is time for a critical examination of much that has hitherto been accepted as beyond reproach. For example, the cross-examination of a witness is praised by those who favour the common law system of trial, as being the best way to establish the truth of a matter. Yet Fielding-Hall, an Englishman with considerable experience of the courts in Burma, could write in 1913[1] that "there is no such curse now to justice as cross-examination by a clever pleader or barrister. It is a sort of forensic show-off by the advocate at the cost of the witness, and frequently at the cost of justice". He considered that a magistrate could, "by far fewer and simpler questions expose false evidence better than an advocate does, because the magistrate is intent only on his business—to find the truth; the advocate is advertising himself, and trying to destroy truth as well as falsehood ... witnesses will lie to the opposite side, but not to an understanding Court."

The example is one of many criticisms that can be made of a system that is a legacy of the English: but that legacy is only one of many of the extraordinary legacies of men and women of the past. All have lived and died, and left but a memory, and their own particular ideas.

---

1 *The Passing of Empire*, 269.

It is with these ideas, in relation to the concept of law, that we are here concerned.

INDIA

Almost 5,000 years ago a civilisation emerged in the Indus Valley. The author of the *Romance of the Three Kingdoms* was right: "empires wax and wane." That civilisation fell under the onslaught of war-like invaders, and a new civilisation emerged, giving birth to the Hindu philosophy embodied in the great texts of the *Vedas* and the *Mahabharatha*, a great poem on a war-like theme containing that great work of art, the *Bhagavad Gita*. Written in Sanskrit, the classical language of the Hindus, the Vedic religion saw God in the forces of creation, life, and destruction: Brahma, Vishnu and Siva; and out of the religious beliefs of the people emerged the rules of Hindu law, a system still regulating the lives of several hundred million people, as their personal law.[2]

That law is based upon the principle of *dhamma*: a principle also familiar to the followers of the enlightened Gautama, the Buddha. *Dhamma* is, like *adat* in Malay or *li* in Chinese culture, a somewhat nebulous, but nevertheless well-understood, concept of proper behaviour: and it provides a necessary foundation for a legal system. The commentaries on Hindu law became known as the *dhamma sastras*, and as the system developed several schools of law took shape, as occurred in the case of Judaism and Islam. The *Dayabhaga* school developed in Bengal, and the *Mitakshara* school in the rest of India, the latter school itself breaking down into local variants in such places as Madras, Bombay and Benares.[3]

There is evidence of Indian influences in Malaysia for a millennium and more. While there is little material evidence of such influ-

[2] Hindu law has been the subject of codification, however, e.g. the Indian Hindu Marriage Act 1955 and other legislation on Hindu succession, adoption, maintenance, minority and guardianship.

[3] In this context, it is worth noting that since Hindu law is personal law, an Indian from, for example, Madras, emigrating to Penang, will take his personal law with him, unless it is established that in his new place of domicile he has acquired another personal law.

ence, there is much that is, though intangible, enduring. Winstedt writes:[4]

> On the spiritual side Sanscrit words for *religion*, *fasting*, *teacher*, *heaven* and *hell* had become too familiar to be abandoned. A lot of Hindu ritual also remained, though hard to extract from Muslim practices brought by Indian missionaries whose ancestors had been Hindus. There are, for example, twelve purificatory rites to cleanse a Brahmin from original sin. Between these ... and the main incidents of a Malay child's life there is such close coincidence that, however they came to the Malay, those incidents are clearly survivals of Hinduism, corroborated by the many Sanscrit words employed in the Malay ceremonies.

Hindu influences live on in much of the ritual attending the installation of a Ruler. "As in the Vedic ritual," writes Winstedt, "... the initial steps at a Malay enthronement are to wash away the old man by lustration and to anoint the new ..." Hindu notions of astrology affected politics too; "in old Malacca, modern Perak, Kedah, Pahang and Negri Sembilan," says the same writer,[5] "there was the same preoccupation with the astrological numbers 4, 8, 16 and 32 that has been traced in Burma, Siam and Cambodia. Generally in all these countries there were four chief ministers ..." In the *Undang-Undang Melaka* we find that the Ruler had to appoint four high dignitaries to help him to administer justice, the Chief Minister (*Bendahara*), the police chief (*Temenggung*), the treasurer (*Penghulu Bendahari*) and the port officer (*Syahbandar*). The titles of *Bendahara* and *Temenggung* linger on, together with that of *Laksamana*, in Kedah.

There is, too, the significant matter of that immobility and impassivity which the Ruler must preserve during the rites of enthronement, and which is also required of a groom in a marriage ceremony: this stillness, says Winstedt,[6] "being evidence in Hindu ritual of incipient godhead." Indeed, the person of the Ruler has a special status, for "the head and cornerstone of the Malay State (*negeri* = *negara*, Sanskrit, it-

[4] *The Malays: A Cultural History*, 27-8.

[5] Ibid., 68.

[6] Ibid., 66.

self a Hindu concept) is the Ruler ... and research has confirmed the truth of folklore in the *Malay Annals* that the origin of this Malay royalty was due to the marriage of Indian immigrants with the daughters of local chiefs, their children inheriting Hindu ideas of territory and divinity grafted on to primitive Malay conceptions of the tribe and of the magical power of chiefs and medicine men." Little wonder that the Constitution of Perak provides[7] that "sanctity shall attach to the person of the Sovereign and such of His residences as shall be prescribed by the Dewan Negara." Aspects of Hindu law and custom persist in the realm of Malaysian constitutional law.

When the British arrived in the Malay peninsula they found a small but increasing Indian community, and as they were equipped with a knowledge of Hindu law gained in India, they had texts and precedents to guide them. In India Hindu law had, however, been much modified by legislation in the case not only of marriage and the age of majority and the removal of disabilities of caste, but also in relation to contract and the disposal of property, evidence and the criminal law. Yet in spite of much legislation, Hindu law survived, with the tenacity of custom and tradition, as a personal law.

Given a knowledge of Hindu law derived from experience in India, the English judges had little difficulty in accepting and applying its principles, accessible as these were in English. Even so, the judges, schooled in English jurisprudence, were prepared to accept local variations of Hindu law, admitting for that purpose the evidence of, for example, the head of a local Tamil community, and an apparently authoritative text, Thurston's *Castes and Tribes of Southern India*.[8] Hindu law at the level of personal law—all that vague area of personal, customary practice untouched by statute law—remains a living force in Malaysia. Any person who follows the Hindu religion will be regarded as a Hindu, and subject to Hindu law, as modified by any local law or custom. As one writer observes,[9] "although authoritative Indian material on Hindu law has been judicially examined [by the Ma-

[7] Laws of the Constitution of Perak, Second Part, Article XII.

[8] See *Nagammal v Suppiah* [1940] MLJ 229.

[9] Imba Malar Yogalingam, "Some Aspects of Hindu Law and Customs in Malaysia," University of Malaya, LLB Academic Exercise, 1980, 24.

laysian courts], much greater weight has been given to local custom and usage as representing Hindu Law in Malaysia."

One of the basic features of Hindu law has been the caste system which, although now castigated for its injustice and rigidity, had in its day its own especial logic, based on the four main castes of priest or Brahmin, warrior, merchant and labourer. The system survives in Malaysia in a much modified form, and "in matters relating to marriage, the caste system usually plays a vital role. On the other hand, there is a virtual absence of the caste issue in matters relating to inheritance."[10] The same writer notes that the Malaysian courts "have never had to consider substantive issues of Hindu law." The reason for this lies in the nature of the subject itself; Indian authority dictates the major principles of Hindu law, Malaysian courts its local variations.

That this has been so has been due to the relaxed policy of the judiciary in considering issues of conflict. A deviation from the strict principles of Hindu law by reason of local practice or policy has been accepted; so that while a Hindu marriage would be regarded as indissoluble according to the canons of Hindu law, divorce has been accepted. Inevitably, there has over the years been a change in Hindu law in India itself, the Indian Hindu Marriage Act of 1955 recognising what practice had already established.

In addition to the caste system, the other unique feature of Hindu law lay in the institution of the joint family: the status of the family regulating the social order of society. The family was seen as the basic unit of the social system: parents, children, grandchildren and collaterals on the male side had a common dwelling and enjoyed the estate in common. At the head of the unit was the patriarch, a reflection at the family level of the ruler at the political level; and he represented the family in law. The Hindu joint family has long been recognised in Malaysia, and indeed is accorded the doubtful distinction of mention in the Income Tax Act 1967.[11] Out of the problems of the joint family grew the rules of the *Mitakshara* and *Dayabhaga* systems of Hindu law:

[10] Ibid., 20.

[11] Act 53.

and "in Malaysia the courts apply the principles inherent in the *Mitakshara* school in matters relating to joint family property."[12]

It would seem, then, that Hindu law in Malaysia has been an extension and adaptation of Hindu law in India, the local courts adopting Indian precedent, being influenced by such Indian statute law as the Hindu Marriage Act 1955, and turning for authority to the texts of such writers as Mayne and Mulla on Hindu law and custom, as well as to local practice. An anguished Malayan judge has in fact accepted a *hundi* as a negotiable instrument, within the law relating to bills of exchange,[13] and indeed, the practice of Hindu moneylenders (*chettiars*) has frequently been recognised by the courts. Winstedt records of the *Pahang Digest of 1596*,[14] that "the rule that interest may not exceed 100 per cent follows Hindu law". He also cites another instance in which Malay custom follows Hindu law, observing that[15]

> A man will charge his land to a creditor allowing him to enjoy the profits or part of the profits of the crop, such profits not to be placed against the money owed but to be in lieu of interest, until the debt is repaid in full. Here is a clear case of evading the Muslim ban against interest.

The influence of Hindu law has been, then, out of proportion to the Hindu element of the population, folk who are, for the most part, poor people. Litigation is in general a luxury of the wealthy, and the average Hindu in Malaysia is at the bottom of the pyramid of society. In this situation, he may take comfort from the fact that some of the principles and practices of his own culture have been thought worthy of adoption by others, and have gone into the shaping of the Malaysian system of law.

---

12 Imba Malar Yogalingam, op. cit., 17.

13 *Murugappa Chettiar v Krishnappa Chettiar and Ors* [1940] MLJ 200.

14 Op. cit., 113.

15 Ibid.

ADAT

To turn to the origins of the Malay[16] people is to enter the heart of a mystery. There seems to be a general agreement that the ancestors of the modern Malay are of Mongoloid stock, and that they came down into Malaysia from the north a few hundred years before the Christian era began. Originating in southern China, they came down the slender trade routes dictated by geography and climate, compelled perhaps by some necessity of which our histories are ignorant. These ancient immigrants seem to have forced the aborigines, earlier, original inhabitants, into places where they were free from attack: a pattern

---

[16] The nature of *adat* is generally related to the Malay people. Like the word *adat* itself, the word "Malay" has a curious penumbra of meaning, observed at various times by philologists, etymologists, anthropologists, lawyers and others. Indeed, it is odd, that learned discussions sometimes take place on such subjects as the common law of *Malaysia*, without any consideration of what that term might mean in anything other than political terms: but such is the nature of academic research.

In 1913 the Malay Reservations Enactment (15 of 1913; still in force in the former Federated Malay States; repeated in other States of West Malaysia; and extended to the federal capital itself) defined "Malay" as "a person belonging to any Malayan race who habitually speaks the Malay language or any Malayan language and professes the Moslem religion." Twenty-three years later, the Johor legislature promulgated the Malay Reservations Enactment (1 of 1936) and offered a definition with a subtle difference, defining a "Malay" as "a person belonging to the Malay or any Malaysian race who habitually speaks the Malay language or any Malaysian language and professes the Muslim religion."

What is significant here is that conformity to *adat* is not one of the distinguishing characteristics of a Malay, race, language and religion being the tests.

The term *adat* is also applied to the custom of non-Malay, indigenous peoples. In East Malaysia there exists a great variety of customary law, richer indeed than that of West Malaysia. In this study the emphasis is upon the jurisprudence of West Malaysia; but the reader should constantly bear in mind that across the South China Sea, between 500 and 1,000 miles away from the federal capital, are other legal systems having obvious similarities with those of West Malaysia, but in other respects possessing a unique character all their own. To some extent, aspects of Borneo *adat* are touched on here, but the subject is more complex than any study has so far revealed.

found in many other places. Succeeding waves of immigrants produced a more stable culture, centred on coastal villages of the kind still to be seen in Borneo. Out of these peoples, fortified by kindred stock from Sumatra, the Celebes and elsewhere: peoples breaking up into various groups and communities, working out their own patterns of behaviour, dialects and laws, gradually emerged the *bumiputeras* of Southeast Asia.

The movements of such societies were dictated by the unique character of Southeast Asia, an area consisting of a lengthy peninsula, half a dozen great islands and several thousand smaller islands: a vast treasure trove to a large degree still, fortunately, unexploited by man. Lacking mechanical power, the movements of the early settlers were by sea and river, their settlements most securely sited at the mouth of a river whose traffic could be controlled, and whose waters gave access to an unknown interior. Splitting up into small communities scattered all over the archipelago, they developed their own customs and languages: so that we, now able to travel easily, can be astonished at their similarities, and enchanted by their differences. The Malays, Achehnese, Javanese, Bugis, Sundarese, Madurese and Balinese, to name but a few, are remarkable evidence of the wandering nature of mankind and of man's ability to survive and prosper, even in a hostile environment. These migrations have continued until the present day, and have produced varied, identifiable cultures of their own; but with the passage of time older and more powerful civilisations from the west and the north were to make their influences felt over the whole area, and to change the character of the residents who, close to nature, were likely to be animists, as such folk tend to be.

Exactly what kind of legal system these early communities possessed is obscure, as is the extent to which they adopted the concepts of other cultures. It seems reasonable to suppose that some sort of patriarchal system emerged. Winstedt observes[1] that "the two basic principles of the [Malay patriarchal] system [were] the consultation of chiefs by the Ruler, and the administration of justice through territorial magnates." As the *Sejarah Melayu* says, "rulers are like fire and their ministers are like firewood, and fire needs wood to produce a flame". Winstedt concludes that these two principles "made easy the

[1] Op. cit., 80.

introduction of State Councils and the administration of the parish [*mukim*] by a Malay Penghulu ...." Pursuing the theme, he notes that "the matriarchal system of Negri Sembilan grew up from the family, with royalty as little more than an ornamental accretion." Patriarchy grows downwards, it seems.

Be that as it may, as we have noted Hindu influences crept into the area of government, mixed with those developing out of customary law. Written digests of law appear: but the written word of yesterday has a different significance from the written word of, say, the late 19th century; and since it is difficult even today to assess the effectiveness of a written law, it is vain to seek to assess the efficacy of documents of uncertain provenance and application. Out of the mists of the centuries a picture emerges of sultans, rajas and ruling chiefs, and we can understand that legal systems developed with these figures at the top, acting through *penghulus* and headmen; but at the lower levels of society one can only speculate upon the taxes and levies imposed, the judicial system employed, and the penalties of law. Digests of codes offer clues of a sort, but these are sources of speculation, and little more.

That Malay legal systems, largely customary but with some parts reduced to writing, did exist is clear: but with the advent of Islam there arose conflict between Malay custom and Islamic law—a conflict not yet dead. Writing in 1839, Newbold, a thorough and impartial observer, noted[18] that

> in most of the independent principalities, fierce controversies, ending generally in bloodshed, spring up continually between the advocates for the ancient customs, *Adat Lama d'hulu* on the one hand, and the intolerant sticklers for the letter of the Koran, on the other ...

Newbold quotes with approval Raffles' note to Minto, "Nothing has contended more decidely to the deterioration of the Malay Character, than the want of a well-defined and generally acknowledged system of law." Raffles had suggested that every Malay chief might be requested to furnish a copy of the code current in his own state, and send at some

[18] *British Settlements in the Straits of Malacca* (1839, repr. 1971) ii, 229-230.

fixed time one or two of the learned men of the country, best versed in the laws to a congress, which might be appointed for the purpose of revising the general system of Malay laws.

Some codes of law were in being, then, their principles being presumably in conformity with custom; men learned in the law existed, and protagonists of Islamic law were seeking to change the system. A later observer, the indefatigable Isabella Bird, writing of the Sungei Ujong of 1879, made some observations that have, in the light of available evidence, a ring of truth for most of the Malay States at that time. She wrote:[17]

> Even Mohammedan law, by which the Malays profess to be ruled [according to the writer, "Chinamen are dealt with in equity"] is modified by Malay custom, which asserts itself specially in connection with marriage, its frequent attendant repudiation, and inheritance.

Of Malay custom itself, Isabella Bird stated that

> [*adat Melayu*] seems to have been originally a just and equitable code ... but it has undergone such clippings and emendations by the successive rajahs or sultans ... that the 'custom' now in force bears a very faint resemblance to the original *adat*. It is said, indeed, that each alteration has been for the worse, and that now any chief who introduces anything of his own will, justifies it as *adat Melayu*. Mr Swettenham, the assistant colonial secretary, says that there is no longer any *adat Melayu*, but that everything is done by *adat suka hate*, i.e. the custom by which a man can best suit his own inclination.

The evolution of Malay custom depended, then, on the degree of recognition accorded by the ruler or other authority in whose name the law was administered. *Adat* aimed at harmony; indeed, a proverb asserts, truly enough, that *adat sentosa di dalam negeri*, with *adat* there is peace in the land. The ordinary people are sometimes wiser than their rulers.

[17] *The Golden Chersonese* (repr. 1967), 237-8.

Yet the issue of *adat* is made the more complex by the influence of Islam. Writing in 1882 of the institution of slavery, W.E. Maxwell said that[20]

> in this particular, as in many others, there is a never-ending struggle between the *hukum 'adat*, the customary law of the Malays, and the *hukum shar'a* or 'religious law' of the Kuran. Muhammadan priests, who would sometimes seek, if they could, to enforce the latter, are met by the plea that the practice denounced is lawful by Malay custom, and it is thus that debt-bondage, like opium smoking, gambling, etc. is always defended.

Of the institution of debt-bondage itself, a practice anathema to the Muslim but not unknown to the Hindu, Maxwell wrote that it "is a native Malay custom, and is wholly opposed to Muhammadan law, which is most lenient to debtors." It is a pity that J.W.W. Birch, the first British Resident in Perak, did not appreciate the distinction: otherwise the road once named after him in Kuala Lumpur would not now be named after his assassin: Maharajalela. Custom is not lightly to be made the subject of alien interference: as Sirau, writing on Iban *adat*, says,[21] "the primary purpose of *adat* is threefold, *viz* the protection, regulation and preservation of the society." This is an important truth.

The tenacity of Malay custom remains, and its relationship with Islam is still unresolved: but at least, disputes affecting *adat* and Islamic law are now generally referred, under State law, to the same authority. In origin, they should be in harmony, and a customary saying asserts[22]

> *adat bersendi hukum,*
> *hukum bersendi kitabullah.*
> *kuat adat, ta'gaboh hukum,*
> *kuat hukum, ta'gaboh adat.*

---

[20] "The Law relating to Slavery among the Malays," JSBRAS, 247-8.

[21] Op. cit., 43.

[22] "Jelebu Customary Songs and Sayings," collected by A. Caldecott, introduced by R.O. Winstedt, JSBRAS No 78, 3: "Customary law hinges on religious law, religious law on the word of God. If custom is strong, religion is not upset, if religion is strong, custom is not upset."

Winstedt quotes[23] a local wit as noting variations in custom: in Rembau, it is "knotty and twisted as the stem of the *jering*; in Jelebu it goes round like a water-wheel; it is doubtful in Sungei Ujong; it is contradictory in Johol." Even so, there was, affirmed Winstedt, "at bottom ... only one *adat* Mingkabau."

No doubt there was only one true *adat Minangkabau*: but to what extent one can divide Malaysia into *law areas*, those cultural-geographic units favoured by the Dutch scholars of Indonesian *adat* law, is a nice question. The Dutch jurists sought to define, albeit loosely, the boundaries within which culturally homogeneous societies had sufficiently distinctive features of social organisation, with particular reference to law, to justify their unique character and separateness. For Ter Haar[24] the whole of Borneo, except for the Malay area of Sambas and Pontianak, constituted one law area, and the latter areas were included in another law area, taking in peninsular Malaysia: so that according to this classification, Malaysia comprehends only two basic law areas, essentially Malay and Iban in character.

This is a rough but reasonably accurate appraisal of the situation, being concerned with *adat* law as its field of enquiry; but it is to be borne in mind that others beside the Malays and Ibans possess their own version of customary law, recognised by the legal systems of the state. Furthermore, in Borneo the term "*adat*" is used of the customary laws of many people, other than Ibans and Malays; and sometimes, as we have noted earlier,[25] these customary laws have been reduced to writing.

One of the most eloquent versions of local customary law is to be found in the *Digest of Customary Law* from Sungei Ujong. A version of this, romanised in 1904, was translated by Winstedt and de Jong in 1954,[26] and is notable for its mixture of philosophy, tradition, custom and law. "Truth," says the unknown author, "arises out of three things: out of discussion, out of Allah's Book, and out of ancestral love." Then he defines the sources of truth as "the word of Allah; the reasoning

[23] Ibid., 4.

[24] *Adat Law in Indonesia*, trans. Haas and Hordyk, ed. Hoebel and Schiller (1948).

[25] *Supra*, chapter VI.

[26] JMBRAS (1954), 4.

and traditions of Allah's Messenger; the decisions of the divines and religious leaders, Shafi'i, Hanafi, Hanbali, and Maliki; and Allah's Prophet, Adam, on whom be peace". The "religious law" itself consists of "ancient custom", "created custom", "inherited lore", "decisions of common accord", "ancient law that awaits ratification," and "decisions to be reached by later deliberation". "Ancient custom" itself lies in the recognition of ancient wisdom, e.g. "One ascends by stairs, one descends by steps". "Created custom" is derived from "the findings of intelligent chiefs of the village or of all the people of the village, settlement or clan ... It may agree with canon law, or contravene it ..."

The writer of the *Digest* anticipated criticism. "If our enemies say, 'But all these types of decisions are not actually practised among you', then our answer is, 'the saying ... may be applied: Every time it is high tide, the river's bank changes, every time there are new rulers, the custom changes.' " The rules and practices were, then, sometimes a record of what actually happened, sometimes a record of what it was hoped might happen: so that it is difficult to disentangle clear rules of law (in the modern sense) from the fascinating catalogues set out in the *Digest*, mingling as it does exact offences with rules of procedure and evidence, the latter based on "serious clues", evidence of wrongdoing that is "as clear as a night lit up by the moon, with the sparkle of a falling star". What is crystal-clear, is that Islam is now the cement that binds the bricks of Malay *adat*.

In some respects Malay *adat* was more generous than Islamic law. Winstedt states[27] that "in spite of Islam the equitable and practical principles of Malay traditional custom were too ingrained in the Malay mind to be abandoned"; so that a widow might get up to half of her deceased husband's estate, rather than an eighth. While Muslim law, based on the *lex talionis*, would demand an eye for an eye, a tooth for a tooth, Malay customary law, considering, say, a slave as a chattel, would impose customary penalties different from those of Islamic law. However, both systems affected little interest in distinguishing public law from private morality, and treated—as the Arab of the Yemen still treats—murder rather as an offence against the family of the victim, than the State: so permitting a compounding that has (however abhorrent to the Western lawyer) a core of logical justice. The Malay law

[27] Op. cit., 114.

on slavery was, by Islamic standards, too severe, however, and as Winstedt says[28] "must have shocked Muslim missionaries." And, in case the reader supposes that the matter of slavery is here overemphasized, Winstedt tells us[29] that "as late as 1874 none but a Muslim had legal rights or could own land in Perak. One person in every sixteen was debt or slave bondsman."

Even in Sarawak, Malay customary law is, as a local writer tells us,[30] "in fact a mixture of Malay customs and Islamic law", the principles of Islamic law only being adopted "to the extent that such principles were consistent with Malay customary law." This comment, true of Sarawak, is probably true generally of all Malay customary law. Yet, while Islam entailed conflict and tension in its introduction, it seems that the introduction of English law caused less difficulty, possibly because this was effected by outsiders with a certain, necessary degree of sympathy. For example, the adoption of the Indian Penal Code was, as Winstedt tells us,[31] "easy because the Malays instinctively preferred a legal system fixed and humane as their primitive custom had been." That distinction between the civil, criminal and constitutional law which had been worked out in England over several centuries fitted in well with the developing structure of the Malay State.

The instructions of the Secretary of State in London to the Governor of the Straits Settlements, promulgated on June 1, 1876,[32] had stated that "the 'special objects' of the British officers [in the Malay States] should be the maintenance of peace and law, the initiation of a sound system of taxation ..." These objectives inevitably involved the abolition of debt slavery, and the construction of a legal system built upon existing foundations: so that even though the advisory treaties excluded from their ambit "matters relating to Malay custom or Mohammedan religion," there was an increasing tendency for concepts of English law to percolate into the area of Malay customary and Islamic

[28] Op. cit., 109.

[29] *Start from Alif: Count from One* (1969), 75.

[30] Gerawat Sila, "A Legal History of Sarawak," University of Malaya, LLB Academic Exercise, 1980, 16, 11.

[31] Op. cit., 107.

[32] Allen, Stockwell and Wright, *A Collection of Treaties and Other Documents affecting the States of Malaysia* (1981), ii, 20.

law. After all, once a law is promulgated to define the age of criminal responsibility, abolish slavery, define rape, lay down a standard scale of penalties, basic rules of evidence and so on, there is an incursion into the area of custom and Islam: as a result of which, English notions of justice, decency and fair play exert a profound influence.

The result is that Malay custom is today a diminishing force within society. In the area of public law, federal and state constitutions have codified its essentials, in the realm of crime and punishment, the Penal and Criminal Procedure Codes provide a standard practice: so that only in the purely personal realm of marriage, divorce, inheritance and the like is Malay customary law still to be observed. And even here, with the codification of State Islamic law the written law has become dominant.

It is true that *adat perpatch* and *adat Nening*, for example, are sometimes held up—rather as the English lawyers once held up the customs of gavelkind and Borough English—as living examples of customary law: but they are dying. In an eloquent passage in his memoirs,[33] Winstedt describes Negri Sembilan as "that delightful little state of lost causes and incredible beliefs, breathing from clustered hamlets and sequestered rice-fields the last absurdities of the matriarchal system". The system, embodied in the *adat perpatch*, is often contrasted with the *adat temenggong*, as if both had a particular identity of their own: but the latter is a loose term, best avoided. All in all, it is safer to treat *adat* as *adat*, a general force within a community, without reference to local customs, often no more than personal laws affecting a particular group of people rather than the inhabitants of a particular area.

ISLAM

As already indicated, the early legal and political systems of Malaysia were strongly influenced by Hindu and Buddhist thought, the result of a traffic extending over many generations, and still continuing. Around the end of the 7th century, however, Muslim traders appeared on the coasts of Malaysia. Islam was accepted in Sumatra in

[33] *Start from Alif: Count from One*, 142. For some useful observations on Malay law, see M.B. Hooker, "The Oriental Law Text," in M.B. Hooker (ed.), *Malaysian Legal Essays*, 449-456.

1204, and in Malacca about a century later. Something in the philosophy of Islam captured the Malay soul.

Like Hindu law, Jewish law and the canon law of the Christians, the system of Muslim law has its foundation in religious belief: unlike the common law which, while much influenced by Christian doctrine, developed as a secular system free of any religious discipline. Islamic law takes its inspiration from the Koran, that revelation made to Muhammad of the word of God, and recorded by the Prophet's followers after his death: a project which "met at first with serious opposition on the ground that it was *ultra vires* to endeavour to do what the Prophet might have done, but had not."[34] The Koran, the sacred book of all Muslims, is the foundation of Islamic law; divided into 114 chapters or *surahs* (a word of uncertain origin, but used in the Koran itself, and meaning probably "a *layer* or *course* of bricks in a wall, the bricks of which must in certain ways—i.e. at least two dimensions—be symmetrical"[35]) and 6,360 verses (or *ayats*) it offers guidance on all matters of right and wrong.

The corpus of Islamic law is known generally as the *Shara* (the way): and a basic consequence of the origin of such law being in principle divine revelation is, that it cannot be altered. Like truth itself, it is changeless. Also, being of divine origin, it extends to all areas of human life, from the moment of wakefulness to the moment of sleep. Like God, it is omnipresent, covering the whole of human existence.

The Prophet died in the year 632.[36] Following his death, Islam spread westwards across north Africa, as far as Spain, and eastwards to

[34] Margoliouth, *Mohammedanism*, 68.

[35] Ibid., 69.

[36] The Muslim calendar is based upon the Year of the Flight (*hijrah*), which commenced on July 16, 622 A.D. Margoliouth (op. cit., 60) offers a helpful formula: Since the Years of the Flight are of 354 days, they do not coincide with our Solar Years. Rough correspondence can be obtained by the formula:

$$\text{A.H.} - \frac{3\text{A.H.}}{100} + 621 = \text{A.D.}$$

(fractions being neglected). Thus $400 - 12 + 621 = 1009$; A.H. 400 began August 25, 1009 A.D. Similarly $1329 - 39 + 621 = 1911$; A.H. 1329 began January 2, 1911 A.D.

Iran, India and China. In 1947 Pakistan was established as a Muslim state; in the Republic of India, perhaps one person in ten is a Muslim; and in Southeast Asia, the non-Chinese populations of Malaysia and Indonesia are largely Muslim. Overall, in today's world it may well be that one person in six is a Muslim.

In the Arabia of the Prophet's day there was a body of customary law already in existence; some of its rules Muhammad accepted, others his teaching modified—indeed, the rules relating to divorce were altered in favour of a wife. The development of Islam need not be pursued here, save to note that, as in the case of other religions and philosophies, several schools of law developed. One group called the *Shi'a* (meaning 'the party', after Ali, the fourth caliph and Muhammad's son-in-law) evolved in Iran, and the other group (now comprising the great majority of the world's Muslims) who accepted the first three caliphs as the legitimate successors of the Prophet, follow the *Sunni* school. The latter developed variants of the main doctrine, in the form of schools taking their names from the scholars who founded them: the *Hanafi* school; the *Maliki* school; the *Hanbali* school; and the *Shafi'i* school. Of these four schools, that of *Shafi'i* is the most influential, although to some extent all tend to be territorial in their influence. Following *Shi'ite* doctrine are Iran and parts of North Yemen, while, of the *Sunni* schools, Saudi Arabia follows that of *Hanbali*; north and west Africa and upper Egypt, *Maliki*; India, Pakistan, Turkey, Afghanistan, lower Egypt, Lebanon and Iraq, *Hanafi*; and Malaysia and Southeast Asia, *Shafi'i*.

It was the founder of the *Shafi'i* school, Ash-Shafi (d. 820) who analysed the four roots of Islamic law as

(a) the Koran;
(b) the *sunnah*, traditions of the Prophet;
(c) *ijtihad*, a personal effort to decide an issue on the basis of the first two roots, (a) and (b), or *qiyas*, reasoning by analogy (a common habit of lawyers); and
(d) *ijma*, consensus, now perhaps the most far-reaching of the four roots, insofar as law is concerned.

Over the centuries Islam has produced a refined and comprehensive body of jurisprudence, possessed of a purity, and sometimes a rigidity, of logic seldom to be found in other fields of law.[37] For the Muslim its living force is constantly renewed by the "five pillars of faith", that is to say,

(a) the profession of faith, that there is no God but God, and Muhammad is his Prophet;
(b) prayer: the five daily prayers of before sunrise, just after noon, late afternoon, after sunset and before sleep;
(c) *zakat*, purification, an annual tax for Islamic purposes;
(d) fasting during the month of Ramadan; and
(e) the *haj*, the pilgrimage to Mecca, to be made, if possible, once in a lifetime.

Islam has therefore imposed a strict discipline upon the Malay and, at the same time, offered a field for research in the development of an indigenous jurisprudence. In some respects there has been a marriage between Islamic law and the common law, for cases involving Muslim law often went up from the Indian courts to the Privy Council in London: so that the doctrine of precedent shaped the development of Muslim law in India, Pakistan and Malaysia.

To some extent the principles of Muslim law came into Malaysia in the 15th century, with such codes as the *Undang-Undang Melaka*, when some aspects of the Muslim marriage law, the law of sale, and certain aspects of legal procedure were reduced to writing. Such laws as the Malacca code were hybrid texts, varied in origin, often diffuse in purpose and probably uncertain in their operation: but they reflect that desire for certainty which is at the root of most legal systems. As with other early legal systems, the Malacca code fell back upon the working of God through the operation of providence, in order to deter-

[37] It is of interest to note that "it was the earliest theory of Islam that the new religion should interfere as little as possible with pre-existing practice: the practice might and should be followed except where the divine law forbade it or superseded it. And had Islam been confined to Arabia ... this principle might have been maintained: it spread, however ... In place then, of the earlier doctrine there arose the maxim 'Islam cancels all that was before it.'" (Margoliouth, op. cit., 105).

mine those disputes in which, for example, the contradictory oaths of the parties offered no hope of certainty. Liaw Yock Fang summarises the matter:[38]

> If a man accuses another man and the latter denies it and there are no witnesses, the judge should summon both parties before him. They should both be ordered to prove their case by submitting to an ordeal in which they immerse their hands in a cauldron of boiling water or oil to take out a potsherd inscribed with an Arabic verse. He who is scalded, shall be punished by the judge. If the offence is serious the offender may even be put to death.

The efficacy of an Arabic verse, the authentic language of the Koran, is here to be noted.

In Malaysia there has been a parallel development of case law and statute law touching on Muslim affairs. Whilst the advisory treaties required the British to refrain from any intervention in matters of Malay custom and Muslim law, British judges were often called upon to administer Muslim law as a matter of personal law, and did so with a certain boldness and nerve: as witness Innes Ag.C.J.C., who in 1918 briskly invoked the tenets of the *Shafi'i* school to hold invalid a will tying up a testator's property for a period of ten years.[39] That a Muslim can dispose by will of no more than a third of his property without the consent of his heirs has been recognised by the courts,[40] as has the limitation on a bequest to one heir in preference to another, without consent,[41] or that on a non-Muslim next of kin being not entitled to inherit.[42] In this wise, Muslim marriage and divorce were from early days recognised; and indeed, only a few years after British intervention in

---

[38] "The Undang-Undang Melaka," in K.S. Sandhu and P. Wheatley (eds.), *Melaka: The Transformation of a Malay Capital 1400-1980*, 1, 191.

[39] *Saedah bte Abu Bakar and Anor v Haji Abdul Rahman bin Haji Mohamed Yusup and Anor* (1922) 11 FMSLR 352.

[40] *Sheikh Abdul Latiff v Shaik Elias Bux* (1915) 1 FMSLR 204; *Abang Haji Zainu v Abang Haji Abdulrahim* [1951] SCR 3.

[41] *Siti v Mohamed Noor* (1928) 6 FMSLR 135.

[42] *Office Administrator v Mugari Mohidin* [1940] FMSLR 170.

the Malay States a law providing for the voluntary registration of Muslim marriages was introduced[43] in Perak.

This enactment of 1885 marks the beginning of legislative intervention into the field of Islamic law in Malaysia. The process has continued intermittently for, as indeed the Koran itself says,[44] "Does there not pass over man a space of time when his life is a blank?" Under the British regime, intervention in a Malay State could only be at the instance of the Ruler, while in Penang and Malacca a secular government, unfettered by treaty, dictated the pattern of legislation.

In the Federated Malay States, Perak was the pioneer of legislation on Muslim affairs, with a series of Orders in Council beginning in 1880 with a prohibition on *Kathis* receiving *zakat*; in 1881 a ban on unauthorised flags in mosques was imposed, and in 1885 an Order in Council required Muslims to attend mosques on Fridays. None of the other federated States displayed a like zeal, although the law throughout the federation gradually tended to uniformity. Despite the establishment of the Federal Council in 1909, no legislation on Muslim affairs appears at the federal level until after the reconstitution of the Council in 1929, when the legislature somewhat nervously passed the Muhammadan Law and Malay Custom (Determination) Enactment.[45]

Under section 2 of this law, "any Civil Court before which any question of Muhammadan law or Malay custom" arose could refer the question to the State Council of the State in which the suit had been instituted; and the determination of the State Council was binding upon the court and, to the extent to which the court's decision was based upon such determination, not subject to appeal. The Enactment, inevitably assented to by all four Rulers, and consisting of four short sections, deserves more study than it has so far received; but its principles continue in force in many of the State laws dealing with the administration of Muslim law. For example, in the Federal Territory the Council of Religion and Malay Custom can issue a *fatwa*, or ruling,

[43] See Registration of Muhammadan Marriages and Divorces Order in Council 1885 (3 of 1885).

[44] *Surah* 76.

[45] No 4 of 1930.

on "any point of Muslim law or doctrine or Malay customary law."[46] And, while seeking inspiration from "the orthodox tenets of the *Shafe'ite* sect," where these are not considered to be in the public interest the Council may turn to the less orthodox tenets of the sect and, as a last resort, such of the tenets of any of the three remaining sects as may be appropriate. What is significant in this procedure is that in all cases the Council must have "due regard to the *Adat Istiadat Melayu* or Malay customary law". The strict tenets of Islam are thus made capable of modification, to accord with Malay *adat*.

The Islamic Family Law (Federal Territory) Act 1984 is but one of a series of State laws dealing with the Muslim religion. As has been the case since 1880, legislation in one State has inevitably influenced that in other States; and indeed the Federal Territory Act itself has grown out of the Selangor Administration of Muslim Law Enactment 1952, parts of which still govern the basic administrative structure of Muslim affairs in the Federal Territory. The Act seeks to define a Muslim,[47] by providing that the question whether a person is a Muslim for the purpose of the Act:

> shall be decided according to the criterion of general reputation, without making any attempt to question the faith, beliefs, conduct, behaviour, character, acts, or omissions of that person.

The Act lays down a number of general principles of Islamic law. One section provides that a Muslim man cannot marry a non-Muslim, unless she be a *kitabiyah*: a term defined as "a woman whose ancestors were from the *Bani Ya'qub*; a Christian woman whose ancestors were Christians before the prophethood of Prophet Muhammad; or a Jewess whose ancestors were Jews before the prophethood of the Prophet 'Isa'." The definition illustrates the problems inherent in rigid conformity to doctrine as well, perhaps, as the limits of the law of evidence.

In all the State legislation on Muslim affairs there is a curious blend of the exact and the inexact, of law that is enforceable and law

[46] Selangor Administration of Muslim Law Enactment 1952 (3 of 1952), section 41.

[47] Islamic Family Law (Federal Territory) Act 1984 (Act 303), section 5.

that is unenforceable. A husband failing "to give proper justice to his wife according to the *Hukum Syara*" (*Hukum Syara* being "the laws accepted by Syafie, Hanafi, Maliki, Hanbali and Syiah (Zaidiyyah and Jaafariya) sects") commits an offence—as does a wife who "wilfully disobeys any order lawfully given by her husband according to *Hukum Syara*".[48] An offence is committed by anyone who purchases intoxicating liquor in a shop or public place;[49] a male of fifteen years of age or more who fails to attend prayers on Friday at a mosque will also, unless "his absence is excusable under Muslim law"[50] be guilty of an offence.

Whether Malay custom, of paramount importance in the issuing of a *fatwa* yet not apparently permissible as a defence to a charge in the religious courts, will work to soften the impact of Islam in Malaysia is a matter on which it is at present possible only to speculate. Islam has provided a stream of refreshing jurisprudence but, since its arrival, it has often had to give way to local custom and tradition, rooted in the hearts of the people, however deep their devotion to Islam and the teachings of the Prophet. In Thailand, the austere philosophy of Theravada Buddhism has been modified by intermixture with local superstitions and beliefs dating from an even older era, and so rendered the more palatable. With good fortune, the influence of Malay *adat* on Islam may render that latest great religion more acceptable, not only to its adherents, but also to others. For (to quote Winstedt yet again[51]) "though the Malay is an orthodox Sunni of the Shafi'i school, there were Shia' elements in the form of Muhammadanism he learnt originally from India. These elements," adds Winstedt, "were a crude pantheism, a Gnostic concern with mystic names and formulae and the worship of innumerable saints." These traits persist.

In the variety of Islamic jurisprudence lies its salvation. In Malaysia reference can now be made not only to any of the *Shafe'ite* authorities, but even to the *Shi'ite*. The options make for flexibility and advance, and the advance is assisted by a gradual encroachment even upon the text of the Koran itself. The practice of Islam would appear

[48] Ibid., sections 128 and 129.

[49] Selangor Administration of Muslim Law Enactment 1952, section 151.

[50] Ibid., section 150.

[51] *The Malays: A Cultural History* (1961), 37.

to permit a man to take up to four wives, on condition that all are maintained in an equitable manner. State laws are now moving towards requiring official approval for a second or subsequent marriage, and to prohibit such approval unless details of the potential husband's income, obligations and other financial circumstances have been provided. As for divorce, this can as a general rule only be effected formally, through the court of a *Kathi* or *Kathi Besar*, and not as of yore by simple *talaq*. In this fashion the strict letter of Islamic law has been modified to accord with the morality of the times, each State advancing at its own tempo, the modifications reflecting a change in the attitude which seems to have spilled over from the towns and cities of Malaysia. A woman writer, Heather Strange, noted in 1981 that[52]

> the divorce rate has been highest among Malays in rural sections of the nation, and has greatly declined in those areas that are industrialising or modernising generally, a reversal of the U.S. pattern. A related factor to a lowered divorce rate appears to be that child support payments can be deducted directly from wages when men are regularly employed ... The highest divorce rate was found among the very young, the same group who married spouses selected by parents.

These observations are pregnant with meanings of value not only to the sociologist but the lawyer, whether or not they remain valid for the future. The family being the basic unit of society, and society moving (so it seems) towards the nuclear family of the West rather than to the extended family of the East, divorce must be a matter of deep concern to the lawmaker.

While under the Constitution "Islam is the religion of the Federation", Malaysia itself is not an Islamic state. Nevertheless, an increasing deference to Islam, even at the federal level, is illustrated by such measures as the Islamic Banking Act 1983.[53] This law is designed to regulate banking business in accordance with the tenets of Islam, even to the extent of requiring a Malaysian Islamic bank to establish by its articles of association a *Syar'iah* advisory body, in order to ensure that

[52] *Rural Malay Women Women in Tradition and Transition* (1981), 232.

[53] Act 276.

the operations of the bank "do not involve any element which is not approved by the Religion of Islam." And legislation on Islamic insurance is under consideration.

Some tension between the principles of Islam and the ordinary law has always existed, coming into the open on such issues as the legislation relating to the Social and Welfare Services Lottery Board,[54] the Racing (Totalisator) Board[55] and the Racing Club (Public Sweepstakes) Act;[56] and the tension is likely to continue to affect the evolution of Malaysian law for some time to come. Given the elements of corruption within contemporary society, there is much to be said for the implanting into the legal system of the pure *ethics* of Islam; yet at the same time there is so much hypocrisy in human nature, that much legislation is likely to do more harm than good. Already the statute book is overloaded with laws, politicians tending to consider that written law is a remedy for the majority of human ills. If all laws were enforced with sympathy and understanding: if, indeed, many laws were not enforced at all: society would be the happier. But the condition of Malaysia is such that government by slogan and exhortation (of which a statute is an extreme form) is likely to create nothing but a climate of cynicism. Islam deserves better than that.

CHINA

In the realm of customary law much of the *volksgeist*, that spirit of the people described by Savigny, is to be seen. Habits are shaped by circumstances, and when people live close to the land a sense of animism, an instinctive awareness of the fact that life takes many forms, creates a respect for the realm of nature, and an adaptation of human conduct in the light of that knowledge. Such respect can be seen today in some of the offences of Iban customary law, such as killing an animal or chicken within or outside a room in which there is a pregnant woman: making a coffin at the edge of another's padi farm: or lying down in another's padi farm during planting. The air is full of

[54] Act 252: repealed in 1992 by Act 470.

[55] Act 10 of 1961.

[56] Act 44 of 1965.

ghosts, and even if they are not known, they must at least be objects of respect, sometimes of worship.

It might be said, then, that customary law has its roots in nature, and in man's understanding of and reaction to nature. In this sense customary law might be said to be "subjective law", that is to say, to consist of rules of behaviour dictated by individual reactions to particular situations which, constantly repeated, form a pattern of behaviour which in time stiffens into custom: a custom whose origins may in the end be lost in the folklore of the past. The term "subjective law" is admittedly a loose one, as vague as the adjective and noun of which it is composed; but it may serve as an antithesis to the term "objective law", a law based upon considered rules of morality embodying in sum the rights and duties of everyone, and seeking to provide the machinery by which such rights and duties can be enforced. Instead of nature, with its variety and caprice, there is a vision of a god or other supernatural authority, omnipotent and possessed of pure logic, who holds the scales of right and wrong. Such is the system of law based on the revelation derived from religion, and to be seen in those systems based on the teachings of those texts regarded as sacred by large sections of mankind. Between these two extreme concepts of law there lies another area of law, best illustrated by the history of Chinese law up to the revolution of 1911. As Lin Yutang has written,[57] "for a westerner it is usually sufficient for a proposition to be logically sound. For a Chinese it is not sufficient that a proposition be logically correct, but it must at the same time be in accord with human nature. In fact," he continues, "to be in accord with human nature, to be *chunch'ing* (i.e. to be human), is a greater consideration than to be logical. The Chinese word for reasonableness is *ch'ingli* which is composed of two elements, *ch'ing* (*jenching*) or human nature, and *li* (*t'ienli*) or eternal reason. *Ch'ing* represents the flexible, human element, while *li* represents the immutable law of the universe."

It is in the teachings of Confucius (d. 479 B.C.) that this philosophy flowers. For the Chinese man and woman, heaven and earth, all things constitute a part of a whole: and it is essential that men have a sense of harmony with the universe. That harmony depends upon one's position in life: sex, age, position within the family and state are

[57] *My Country and My People* (1935).

seen as part of a greater system, and harmony can only be maintained by proper behaviour. A truly civilised man needs no laws: but, as a Chinese viceroy wrote around 1871,[55] "the enactment of laws is to do what civilisation fails to effect; and to suppress fierce-heartedness, rebellion, unprincipled intrigues and wickedness ..."

Confucius and his followers saw—what, alas, few see today—the close link between good morals and good manners. As a military historian, Liddell-Hart, wrote,[56] "Manners are apt to be regarded as a surface polish. That is a superficial view. They arise from an inward control. A fresh realization of their importance is needed in the world today, and their revival might prove the salvation of civilization." Good manners, proper behaviour: these are at the heart of Confucian philosophy, and that philosophy coloured the development of Chinese law. For the Confucian scholar, law is really for the barbarian.

Yet there was another school of law in China. Just as those of the Confucian persuasion saw man as essentially good, those of the other, the Legalist school, saw man as bad and selfish. The leading figure of the Legalist school is Han fei-zu (d. 233 B.C.). Han saw change as part of human progress; for him, it was essential ever to adapt to circumstances, and to adapt, men had to change. There was no point in trying to make men good, he considered, but some merit in preventing them from behaving badly. What a person's character might be was irrelevant: publish the rules, create uniform, objective standards, and punish those who fail to conform to the rules not with polite censure, but painful penalties. Such was the view of the Legalist school.

Chinese law developed in a kind of limbo between the individual and the state. Accused persons were allowed no right of representation, so that no legal profession emerged in China, such legal expertise as developed lying in the minds of court officials, magistrates' clerks and the like. Chinese law reflected the character of the people: a wise man will avoid entanglement with the law, just as a hypochondriac will avoid a leper colony. The curious antinomy continued, neither the Confucian nor the Legalist concept of law ever being truly dominant; but the stasis inherent in the Confucian philosophy itself could not withstand those pressures, both within and outside China, work-

[55] Quoted in *Regina v Yeoh Boon Leng* [1890] 4 Ky 630 at 636.

[56] *Why Don't We Learn From History* (1972), 89.

ing to change. 1911 saw the end of the Confucian influence, and from that time law was and is seen as an instrument of necessary change.

It is known that there were Chinese contacts with Malaysia as early as the 5th century, and the uninformed expert may suppose that they go back much further. However, following the conquest of China by the Manchus in 1644, many Chinese sought refuge overseas, some in Taiwan, others in Southeast Asia, in spite of the fact that it was the policy of the Manchus to discourage emigration. Indeed, under a law of the Ching dynasty[60] any private citizen of China who might "clandestinely proceed to sea to trade, or [go] to foreign islands for the purpose of inhabiting and cultivating the same [was liable to] suffer death by being beheaded": a formidable penalty, if it could be enforced. Difficult conditions in China, and the developing prospects of trade in Southeast Asia, brought an increasing number of Chinese to Malaya, most of them bachelors hoping to make a fortune and then, like the Hadhramis in the same area, to return wealthy to their homeland. Tin mining, in particular, attracted many Chinese immigrants after the turn of the 19th century and, as Ryan notes,[61] "the Malay governments could not control the flood of Chinese even if they had wanted to do so, and it is doubtful if they did, for they were growing rich on the revenue from tin."

Apart from the benefits of their industry, the governments of the day had little interest in the activities of the Chinese immigrants, who were allowed to govern themselves, largely through the *Kapitan Cina* system. Probably originating in Portuguese Malacca,[62] the system offered a method of administering an alien community with a minimum of conflict, the *Kapitan Cina* exercising administrative, judicial and many other functions. Even when formal administrative and judicial structures were established the office persisted, since it tended to satisfy the needs of the community.

So Chinese law in Malaysia developed its own especial character. Hooker observes[63] that "the Chinese variety of customary law was

---

[60] *Ta Tsing Leu Lee* (Staunton's translation) section ccxxv.

[61] *The Cultural Heritage of Malaya*, 19.

[62] See "The Kapitan Cina System in the Straits Settlements," by Chan Cauk Gnoh, *Malaysia in History*, Vol 25 (1982), 74.

[63] *Legal Pluralism* (1975) 158.

wholly the invention of the colonial courts in Malaysia, Singapore and Hong Kong"; and if we accept "invention" as "creation", there is a substantial element of truth in the observation. The common law judges, men with some knowledge of India, little knowledge of China, agreed that questions of personal law were to be decided according to Chinese law and custom, but this entailed an investigation for which they were not equipped, as witness the arguments on the nature of Chinese marriage set out in the report of an 1890 case from Penang.[64]

What made the matter of Chinese customary law especially difficult was that in the process of time Chinese immigrants settled, and became domiciled in Malaysia; and since it is a principle of English law that a person's personal law is that of his country of domicile, things soon went from bad to worse, as the quest for a local law continued. As Taylor J. noted,[65] "at first imperceptibly ... There was no Malayan personal law and it would have been impossible to frame one." In the Malay States, Taylor J. observed, "local questions of personal law [were dealt with] on the same fundamental principles as English Courts [dealt] with the personal law of foreigners—that is, they applied the law of the community in every case." There is an abyss between the fact of residence and the concept of domicile, and into this abyss many judges fell. The Chinese system being "based on the notion that the family, not the individual, is the unit of consideration"[66] the British judges in their confusion erred grievously in their notions of Chinese marriage and adoption, and in their failure to understand the non-litigious nature of the Chinese, a people anxious to avoid confrontation, and its frequently attendant humiliation, wherever possible.

A Chinese once described an English criminal trial[67] as a situation in which "one man is quite silent, another talks all the time, and twelve men condemn the man who has not said a word." The Chinese observed the English with a more realistic eye than the English observed them. The Chinese were not polygamous, but the British judges of Malaya decided they were; and in the Straits Settlements the

[64] *Regina v Yeoh Boon Leng* (1890) 4 Ky 630.

[65] *In re Tan Soh Sim dec'd* [1951] MLJ 21 at 25.

[66] Ibid., 26.

[67] Quoted in Cyles Brandreth, *The Law is an Ass* (1984).

adoption of a son was not regarded as conferring on him any rights on intestacy—although the Federated Malay States Court of Appeal took a more realistic and sensible view.[68] Some saw confusion arising earlier on, and sought to avoid it. In 1893 Perak promulgated an Order in Council on the recognition of Chinese laws and customs relating to marriage, adoption and inheritance,[69] and the principles of the Order were followed not only in Perak, but in other states. The law was enacted for the purpose of making it unnecessary for tribunals to take evidence as to the law of China on matters relating to marriage, "inferior wives", adoption, inheritance and intestacy, the Chinese laws set out in the Order in Council being "declared to be law in the State of Perak and ... to be observed by all Courts of Justice and other tribunals ... in respect of any cause, suit or other proceeding, either or both of the parties to which [being] of Chinese nationality."

The Order in Council was fortified by the [Federated Malay States] Secretary for Chinese Affairs Enactments of 1899. These laws regarded as a Chinese "any person bearing a Chinese surname, commonly called a *Seh* or *Sang*, who is a Chinese subject owing natural allegiance to the Emperor of China, or who has domicile in the Empire of China, or its dependencies." Any person who "habitually used the Chinese dress or language, or followed Chinese customs," was presumed to be of Chinese nationality; so that race and religion were irrelevant. Christian Chinese were, oddly enough, deemed not to be of Chinese nationality: an interesting parallel being offered here with Malaysian law relating to the definition of a "Malay", which requires acceptance of Islam as one of the attributes of such a status.

Under the enactments of 1899 the Secretary for Chinese Affairs was required, "as far as local circumstances and justice and equity allow, [to] pay regard to the known laws and customs of the Chinese." In this context the "broad principles of Chinese family law" incorporated in the Perak Order in Council of 1893 were adopted. In all, it seems likely that the civil servants administered Chinese affairs with more skill than the judges; yet even the legislators can err, as the reference in the Law Reform (Marriage and Divorce) Act 1976 to persons "lawfully married under any law, religion, custom or usage to one or more

[68] *Yap Tham Thai alias Yap Fook Sung v Low Hup Neo* (1922) 1 FMSLR 383.

[69] No. 23 of 1893.

spouses" indicates when "in actual fact, Chinese custom did not allow polygamous marriages."[70]

Even so, Chinese family law and, indeed, customary law generally was recognised and administered throughout Malaysia.[71] That law, gradually modified by local custom and then, as the doubts of domicile were resolved, by written law, survived. In 1951 it was possible for an expatriate judge to affirm[72] that "Chinese Family Law, though not unchanged, is still the personal law of locally-domiciled Chinese, but it does not govern intestate succession for which other provision has been made." But the machinery of the legislature ground on: and when on March 1, 1982 the Law Reform (Marriage and Divorce) Act 1976[73] came into force, it was possible to consider the Malaysian Chinese as true Malaysians free at last of the strange, hybrid custom which colonial judges had thrust upon them.

This is not to say that the contribution Chinese legal philosophy has made to Malaysia has ceased, or that the essential character of the Malaysian Chinese has changed. The principle of the family persists, as does that of patriarchal authority. Indeed, Goh Bee Chen has noted[74] that it is still "very common for rural Chinese Malaysians to have match-marriages". The family remains important; the concept of "face" remains important; and detestation of a legal system based upon the principle of confrontation remains. In the rural areas, Confucian ideas remain alive: and even in Sarawak the courts have continued to apply Chinese custom, in spite of the fact that the Malaysian Chinese are not regarded, even yet, technically as natives of the country.

To a large extent this belief arises from a Chinese nationality law of 1909, under which "a child born of a father who at the time of its birth is Chinese" acquired Chinese nationality by parentage, whatever the locality of the birth. This principle of the *ius sanguinis* (the law of blood) haunted Malaysian politics for many years, and the ghost was

[70] Goh Bee Chen, "The Traditional Chinese Concept of Law, Justice and Dispute Settlement," University of Malaya, LLB Academic Exercise, 1983, 102, fn. 38.

[71] And in Sarawak: see *Chan Bee Neo and Ors v Ee Siok Choo* (1947) SCR 1.

[72] Taylor J. in *In re Tan Soh Sim dec'd* [1951] MLJ 21 at 27.

[73] Act 164.

[74] Op. cit., 47.

only exorcised (at the official level, at least) in 1974, when in a joint statement by Chou En Lai and Tun Razak,[75] the People's Republic of China announced that it considered "anyone of Chinese origin who has taken up of his own will or acquired Malaysian nationality as automatically forfeiting Chinese nationality." From that time, it has not been correct to regard any Malaysian Chinese as possessed of Chinese nationality.

The effect of the Chinese on the legislative history of Malaysia has not been limited to matters of personal law; they have had a significant influence in the development of legislation on labour, immigration, societies, social welfare and education, and may well have contributed to an improvement in the status of women generally.[76] The effect has been insidious: for a self-effacing community ever-anxious to avoid conflict with authority; a community detesting litigation or any other process involving a public proceeding liable to put one's prestige or reputation at risk; a community still largely under the influence of Confucian ethics; a community perceiving law as "pre-dominantly penal in character";[77] such a community exercises its influence through more subtle means than those of confrontation.

The price paid for such peculiar modesty was a certain misunderstanding of the true nature of, for example, marriage amongst the Chinese. In an appeal of 1961[78] it was said that the personal law of a Chinese domiciled in Malaya resulted from his race, not from, for example, membership of a religious community; so that an appeal judge[79] could then affirm that "a Christian Chinese may legally contract a polygamous marriage if to do so is consistent with his personal law based on race." The Malaysian Chinese had to wait until the coming into

---

[75] See *Foreign Affairs Malaysia*, v. 7, n. 2, June 1974, 53.

[76] See the writer's "The Influence of the Chinese upon Legislative History in Malaysia and Singapore," (1978) 20 Mal. L.R. 265 at 285.

[77] Goh Bee Chen, op. cit., 213.

[78] *Re Loh Toh Met dec'd* [1961] MLJ 234. The appeal is notable for a lengthy judgment by Thomson C.J. covering historical considerations and case law, both local and Indian, on the subject of marriage. The case is one of an interesting trio, the others being *Dorothy Yee's Case* [1956] MLJ 257 and *Re Ding Do Ca dec'd* [1966] 2 MLJ 220.

[79] Ibid., Hill J.A.

force of the Law Reform (Marriage and Divorce) Act 1976 before the process of their assimilation into Malaysian society really began.

Yet their influence is not spent. In the course of time it is likely that Chinese legal philosophy, mingling with that of the Malay Muslim, will create a legal system quite different from that left as a legacy by the British.

ENGLAND

When the English first arrived in Penang, they brought with them no formal legal system. Coming under the aegis of the East India Company, a commercial organisation founded by a group of London merchants in 1599, trade and not government was their first concern. So the first decade or so of British rule in Penang is said to be a period of "legal chaos" during which "the only law ... that appears to be in force ... is 'the Law of Nature'."[80]

The period of chaos, if chaos it was, ended with the promulgation of the First Charter of Justice in 1807: a document held to have introduced into Penang the law of England as it then existed. Until that time "each class [of the population] received full recognition and protection, according to its own laws and usages—in other instances, the law of nature practically superseding any other."[81] This can hardly be termed chaos. However, the application of English law was confirmed by the Privy Council in 1875,[82] when the Council advised that "the law of England must be taken to be the governing law, so far as it is applicable to the circumstances of the place, and modified in its application by these circumstances."

This authoritative pronouncement put an end to a question that had remained in doubt for many years, although it cannot be said that the conclusion reached by the British lawyers in favour of the imposition of English law in Penang remains wholly convincing. The Charter of 1807 nowhere declared that English law was to be the territorial law of Penang, and indeed, the draftsman seems to have gone out of his

[80] Dickens J. in *Palangee v Tye Ang and In the Goods of Ethergee dec'd* (1803) 1 Ky xix at xx.

[81] Kyshe, at 1 Ky x.

[82] *Ong Cheng Neo v Yeap Cheah Neo and Ors* (1875) 1 Ky 326 at 344.

way to avoid any such pronouncement: for the charter set up courts, endowed them with a jurisdiction, but nowhere indicated what law those courts should apply.

With the arrival of British lawyers in the territory, it was inevitable that the *lex loci* of Penang at the time of its cession from Kedah in 1786 should have been overlooked. Such judges as Malkin affirmed[53] that the Charter introduced English law, and this was a convenient fiction, as all good students of the Civil Law Act 1956 will testify. In one of the most powerful judgments in Malaysian legal history[54] Sir P. Benson Maxwell, while admitting the lack of any invocation of English law, argued that all the "leading provisions" of the Charter "manifestly require that justice shall be administered according to [English law], and it alone." Negative evidence he found in support of his argument, in that there was no mention in the Charter of any law other than that of England: the Charter referred to the religions, customs and usages of the inhabitants of Penang, but not to their laws. In all, the judgment has a defensive air of the expedient about it: but by 1859 the pattern had been set, and even then it was probably too late to change it. In 1871[55] the redoubtable Thomas Braddell made a gallant attempt to argue that as Penang was part of Kedah on its cession in 1786, and the Raja of Kedah was a Muslim prince, Muslim law was the *lex loci* of Penang and continued in force after cession until altered by competent authority; and no such alteration had been affected. Hackett J. dismissed the proposition as "untenable"; and with the Privy Council advice of 1875[56] the argument was, for the colonial judiciary, concluded.

Whether or not a disservice was done to the inhabitants of Penang by the application of English law remains a matter for speculation. English law took root in Penang and, in 1826, with the Second Charter of Justice, in Malacca and Singapore. Indeed in Singapore, legal history seems to be regarded as beginning in 1826 with the reception of English law, in spite of the fact that the *lex loci* of Singapore, on its cession in 1819, was in all probability the law of Johor. The thought

[53] *Rodyk v Williamson*, cited in *In the Goods of Abdullah* (1835) 2 Ky 8 at 9.

[54] *Regina v Willans Esq* [1859] Leic 66 at 74.

[55] See *Fatimah v Logan* [1871] 1 Ky 253.

[56] *Ong Cheng Neo v Yeap Cheah Neo* [1877] Leic 314.

ful student can here meditate for a moment on the transience of law and legal systems.

English law came into Malaysia as a tide, at first a gentle movement in a few places and then as a powerful surge challenging the entire coast and its estuaries. Its influence soon ran from the settlements of Penang, Malacca and Singapore into the Malay States and, as trade and commerce developed, the need for a law common to the whole area began to be appreciated. And since English law is founded upon the common law, it is now necessary to turn to a consideration of that common law which is seen as the glory of English law, and its main contribution to the jurisprudence of the world.

Chapter 9

COMMON LAW

COMMON AND CIVIL LAW

The English like games. They invented cricket, rugby, football, badminton and a variety of other sports; and these are notable for the existence of, in general, two opposing parties, playing the game in accordance with rules agreed upon in advance, rules whose application is controlled by a referee against whose decision there is no appeal. Such is the method which lies at the heart of the English common law system; and even today a trial has, for the English, the elements of a dramatic game, in the nature of a lottery, regulated by complex and often subtle rules of procedure, and subject to the overall control of a disinterested judge. This "adversary system", as it is usually called, together with what is known as "the rule of law" and "the doctrine of precedent" lie at the heart of the English common law.

That law took shape in England in the early Middle Ages, with its origins in the decisions of the judges, men largely of Norman-French descent, who adopted the convenient fiction that they only declared what the common law was: they did not make it, they only discovered it. With the emergence of powerful kings, a strong government, a centralised judiciary prepared to go on circuit and a group of professional clerks keeping records of decisions, the way was open to a uniform law, common throughout the land. Milsom[1] sees the common law as "the by-product of an administrative triumph, the way in which the government of England came to be centralised and specialised during the centuries after the [Norman] Conquest." It is administrative ability that gives life to a society.

[1] *Historical Foundations of the Common Law* (2nd. ed.), 11.

By-product of an administrative triumph or not, one Continental observer[2] saw the common law as "a species of continental feudal law developed into an English system by Kings and justices of continental extraction". These "Kings and justices" obliterated the customs and laws of the Anglo-Saxons as effectively as their successors were to obliterate Malay customs and laws in Malaysia; and indeed, the curious reader may see a strange affinity in the behaviour of the Norman conquerors in England and the British (in the context, certainly, one cannot write, the *English*) in Malaysia.

For efficiency was the goal, in each case. A properly-organised society, with a ruler at the top and peasants at the bottom, the latter doing their allotted tasks, paying the required taxes and in return receiving the protection (the word now has an ironic ring) of an overlord. Obedience was the key to survival and progress: and out of this principle grew a hierarchy of courts and the requirement that a junior court follow the rulings of a senior court. In this fashion the doctrine of precedent evolved, just as out of the drive to conformity emerged the rule of law and, out of the rule of law, that modern principle of egalitarianism which, popular as it is in contemporary society as a political objective, tends to the destruction of all that is best.

With the fascinating history of English law we are not here concerned, for it has often been told and retold, usually with respect and affection. What we are concerned with here is, the nature of the common law that arrived in Malaysia, its development and its future. At an early stage in his career the law student is introduced to the sources of the English common law, the emergence of equity, and the progress of an English statute book in which much of the law of Malaysia is, even today, reflected.

The term "common law" has, like *adat*, a variety of meanings. When applied to a country, it denotes any system based on the English legal system: so that Malaysia, Singapore and most of the Commonwealth countries, together with the United States (except Louisiana) and Israel, are regarded as common law countries. The other major grouping of the world's legal systems covers those countries following

[2] Van Caenegem, *The Birth of the English Common Law* (1973), 110. On the common law in Singapore and Malaysia, see A.J. Harding (ed.), *The Common Law in Singapore and Malaysia* (1985).

the *civil law*, a system derived from Roman law; and these countries include most of western Europe, together with Scotland, Turkey, Thailand, Japan, Taiwan, Sri Lanka, South Africa, Louisiana and the province of Quebec in Canada. Other classifications can be made. In the history of law the civil law and common law systems are comparative infants, with Islamic law even more junior: all being preceded by far older legal systems, extending back 5,000 years and more in India, and no doubt further back in time elsewhere.

Since the civil law system preceded the common law system, it is useful to pause and distinguish the two. Much has been written on the matter, but the essential distinction relates to the popular idea of the function of the judge, and nothing more. The common law judge is required to keep himself out of the arena of argument; the system is so devised that complex rules of etiquette, evidence and procedure regulate the behaviour of the lawyers appearing before him. The trial itself is the climax of a series of events in which the judge has no real part; what witnesses and documents are brought before him by the parties is a matter regulated by complicated rules with which he will be familiar, but with which he has no concern. If, for example, the lawyer for a plaintiff has made a mistake in his pleadings, then the judge may well reject the claim, indifferent to the truth of the matter: for it is not for him to come down into that arena in which counsel are engaged and to seek, in its heat and confusion, where justice lies.[3] For the lawyers representing the antagonists must seek to do that: the common law judge has no active moral duty, merely an invigilatory and a decisive duty.

On the continent of Europe they manage things differently. The judge there has an inquisitorial duty. For the common law lawyer, the adjective carries recollections of the Spanish Inquisition and the torture of heretics: but under the civil law system the duty of the judge is essentially to establish the truth of the matter before him. To that end he takes control of proceedings in a different fashion from the common law judge, virtually supervising all its phases prior to trial, even to the extent of calling witnesses himself. Under this inquisitorial system,

[3] David Marshall gives a useful topical comparison of the two systems in the 9th Braddell Memorial Lecture 1978, "Facets of the Accusational and Inquisitorial Systems" [1979] 1 MLJ xxix.

it is recognised that the state as well as the parties has a legitimate interest, not only in the proper outcome of a trial or suit, but also in every phase leading up to that outcome.

Under the common law system, however, proceedings in public, with opportunity for the testing by cross-examination of the testimony of witnesses, under the supervision of an impartial judge, are regarded as essential. There are merits in both systems, as well as defects: but whatever system is to be adopted should grow out of and be in harmony with the nature of the people it is designed to serve, for otherwise it will work to injustice. For too long the virtues of the common law have been praised, especially by those English and American lawyers who see in "Our Lady the Common Law" a figure of romance so powerful as to convert the common law itself almost into a religion. That way, madness lies.

The civil law differs, then, in its basic philosophy from the common law system. The civil law judge is less impressed by precedent than is his common law brother; he prefers to take his law from codes laying down general principles which he can adapt to the case before him, in such manner as he thinks appropriate; he seeks his inspiration from Roman law;[4] and he is less suspicious of the academic lawyer than is the common law judge. Not for him the drama of the courtroom: quiet research, as complete as possible, before the attribution of fault, is his goal.

As the English common law developed, it acquired, as do most of the institutions of mankind, a certain rigidity, the courts that declared the common law developing their own particular procedures and jurisdictions. In consequence, petitions of those dissatisfied with or unable to obtain redress in the common law courts found their cases reserved for the King in Council, as the fountain of justice, and these the King referred to his advisers. In time, a practice emerged of referring cases to the Lord Chancellor, as the "Keeper of the King's conscience": so

[4] Roman Law itself was a system founded on a short, practical code of law known as the "*Twelve Tables*", and dating from around 450 B.C. The *Twelve Tables* incorporated some aspects of customary law, together with rules on procedure, contract, marriage and *delict* (crime). The Roman civil law was supplemented by *lex naturae*, the law by which the actions of man were to be seen in relation to the laws of nature and the universe, and out of the *lex naturae* grew the *ius gentium*, the law of nations.

that the Chancellor's office, the Chancery, developed as a court exercising a separate jurisdiction of its own and administering what became known as equity. Since, in any legal system, it is desirable to avoid conflict, one system had to assert its supremacy, and this occurred in 1616,[5] when it was held that in any case of conflict between common law and equity, equity should prevail. Even so, as a literary Englishman, Augustine Birrell said in 1900, "the distinction between Law and Equity is one which will never be grasped by the lay mind": and today even the lawyer may find the distinction sometimes a difficult matter.

Even so, system tends to formality and ossification. Equity in its turn became as formalised as the common law. Readers of Dickens' novel, *Bleak House*, will be familiar with the ponderous and tedious nature of the Court of Chancery. The story symbolically opens with a vivid picture of the Lord High Chancellor in his High Court of Chancery, in Lincoln's Inn Hall, at the very heart of a thick November fog. The morbid condition of the English legal system was cured by the Judicature Acts of 1873 to 1875, which set up a new structure of courts, gave statutory recognition to the dominance of equity, and enabled all courts to give both common law remedies (such as damages) and equitable remedies (such as injunction, specific performance, rescission and rectification). The Acts live on in Malaysia, in parts of the Civil Law Act 1956.[6]

The minor revolution affected by the legislation of 1873-75, parts of which were adopted in the Straits Settlements with the Civil Law Ordinance in 1878, gave English law a new impetus: and once a single hierarchy of courts had been established, the English judges developed and refined the doctrine of *stare decisis*. Under this doctrine an appellate court was (at least, until 1966, when the House of Lords took the liberty to dissent from itself)[7] bound by its own decisions, and each inferior court by the decisions of its superior in the hierarchy. This doctrine in its turn depended upon the identification of the *ratio decidendi*

---

5 *The Earl of Oxford's Case*. But "Equity in law," Selden said, "is the same that the spirit is in Religion, what everyone pleases to make it ... Equity is a roguish thing."

6 Act 67.

7 See [1966] 3 All ER 77.

of a case, the kernel of law that formed the legal foundation of the decision. Out of these doctrines a subtle and complicated system has developed, the nature of which can be found in many entertaining texts. Suffice to say that, together with much else in English law, it fetched up on the shores of Penang and the Malay States.

The term "common law" in time came to mean the law common to all England, so that it is now difficult to disentangle it from the doctrines of equity and, indeed, from the content of a body of statute law which is gradually codifying and revising that collection of decisions by common law and equity judges once regarded as the common law of England. New situations create new responses: and with Britain's accession to the Treaty of Rome 1957 and its entry into the European Community on January 1, 1973, English law became increasingly influenced by European law and civil law influences. However, for the purpose of this chapter the term "common law" can be interpreted as including English equity and statute law of a general application.

LETTER AND SPIRIT

With the arrival of the English in Penang in 1786, English law of a sort arrived in Malaysia. The fact that the *lex loci* of Penang was at the time of cession the law of a Malay-Muslim state, the state of Kedah, was conveniently overlooked: as, indeed, was the fact, a few years later, that Dutch law was the law of Malacca prior to the arrival of the British. With a cavalier disregard of principle, British judges took the view that the Charters of Justice abrogated existing law (except insofar as the odd local custom might be concerned) and substituted for it English law. In this fashion, English common law, equity and such English statutes as were thought to lay down general principles of law was transplanted to Malaysia: the date of reception being at first considered as 1807 then, with a Second Charter, November 27, 1826: a date which, in site of the promulgation of a Third Charter in 1855, remains fixed by judicial illogic as the date of reception of English law in Penang, Malacca and Singapore.

With the arrival of professional lawyers from England there began a conflict which continued at least until *Merdeka*, and is likely to continue until such time as not a single administrator exercises the powers of a magistrate. The appointment of the irascible John Dickens as a

judge and magistrate in Penang in 1801 heralded this conflict, one between the justice of common sense and the justice of law. It cannot be denied that on occasion the law is, as Mr Bumble said, "a ass—a idiot."[8] When it is remembered that the English legal system was not substantially reformed until the latter part of the 19th century, we find that the traditional concept of law held by the English lawyer was for the most part full of complex technicalities. For example, in 1829, one Puddifoot was sentenced to death for stealing a sheep;[9] in fact, it was a ewe which he had stolen, but the relevant statute used the word "sheep" as well as "ewe", and Puddifoot was duly pardoned, on appeal to the lawyers of Serjeant's Inn.[10] Again, in 1841, Lord Cardigan was indicted for shooting at a captain called Harvey Garnett Phipps Tuckett with intent to murder him, in the course of a duel; Lord Cardigan was found not guilty because, although the offence was proved, the Crown had failed to prove the captain's full name.[11] When technicalities (even merciful ones) enter the sanctuary of the law, justice flees.

Justice, then, became the last concern of the professional lawyer, who held on to the letter of the law at the expense of its spirit. On the other hand, such an administrator as a district officer, combining in one person the offices of collector of revenue, magistrate, chief police officer and so on, was more concerned with a prompt, rough and ready justice. Isabella Bird gives a picture of Sungei Ujong in 1879:[12]

> Captain Murray [the British Resident] is judge, "sitting in equity", Superintendent of Police, Chancellor of the Exchequer, and Surveyor of Taxes, besides being Board of Trade, Board of Works, and I know not what besides. In fact he is the Government, although the *Dato' Klana's* signature or seal is required to confirm a sentence of capital punishment, and possibly in one or two other cases ...

8 Charles Dickens, *Oliver Twist*, chap. 51.

9 Until 1808, theft from the person above the value of a shilling (about 17 cents) was a capital offence.

10 See Poland, "Changes in Criminal Law and Procedure since 1800," in *A Century of Law Reform* (1901, repr. 1972), 61.

11 Ibid.

12 *The Golden Chersonese* (repr. 1967), 187.

"Malays being Mussulmen, are mostly tried by the 'Divine Law' of the Koran," wrote Bird,[13] "and Chinamen are dealt with 'in equity'... There are no legal technicalities." The insistence on *equity* is significant; by the 1870s there was a general appreciation of the origins of equity within English law, and its informal response to meet the harmony required within society, so characteristic of Chinese legal philosophy, was understood better by the administrator than the lawyer.

There was, therefore, a continuous tension between the executive and the judiciary, within the British administration, in its interpretation of the common law, in spite of the fact that in the course of time administrators were required to pass law examinations. The problems are not difficult to understand. An administrator comes into close contact with the people, and soon acquires a knowledge of their characters and reputations. A story is told of Berkeley, an English civil servant who from 1891 spent twenty-seven years in one district, Upper Perak, and achieved a certain fame for his paternal administration. "On one occasion," records Heussler,[14] "there were precious few—a European lawyer had the temerity to enter the district to defend a man accused of thievery. Sitting as a magistrate, Berkeley listened impatiently for a minute or two as evidence was produced. Then he said, 'I do not want to hear any more; he's guilty.' The lawyer protested that he had not yet spoken in the man's defence, and Berkeley replied, 'Of course, he's guilty. He always was a cattle thief as were his father and grandfather before him.'" Knowledge of a district and its people on the part of a magistrate who was also a district officer and general administrator—"a king in his own place", to borrow a phrase from the Sungei Ujong *Digest*—necessarily implied the importation into any judicial proceedings of a knowledge gained outside the boundaries of the evidence presented in court.

In Penang and Malacca, as small Crown Colonies, English law developed under the authority of the Charters. There, the British were confident of their position, and from the early days professional lawyers strove to apply English law, for the most part indifferent to any other law. In the Malay States, however, the English common law came in partly through the agency of British officers familiar with its

[13] Ibid., 193.

[14] *British Rule in Malaya* (1981), 124.

principles, and partly by the sidewinds of procedure and precedent. The principles of adjectival law, of the law of procedure, are insidious in their effects upon substantive law. Much of the history of English law grow out of the evolution of the adversary system, and even the Malaysian observer can echo Maitland's insight, that the forms of action rule us from their graves.

Yet the introduction of English law was not without its English critics. Newbold, writing of Penang in 1839,[15] had some harsh truths to impart

> English law, that has expanded progressively with the numerous exigencies of a highly artificial state of society, loaded with costly bulwarks of forms, and clogged with tedious processes, has been prematurely introduced, tending rather to embarrass than to advance the ends proposed by natural justice, good government, and common sense. Not only its inefficacy to reach the guilty, but its absolute tendency to oppress the poor, and to further the criminal views of the wealthy litigant, are glaringly obvious to every unbiased observer.

Even so, English law was soon entrenched in Penang and Malacca; and with British entry into the Malay States, from the Treaty of Pangkor onwards, the basic Malay-Muslim law of those States was increasingly modified by the influence of English common law, equity and statute. As Ahmad Ibrahim points out, [16] "English law was introduced into the Malay States by legislation and by the decisions of the British judges." While the general law of England was never formally adopted until 1937 (when the Civil Law Enactment of the Federated Malay States were enacted, to be extended to the Unfederated States in 1951) the judges of the Malay States "adopted freely ... a great mass of English rules of law and equity, civil and criminal law and procedure, either directly or derivatively."[17] At times, the pendulum swung too far. In 1917 Lord Dunedin had to criticise local judges for being too

---

[15] *British Settlements in the Straits of Malacca* (1839, repr. 1971) i, 29-30.

[16] "The Civil Law Ordinance in Malaysia" [1971] 2 MLJ I viii at I xi.

[17] Sproule Ag C.J.C. in *In re the Will of Yap Kim Seng dec'd* (1924) 4 FMSLR 313 at 31.

much under the influence of the doctrines of English equity,[18] and for failing to pay sufficient attention to local law: a sentiment echoed by Thomson J. in 1956,[19] when he referred to "the no doubt well-intentioned efforts of counsel to force [Perak] law into conformity with conceptions of English law which really have very little relevance."

Yet with the passage of time, even the expatriate judges appreciated that they were assisting in the evolution of an indigenous and unique system of law. Innes Ag C.J.C., in Selangor in 1919 held[20] that the age of majority in the Federated Malay States was, "for general purposes", twenty-one: so overruling a magistrate who had recognised Hindu law as conferring majority at sixteen. He said

> I find the Magistrate was in error in not looking beyond the written law in force in these states. There are certain branches of jurisprudence with which the written law in force in these states either does not deal at all or in dealing with them does not do so exhaustively. I mentioned by way of illustration the law of wills, of trusts, of torts and of succession. In some instances *the practice of this Court and of the legal profession* [my italics] has filled these blanks and has brought into life what in a British Court is described as a "common law". By this common law the age of majority for general purposed in these States is 21.

Four years later, Reay J.C. could observe[21] that "before reliance can be placed on English decisions, particularly decisions on points of procedure, it is necessary in the first instance to examine carefully our local law and to ascertain what it is and in what respects it resembles or differs from English law." And in 1933 Terrell Ag C.J. could say[22] that "the courts of the Federated Malay States have on many occasions acted on equitable principles, not because English rules of equity apply, but because such rules happen to conform to the principles of

[18] *Haji Abdul Rahman v Mohd Hassan* [1917] AC 209.

[19] *Bachan Singh v Mahinder Kaur and Ors* [1956] MLJ 97.

[20] *Kandasamy v Suppiah* (1919) 1 FMSLR 381.

[21] *Leonard v Nachiappa Chetty* [1923] 4 FMSLR 265 at 268.

[22] *The Motor Emporium v Arumugam* [1933] MLJ 276 at 278.

natural justice." What is important to emphasize here, however, is that no decision of an English court is binding on any Malaysian court, unless it has been adopted by a law or a superior court, or is founded on an appeal from the latter.

So potent has the common law influence been, that decisions from common law jurisdictions beyond England have come to be cited with increasing frequency in Malaysian courts. Indian cases have always been regarded as having a persuasive authority (as the jargon of the legal profession puts it); and in 1978 the Federal Court relied not only on English but also Australian authorities, to determine a problem of entitlement to rents, after a contract for the sale of land.[23] Even so, in spite of the willingness of the Malaysian judiciary to venture into the area of Commonwealth law reports, Malaysian law remains firmly anchored in the common law of England. This has not been due only to an accumulation of judicial authority in the matter. In 1878, the Civil Law Ordinance of Penang, Malacca and Singapore formally invoked various fragments of the English Supreme Courts of Judicature Act 1873, together with (in a section to tax the intelligence) the whole corpus of English commercial law; and in 1937 the Federated Malay States, in the Civil Law Enactment,[24] adopted in general terms "the common law of England, and the rules of equity ..." In 1951 the Enactment of 1937 was extended to the Unfederated Malay States, and five years later came the Civil Law Act 1956,[25] which reaffirmed the application of the English common law and rules of equity and (in East Malaysia but not, oddly enough, Penang and Malacca) certain "statutes of general application" and the application of English commercial law.

There are many interesting issues arising out of the act of 1956, and these have been the subject of considerable discussion. What we are concerned with is, however, the philosophy or policy behind the legislation, which has placed the reception of English common law on a statutory foundation. On the face of it, such a statutory recognition put the seal of authority on the local use of English law; and since, at that time, members of both bench and bar were all qualified in English

[23] *Murugasu v Michael Chong Ngian Fong* [1978] 1 MLJ 23.

[24] Enactment No 3 of 1937.

[25] Now Act 67.

law,[26] there was an obvious logic in the law. So entrenched was English law, indeed, that a Lord President[27] could echo the words of Lord Diplock, and insist that in the context of several fundamental articles of the Federal Constitution (Articles 5, 8 and 13) it is "firmly established" that the word "law" refers to "a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation at the commencement of the Constitution."

The observation correctly states the general interpretation of law. And if the Civil Law Act were to be repealed, what then would be the position? What guidance would the legislature be able to offer to the judiciary, upon a general choice of law? These are questions likely to become of increasing importance, as Malaysian jurisprudence, returning to its origin, seeks to develop in its own Malaysian way.

A GLORY OF COMMON LAW

The jury system was once regarded as one of the glories of the common law. It came into Malaysia by way of Penang, the Charter of Justice of 1807 providing for both grand and petty juries. The grand jury (abolished in Malacca and Penang in 1873, and in England between 1933 and 1948) consisted of a panel of thirteen to twenty-three persons; their duty it was to enquire into the circumstances of an alleged crime, their investigations concluding with the finding of "a true bill" or "not a true bill" against the alleged criminal, who was then tried on a specific charge, presented in the form of an "indictment", as it was called (the term is still in use, in England). The function of the grand jury was, therefore, similar to that of magistrate ascertaining whether there is a *prima facie* case against an accused: a procedure which is now virtually reduced to an examination of the relevant written testimony. As for the petty jury, this was summoned to answer the specific question of guilt or liability, its decision being unanimous.

From the time of Ethelred II (ca. A.D. 1000), the concept of the jury exercised a powerful, indeed emotion influence on English law. Yet in England the use of the jury has steadily declined. Most crimes

[26] May Scots lawyers forgive me for including them in this tribute.

[27] Raja Azlan Shah L.P. in *Che Anuar Hitam v Public Prosecutor* [1984] 1 CLJ 72 and *Ong Ah Chuan v Public Prosecutor* [1981] AC 648 at 670.

are dealt with summarily, and in those cases in which a trial by jury is possible, the right is often waived, whilst in civil cases jury trial survives only as an exceptional feature of procedure, usually in actions of defamation. In 1968 English law was amended to permit a majority verdict by ten out of eleven or twelve, or nine out of ten jurors: a radical destruction of the original principle of unanimity.

The reasons for and against the jury system have always been hotly debated. Jurors are often ignorant, inexperienced, and sometimes even possessed of criminal records; in complicated cases they may well be unable to follow the evidence; they are remote from the judge, and often lack guidance; and the system is expensive in time and money. On the other hand, jurors bring a lay element into court and as laymen are identified with the accused or defendant; they represent popular wisdom and, being numerous, should be beyond the scope of bribery or intimidation (although cases have occurred in England in the 1980s of intimidation of jurors); and they are competent to offer an opinion based on consensus, that Eastern device for avoiding confrontation.

With the adoption in Penang and Malacca in 1870 of the Indian law of criminal procedure, "indictments" were replaced by "charges", and the number of jurors reduced to seven. In the Malay States, British influence seems originally to have imported juries, but in 1902-3 the Federated Malay States Criminal Procedure Code introduced trial with male assessors (a notion borrowed from Indian practice), the judge having no power to overrule his assessors. A new code of 1926 provided for the introduction of the jury system in tandem with that of assessors; and in 1920 and 1935 Johor and Kedah adopted the assessor system, although what the position in the other Unfederated States was prior to World War II is obscure: it seems likely that a judge sitting alone disposed of all cases. In 1947, however, the assessor system of the Federated Malay States was extended to the Unfederated States.

In 1953 a notable trial in Perak under emergency regulations[28] led to a review of the matter of trial by jury. At the trial of a young woman,

[28] Emergency regulations introduced in 1948, with the outbreak of an "emergency" precipitated by armed communist insurrection, which continued until 1960, with the promulgation of the Internal Security Act. These regulations overrode ordinary law, and often modified or altered it, for the duration of the emergency.

Lee Meng, on a capital charge under the regulations[29] the assessors found the accused not guilty of a capital offence; the judge disagreed, and ordered a retrial; and on the retrial the assessors were divided, the judge agreed with one of them, and Lee Meng was convicted. Had Lee Meng been tried by a jury, it is probable that she would have been acquitted. In consequence, the issue was reopened: but in 1954 the Federal Legislative Council concluded that the assessor system should not be replaced by trial by jury.

But the case of Lee Meng left many scars. In 1957 the newly-independent government amended the law on criminal procedure, to extend trial by jury to the Malay States, in all capital cases, so that all such cases in those States (except for offences against emergency regulations, and the Kidnapping Act 1961) were tried by a judge and seven jurors: a majority verdict of not less than five to two being permitted. In 1976 another amendment restricted trial by jury in Penang and Malacca to capital cases. In Peninsular Malaysia, therefore, all capital cases were then tried by jury, unless specific exception was made, as in relation to emergency cases and those for which an alternative method of trial was prescribed by such particular legislation as the Kidnapping Act 1961, the Dangerous Drugs Act 1952, the Firearms (Increased Penalties) Act 1971 and the Internal Security Act 1960.[30]

In Singapore trial by jury was abolished in 1969, capital cases there being tried by two judges. Singapore's example stimulated debate in Malaysia, and in 1976 a law officer, no less, wrote[31] that "it is very difficult to obtain convictions for murder in big towns because jurors hesitate to return the true verdict for fear that their verdict will be responsible to sentencing the accused to the gallows." Noting that out of the 302 offences created by the Penal Code, only ten are punishable by death, and of those "murder is the only offence so affected," one ob-

[29] See references in S. Chandra Mohan and S. Ramankutty, "The Introduction and Development of Trial by Jury in Malaysia and Singapore" in (1966) 8 Mal. L.R. 270 at 276.

[30] Act 365; Act 234; Act 37; Act 82.

[31] Tan Sri Dato Haji Mohd Salleh bin Abas, then Solicitor General, in [1976] MLJ xlix at li.

server noted[32] that although the Code stated that all cases carrying the death penalty shall be triable by jury, "this in reality is a sham ... there are three different modes of trial." These consist of trial by a judge alone, in the case of offences under the Dangerous Drugs Act; trial by judge and jury under the Penal Code; and trial by judge and assessors under other laws: a state of affairs one writer[33] considered contrary to the principle of equality before the law, prescribed by Article 8 of the Federal Constitution; and the writer concluded that "the jury system is losing its significance."

In the event it was the then Lord President, Tun Abdul Hamid Omar, who in April 1993 brought matters to a head by recommending that the jury system be abolished.[34] At first prescribed for all capital cases, in 1971, juries ceased to apply in cases of armed robbery; in 1975 to cases of unlawful possession of firearms; and in 1976 to cases of drug trafficking. Remaining only in relation to cases of murder and kidnapping for ransom, their abolition in 1994 therefore followed the trend of events.

A PLEA

Indeed, the full horror of the common law system is to be seen in the structure of a trial. In a criminal trial a defendant is required to plead guilty or not guilty before any evidence is led and before the judge has (apart from any reading of the relevant papers he may have made) any notion of the realities of the case. A charge is prepared by some official in authority, and it is this particular assessment of guilt that the accused is required to answer. If he pleads guilty, then a certain favour may perhaps be manifest, and his sentence then be the lighter: in Singapore, a chief justice has stated[35] that in principle he considered it proper that "where an accused person pleads guilty the court in assessing sentence ought to consider such a plea as a mitigat-

---

32 Harbans Kaur, "The Jury System in Peninsular Malaysia." University of Malaya, LLB Academic Exercise, 1979, 46.

33 Ibid.

34 *Asiaweek*, May 19, 1993.

35 *Melvani v Public Prosecutor* [1971] 137. In Thailand, I believe that a plea of guilty may attract only half the normal penalty.

ing factor." If the accused pleads not guilty, and at the end of the trial is found guilty, his plea may be regarded as flavoured with contumacy, and his penalty be the greater. To some, this may not be justice.

The criminal trial resembles, then, a game in which the prosecution holds the significant cards and controls the course of events. The accused cannot challenge any of the rules of the game, in spite of the fact that he may disagree with all of them. Like a mentally disordered patient, he is subject to a particular treatment of which he is all often ignorant. If he is represented by a lawyer, he may be informed of the rules and advised on how to use them to his best advantage; but if he is unrepresented (another term, all too often, for the poor) he will be caught up in what he sees as the machinery of a cruel system.

In fact, the adversary system which forms so essential a feature of the common law is now under serious challenge, as the merits of the inquisitorial system are becoming better known. That system is based on a search for truth, not a finding of guilt or innocence. In recent years the adversary system has become increasingly discredited, and appears to require radical modification so that, while protecting a suspect's interests, it does not interfere with the exposure of truth. Artificial rules of evidence, designed to conceal rather than reveal the truth, from the right to silence onwards, need critical examination and, where necessary, abolition. For this, the legal system require lawyers who see their prime function as the ascertainment of truth, and who do not see the administration of justice as some kind of profitable game.

That any law is better than no law can be accepted. But whether the criminal trial as we know it, a legacy of the common law, is the best method of attaining justice in criminal matters is to be doubted. Many lawyers, I suspect, feel this in their hearts: but crude though the system is—as is the examination system which produces the lawyers who administer it—it is, it seems, the best we can contrive. Yet even this is to be questioned. A seminar conducted by padi-growers, fishermen, rubber-tappers, mechanics and tin miners would probably produce a better system, for lawyers have become too arcane for their own good and the good of society.

LIBERTY IN THE AIR

Turning from the matter of procedure, the influence of the English common law may be perceived, possibly in its purest form, in the realm of public law at the federal level, and especially in the Federal Constitution. That Constitution has grown out of the Constitution of India, which, in turn, was the product of an Imperial Act, the Government of India Act of 1935; so it may be said to reflect common law principles, adapted to an Asian environment.

What is notable at the outset, perhaps, is the hostility of the common law lawyer to the exposition in specific terms of individual rights. To seek to define liberty in legal terms is, invariably, to limit it. Liberty is the air we breathe, the light of the sun, moon and stars, it is not to be captured in the words of any law, for it is the spirit that gives, or should give, life to the law. The Commonwealth lawyers who drafted the Malaysian Constitution instinctively knew this; the part on fundamental individual rights was not of their proposing, and they observed that such rights "are all firmly established now throughout Malaya and it may seem unnecessary to give them special protection in the Constitution. But we have found in certain quarters vague apprehension about the future."[36] So, into the Constitution they went, with (oh, the fine print) "limited exceptions".

No wise man favours a "bill of rights", that ingenious document devised to limit and suppress liberty, while creating the illusion of sustaining it. "The letter killeth",[37] and if the ordinary law cannot protect a man's liberty, it is unreasonable to expect a constitutional set of rights to do so. All the provisions of the Constitution, all the efforts of his gifted lawyer, could not release Lee Mau Seng from his bondage in Singapore.[38] Karam Singh, a Malaysian lawyer, was locked up, but

---

[36] *Report of the Federation of Malaya Constitutional Commission* (1957), para 161.

[37] "... but the spirit giveth life". *The New Testament*, 2 Corinthians 3, 6. However, the United Kingdom has now incorporated the European Convention on Human Rights into the United Kingdom law, by the Human Rights Act 1998 (c. 42). Whether the ordinary citizen will enjoy a greater freedom that under the common law remains to be seen.

[38] *Lee Mau Seng v Minister for Home Affairs, Singapore, and Anor* [1971] 2 MLJ 137.

never knew exactly why.[91] Such are the consequences of a bill of rights, of a recital of so-called liberties, inevitably drafted so as to raise the hopes of a detainee, then dash them to the ground. Freedom is not to be found in a constitution: only a distribution of power is there to be perceived.

Just as the Normans imposed the feudal system upon the Anglo-Saxons, and in so doing created that major legal fiction, that all land belongs ultimately to the crown: so the British in Malaya imported the same principle, as a principle of land tenure and, in doing so, laid the foundations of a modern government revolving around a supreme head of state. For the Malaysian politicians who fought for and won independence were much under the influence of the Westminster type of government, which they came to regard as a model. After all, that model had been adopted in other independent Commonwealth territories, was the product of much struggle, debate and compromise, and represented a mature political wisdom. A precedent had been set in England for an efficient distribution of power between the Crown on the one hand and the people on the other. A cabinet or council of ministers collectively responsible to Parliament, a prime minister who had major political support, a fully-elected lower chamber in the legislature, with an upper chamber with non-elected members and limited powers: these were the basic features of English constitutional law, again based on the principle of public confrontation, adopted by an independent Malaya and Malaysia. The adoption seemed so obvious, that it was never seriously questioned.

Of course, the English constitution was not to be found in any particular document. If it existed at all, its life lay in a few confused statutes and a multiplicity of shifting conventions. As a federal state, Malaysia must possess some formal document allocating power at federal and state levels: and so the present constitution has been shaped by necessity, as well as tradition. But it embodies English principles, notably those of the responsibility of Ministers to the law itself (a notion of some antiquity in England) and of the responsibility of Ministers to the electorate (a concept of comparatively recent origin). Out of the former principle has developed an as yet imperfect branch of jurispru-

[91] *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia* (1969) 2 MLJ 129.

dence, that of administrative law; out of the latter an uncertain system, one involving the creation and sustenance of major political parties.

These particular considerations apart, while much of the structure and little, perhaps, of the spirit of the English constitution has been adopted in Malaysia, the common law doctrines of the prerogative, of the rule of law and of the separation powers (vague as these doctrines are) may be said to form part of Malaysian law. That residue of authority left in the *Yang di-Pertuan Agong* after legislative intervention, and known as the prerogative, survives: and the Supreme Head of the Federation is even, as is the monarch in England, head of the armed forces and the fountain of justice. Yet these concepts have, in their journey from England, acquired a Malaysian character, and one already running in a direction different from that of their origins, and being exercised in a Malaysian fashion, a Malaysian interest.

AN ACHIEVEMENT OF SPIRIT

Out of England have come, then, the doctrines of the common law and equity, and much of the bulk of Malaysian statute law. The doctrines themselves are to be found in the law reports and textbooks, and the statutes are to be found in a miscellany of volumes, some of them indeed difficult to trace, for they go back to days before World War II.

Furthermore, few know the content of the written law. Of old, it was the custom of the Isle of Man that on one day in every year the entire population of the island would gather "on the top of Tynwald's formal mound",[40] where all the laws passed during the previous year were read. Were this practice adopted in contemporary Malaysia, neither lawmakers nor public would have time to do anything but listen, and the Lake Gardens of Kuala Lumpur would be choked with the crowds of those listening to an unending recital from Parliament House. In these advanced days, printing has replaced the spoken word, and it will not be long before all legislation is transferred to a computerised reservoir, and made accessible, on a screen, in a matter of seconds. Even so, access to the law is likely to remain no easy matter, for the layman.

In the realm of statute law, the Civil Law Act adopts, as we have noted, virtually the whole of the commercial law of England, and

[40] Wordsworth, Sonnet, "Tynwald's Hill".

much besides. That the Act requires review is beyond doubt. Untidiness has a historical, and often a social merit, but there no longer seems any need to adopt different principles for the reception of English law in West and East Malaysia, nor for differences in the reception: always assuming any such reception is necessary. A bold reform is required, so that the foundations of the Malaysian legal system are in harmony with the ever-evolving character of the Malaysian people.

In this context, it is necessary to consider yet again what is the essential aspect of procedure that society requires of its legal system. I suggest that this lies in the provision of adequate machinery for reconciling differences between individuals, and between individuals and the state, the organ representing the community at large, and that this machinery be of a kind that is in harmony with the character of the people it serves.

That the common law system is, by and large, generally adequate cannot, I think, be disputed. It has developed over many centuries of trial and error, and represents one of the great achievements of the human spirit. Yet even in the land of its birth it has been, and is, subject to radical change. It was no accident that in 1966 the House of Lords assumed, of its own motion, the ability to disagree with its own earlier decisions,[4] and that the Judicial Committee of the Privy Council tolerated dissent in its advice to the Crown. Times change, and legal systems, like people, must change with them. When we consider whether the common law system is appropriate to the character of the Malaysian people, we raise issues beyond even the matter of language and must turn to the manner in which the local common law system deals with the matter of conciliation of differences. This takes us into another chapter, so, as the old Chinese storyteller would say, if you wish to know more, read on.

---

[4] See [1966] All ER 77. All reminiscent of the Lord Chancellor, in W.S. Gilbert's *Iolanthe*: "... I am here in two capacities, and they clash, my Lords, they clash! I deeply grieve to say that in declining to entertain my last application to myself, I presumed to address myself, in terms which render it impossible for me ever to apply to myself again. It was a most painful scene, my Lords, most painful!" Let us hope that the Malaysian observer does not often have the discomfiture of seeing the Federal Court disagree with itself.

Chapter 10

CONCILIATION

DEEDS AND WORDS

At the core of every legal system is the concept of conciliation. Disputes between individuals must be settled without violence, and in such a manner as to leave no poison of resentment within the heart of any one affected by the dispute: for such a poison will inevitably work itself out within the body of society generally, and to its detriment. If justice is a matter for God, harmony at least is an objective for man and society.

Some systems arrange for settlement of disputes by the invocation of chance (and therefore of the gods themselves)—an illustration of the general desire to avoid personal confrontation. The Bidayuhs of Sarawak, for example, favoured a popular form of trial by candle:[1] two similar candles consisting of wood wrapped in black cloth, soaked in coconut oil, were lit at the same time, that going out first indicating the loser. Then, there was trial by diving, two poles being put in a deep pool, each party holding on to one pole and diving beneath the surface: the one first emerging being the loser. Again, trial by boiling water was occasionally used, hands being put into the water and the innocent emerging unscathed; and there was also a sort of vicarious trial, by cockfight.

These practices, some to be found in the history of England and other countries, appear amongst other groups in Sarawak, Doris Suling Anding giving a similar list;[2] and the practice of diving was

---

1 See John Wayne Chamberlain Sirau, "The Bidayuhs of Sarawak: The People and their *Adat*," University of Malaya, Academic Exercise, 1984, 154.

2 "Native Customary Law and Adat of the Balau Iban," University of Malaya, LLB Academic Exercise, 1982, 88 *et seq.*

adopted to determine guilt as recently as 1960 in Sabah, in a case of incest. The judge of the Native Court of Appeal at Sandakan observed[3] that "this method of eliciting the truth is entirely to be deprecated and should be discontinued ... Similar practices were abandoned in England about six hundred years ago ..." The conviction for incest, based on the diving contest, was quashed. In Sarawak "all ordeal systems are [now] outlawed."[4] Trial by ordeal, and cockfighting, implying as they did the intervention of a just providence, were part of a customary law based on the need for harmony and balance in a community living close to nature: and the maintenance of harmony, conciliation, remains as an essential social objective.

So important is the principle of conciliation amongst the Kelabit of Sarawak that they have developed a complex vocabulary on the subject.[5] For example, *ngerang* implies the concept of visiting, to solve a family dispute, *mekerab* refers to disputes between different families with, usually, a neutral mediator involved; *mekitang* (meaning, "hanging on both ends so that it is properly stretched") is for serious disputes, with a mediator going to and fro until the final stage, *metutup* ("bringing face to face:) is reached. The term *pakanih*, "talking it over", implies a more formal process of mediation involving the intercession of the elders of the tribe; and in relation to a major issue which the elders cannot solve, there lies *panung*, when the elders and headmen of other villages are requested to settle the matter. So refined a vocabulary, so ingenious a system, illustrates the importance of the maintenance of harmony within society by means of minimising any personal loss of prestige, reputation or respect.

Despite much evidence, however, it is difficult to assess the attitude of the *bumiputera*, be he Malay or Iban or whoever, to litigation and conciliation, since some have entered a sophisticated urban soci-

[3] *Lagundi bin Koh and Lusiah bte Lagundi v Regina (1953-1972), Cases on Native Customary Law in Sabah*, 14.

[4] (1998) 25 JMCL (Special Issue) 109. The papers in this volume dealing with customary law in Sarawak and Sabah are of especial interest and importance. See also the Native Customs (Declarations) Ordinance 1996 (22 of 1996).

[5] See Medan Maya, "Kelabit Customary Law: A Contemporary Socio-Legal Perspective," University of Malaya, LLB Academic Exercise, 1982, 57-61.

ety while, at the other end of the scale, others have preserved the traditional values of an older society. Accepting, however, that all are under pressures making for uniformity and modernisation, it is probably reasonable to seek to understand the attitude of mind of the average citizen to the existing machinery for the administration of justice.

In Sarawak, an observer of the Fifth Division of the State writes of customary law[6] as "a system of *adat* laws which the community traditionally administered to the members for generations without the assistance of any outside agency." Another writer,[7] writing of the Land Dayaks of Sarawak, states that the system of native courts established under the British administration was "alien to the indigenous administration of justice in which disputes between natives are settled by the village headman and a council of elders." A similar situation obtained in Sabah, one writer[8] wisely going so far as to see customary law as the basic law of the land. In their desire for a comprehensive system of law in which there was a mechanism for appeal and a consequent regulation of power, the British sought to formalise the native customary court system and to bring it within the general legal system. Native courts continue to exist in Sabah and Sarawak: but once absorbed into the general legal structure, their ultimate demise becomes only a matter of time.

Such an absorption follows logic, not sentiment, and it therefore brings within its coercive machinery those who might well prefer to remain outside it. What has happened is that the English legal system has gradually intruded into a sphere to which it never belonged and, in doing so, imported the concept of confrontation. Writing of disputes in Terengganu, Salleh Omar writes[9] that the legal system "remains an

[6] Mutang Tagal, "Lun Bawang Customary Law: A Socio-Legal Study," University of Malaya, LLB Academic Exercise, 1979, 37.

[7] Francis Johen Adam, "Customary Law relating to Marriage, Divorce and inheritance Among the Land Dayaks in Sarawak," University of Malaya, LLB Academic Exercise, 1977, 28.

[8] Mary Roberts, "Native Courts and the Institution of Native Chiefs in Sabah," University of Malaya, LLB Academic Exercise, 1976, 1-2.

[9] "Village Politics and Traditional Dispute Resolution Methods: A Case Study on the Disputing Process in a Trengganu Village," University of Malaya, LLB Academic Exercise, 1982, 5.

alien legal system by the nature of its mystifying rules of procedure, aloof court atmosphere and expensive professionals, not to mention the adversary system [confrontation] in trials." In a Terengganu Muslim village, most disputes relate to land ownership and boundaries, stray cattle, the use of water, family disputes or petty quarrels. These are disposed of by the village headman, often with the advice of the elders of the community. One of the elders, Encik Zakaria, is quoted[10] as saying that "in conducting dispute settlements, he is governed by the *Syar'iah*, which is the anchor, while *adat* in the rope that is linked to it." Only a few disputes trickled through to the magistrate's court some fifteen miles away, for "the use of formal court systems ... occurs when there are some economic or political advantages to be gained. And usually the parties do not know each other, or when they do, are not on good terms."[11]

The Subordinate Courts Act of 1948[12] gives local *penghulus* in peninsular Malaysia civil jurisdiction in minor suits (where the subject-matter does not exceed fifty dollars in value), where all parties to the proceedings are "persons of an Asian race speaking and understanding the Malay language"; and a criminal jurisdiction, restricted to a maximum fine of twenty-five dollars, is exercised over "persons of an Asian race." In practice, it seems that these provisions are obsolescent, dating from the good old days when *penghulus* had great authority. With the advent of politics at all levels, and in many instances the transformation of the office from one of hereditary succession to political appointment, the village headman seems to have taken over the position of the *penghulu*. Even so, his authority, arising from a letter of appointment from the Mentri Besar authorising him, *inter alia*, "to oversee the daily affairs of the villagers, and to try and alleviate their problems and difficulties",[13] suggests that the village headman has replaced the *penghulu* as the informal force of conciliation in the village. On important issues there will, no doubt, be recourse to the formal system of law: but only when conciliation has failed.

[10] Ibid., 48.

[11] Ibid., 61.

[12] Act 92.

[13] Salleh Omar, op. cit., app. IV, quoting a Terengganu letter of authority of February 10, 1970.

SYMBOLIC GIFTS

If confrontation causes concern to the Malays, it appears to cause consternation amongst the Chinese, The Chinese can correctly be termed a non-litigious people. As a Russian writer notes,[14] "as a result of the conflict created between the law and Chinese moral and cultural values, the concept of law as an embodiment of the norms of justice, directed towards ensuring the rights of citizens and protecting them from oppression—a concept that has prevailed in Europe since Greek antiquity—never took shape in China." Nor did it take shape in Malaysia, for the Chinese brought with them Confucian views based on the family and morality. In consequence, to quote Goh Bee Chen,[15] "culturally, the common law justice system runs counter to the rural Chinese Malaysian beliefs. The English judicial process requires of a judge a verdict rather than a compromise solution. This necessarily excludes the Confucian concept of yielding and compromise." Indeed, she writes of "the ritualized court settings, the undue reliance on procedural rules, heavy costs and so on" of that process, observing that "to have one's case adjudged in the law court is public display of family shame in the Chinese sense ...".[16]

What an aggrieved Chinese litigant seeks is usually "the restoration of his reputation and his family's 'face' in the eyes of his community. As such, the traditional symbolic gifts (for instance, red candles, red cloth, gold flowers) are more valued than any monetary damages."[17] Harmony out of compromise: this is the objective, and the

---

[14] Vitaly A. Rubin, *Individual and State in Ancient China*, trans. Levine (1976), 117. As an instance of the attitude of a Sarawak Chinese to the problem of evidence, K.H. Digby relates the case of a prosecution of a Chinese for causing "grievous hurt" to another Chinese. Digby as trial judge enquired, "Is the accused going to call any witnesses?' He records: "the question was duly translated, and received an eloquent reply, which was interpreted to me as follows: 'If the Court intends to do justice, witnesses will be unnecessary; but if the Court does not intend to do justice, the accused wishes to call a considerable number.' (*Lawyer in the Wilderness* (1980), 98).

[15] Op. cit., 200.

[16] Ibid., 204.

[17] Ibid., 214.

common law system of confrontation is, in Chinese eyes, a deplorable method of seeking to restore harmony within society. Goh quotes Lee Seok Yew, of the Paloh Chinese school;[18] "Law is one of the many ways of solving problems. However, the manner in which it solves problems is destructive, not constructive. Villagers here observe *li* (ceremony, correct behaviour) and thus there is no need for them to resort to the law courts to settle their problems. Most of them rely on *kan-ching* (good relations) and settle their disputes through mediation."

For the Muslim, then, the *syari'ah*, for the Iban, *adat*, for the Chinese, *li*, with mediation as the key to reconciliation: the mediator taking a much broader view of the issues involved than any common law judge, whose area of investigation is limited by narrow concepts of what is relevant, what irrelevant.[19] What of other communities? Tamils, it seems, favour arbitration by a village headman or elder; indeed, "the practice of settling disputes out of court is ... the virtual preserve of the Tamil Indian," writes one observer, Hon Phaik Hon,[20] adding that "the Ceylonese, Punjabi and Chettiar community who form the upper crust of the Indian society are more litigation conscious primarily because they have the means to bear the legal costs." Poverty is indeed a barrier to common law justice. Writing of a poor community in Malacca in 1981, Heng Aik Luan noted[21] that "65.5% of ... Portuguese-Eurasian householders interviewed ... have yet to step into a courtroom."

---

18 Ibid., 173.

19 "... [O]nce a matter is in the hands of the legal specialists, the lawyers and the judge, they impose their own construction upon it in such a way that both the form and the course which the dispute takes are largely beyond the disputants' control. What is in dispute and how it is to be dealt with are determined by the reach of legal rules ... A narrow concept of relevance also requires that the precise issue in dispute is separated from any larger complex of relations between the two disputants, and dealt with in isolation from their relationship": Simon Roberts, *Order and Dispute* (1979), 21.

20 "Extra-Legal Methods of Settling Disputes," University of Malaya, LLB Academic Exercise, 1977, 34.

21 "Certain Aspects Access to Law and the Legal System by Portuguese-Eurasians in Malacca: A Socio-Legal Study," University of Malaya, LLB Academic Exercise, 1981, 62.

No doubt the tendency to resort to litigation depends upon many factors, some residing in the psychology of the parties, some in their resources, and some in the nature of the remedies available. If a case is likely to extend over a period of several years, then clearly there are advantages in compromise. Even so, even assuming a common law system operating at its maximum efficiency with all the facilities of legal aid for the poor, it seems on balance to be unsuitable for resolving the more common types of disputes within Malaysian society; although for major issues, where confrontation is inevitable, it is doubtless appropriate.

RITUAL

Much of the difficulty found by an Asian observer of the common law appears to lie in the fact that under that system law is seen in similar terms to good and evil, white and black. The plaintiff or prosecutor may win or lose: seldom is any compromise possible.

Yet, without trespassing far into the field of morality, it may perhaps be proper to point out that life can seldom be observed or understood only in terms of good and evil; the imposition of a sentence of death, whipping or imprisonment may be seen as a sort of good by one group of people, a sort of evil by another. And if our concept of good is so uncertain, can our concept of the just be any better?

As noted, the English invented the common law in much the same manner as they invented their national games. Taking two sides as evenly matched as possible they are put in a position of confrontation, then bound by particular rules, which, again, are intended to put them in a position of equality. In golf or racing, there may be particular handicaps: but in the realm of most sport, most litigation, these are not to be observed, even if they exist. Relevance is all: the conflict must be confined within certain rituals, be kept within the limits prescribed by agreed rules, to be applied and interpreted by an impartial referee or judge.

Seen as a game, litigation has its own charm. After all, the essential function of the process of law is to resolve a particular issue as peacefully as possible. What the objectives of the particular resolution may be is a nice point; it may be that justice is sought: or that the law be observed: or that the community should benefit: or that conflict

should end.[22] Insofar as the principles of the common law embody principles of universal application they are not, of course, transplants from an alien culture, for they existed before the common law came into being. Murder is an offence against natural law, whether we view that law as established from eternity by God, or as human reason operating in collaboration with conscience; so that the provisions of, say, a penal code modelled upon a common law in harmony with universal principles is not offensive to the Malaysian mind. Yet the penalty for the offence of murder itself, and the manner in which that penalty is imposed, raise more difficult issues.

To a great extent, it is now possible to recognise the common law system, certainly in relation to dispute and conciliation, as one embodying principles alien to Malaysia. It is alien to the Malays, to the Chinese, to the Tamils, to the Dayaks. For too long the currents of Malaysian jurisprudence have wandered into the shallows of an alien law. The reasons for this are obvious enough: every system has its own inertia; lawyers themselves are conservative in their practice and outlook; and even now, a considerable number of lawyers in practice in Malaysia—and most of the senior ones—have been trained under, and taught to admire the common law system. And old habits die hard.

Furthermore, there is the matter of human vanity. Men, even more than women, tend to love display, to dress up in fine clothes. There is, indeed, a certain beauty in a system which favours (as does the common law) ritual, ceremony and dress. Yet these must be appropriate to their time and place. Once, in 1951, the Chief Justice of the newly-unified judiciary of Sarawak, Brunei and North Borneo (now Sabah) ordered his judges to dress in the English style. One of them, Lascelles J., duly ordered robes, and put them on. On his appearance in court, the Iban litigants collapsed in helpless laughter, convinced that they were attending a *wayang*. The judge adjourned the proceedings, withdrew, put on a khaki shirt and shorts, and resumed the sitting in sobriety. What is appropriate to the Strand or Old Bailey is not necessarily appropriate to Kanowit or Kuala Terengganu.

[22] Alan Watson offers a clear summary of the issues in *The Nature of Law* (1977), especially in Chap. 1.

FILLING GAPS

In a stimulating article of 1971,[23] one of the fathers of Malaysian law, Professor Ahmad Ibrahim, observed that "the lack of a civil law enactment did not prevent the filling of *lacunae* in the law before 1937 [with the FMS Civil Law Enactment] and there is no reason why *lacunae* cannot be filled even if the provisions of the Civil Law Ordinance [now Act 67] were repealed." Then, he considered, Malaysian judges could take into account the provisions of systems of law other than the common law and "in particular the position of Muslim law as the law of the land can be re-emphasized and adequately recognised."

This last comment goes a little too far, since as a general proposition Muslim law cannot be regarded as "the law of the land". Islam is indeed the religion of the Federation,[24] just as the Protestant Church is the established Church of England: but in each case, the state is a secular state, and it is wise to keep religion out of law (as well as out of politics) for the two mix ill. Even so, the issues raised by Ahmad Ibrahim are of considerable importance. The inappropriate character of the common law in the realm of conciliation has been, I hope, demonstrated in a Malaysian environment. What, then, are the options open to Malaysian lawmakers in relation to the operation of the English common law, as now invoked by the Civil Law Act?

These options are three in number: the Act can be left as it is; it can be repealed; or it can be amended. From the foregoing, it may reasonably be deduced that the Act is in itself too restrictive. Malaysia is in Southeast Asia, not western Europe: and since 1972 the United Kingdom has been a member of the European Community, a fact tending increasingly to bring its legislation into line with that of its European colleagues. To remain tied to the apron strings of Mother England is unlikely to be good for the future of Malaysian law.

Yet to repeal the Civil Law Act would leave a vacuum, and is probably unthinkable. Bench and bar both need to anchor themselves in some agreed principles, otherwise they will be unable to declare the law, or advise clients upon it, with any degree of confidence. The commercial law of England, adopted by section 5 of the Civil Law Act, ought to be the subject of codification: but as English law more often

[23] "The Civil Law Ordinance in Malaysia" [1971] 2 ML J viii.

[24] Constitution, Article 3.

than not reflects general principles enjoying international recognition, there is no reason why such adoption should not continue, while a piecemeal codification of Malaysian commercial law is under way.

So the third option suggests an amendment of the Act, to sever the connection with English law and enlarge the catchment area of Malaysian law. Section 3 of the Civil Law Act invokes the English rules of common law and equity; until now, such an invocation has been acceptable: but if amendment is to be made, a suitable model is desirable—for the experience of others is no bad guide, in all fields of human activity.

Such a model may be found just across the border. In Thailand—not a common law country—the question of what law to adopt when local statute law is silent is covered by section 4 of the Civil and Commercial Code.[25] This section provides that in all cases coming within the letter *or the spirit* of any of the provisions of the Code, the Code shall apply. So far, so good: and the reference to *the spirit* of the Code imports a happy flexibility, based on the continental notion of a code in which only general principles are set down.

However, after this broad, general direction, more directions are given:

(a) where no provision of the Code is applicable, *local custom* shall apply, and
(b) Where there is no such custom, the case shall be decided by *analogy* to the provision of the Code most nearly applicable, and
(c) if there is no such provision, the case shall be decided "by the *general principles of law*."

In this manner the Thai judges, who are trained in the civil law system as judges, seek guidance first from their own country, and then from the rest of the world. "General principles of law" is interpreted in a wide sense, the Thai judges being in consequence free to range

[25] Of B.E. (Buddhist Era) 1268. Thai laws are dated according to the Buddhist Era, B.E. 2468 corresponding to 1925 A.D. Deducting 543 from the year of a Thai law will give the approximate date according to the Gregorian calendar.

through the legal systems of the world in order to extract an acceptable solution to any problem before them. In short, they are not fettered to any one system.

Whatever form change may take, it is clear that sooner or later Malaysian law must break out of the chains, loose though they may be, imposed by history and the adoption of the English common law. There is, after all, no sanctity in the common law, which has developed as part of man's eternal quest for justice. Even if the foundations of Malaysian law are enlarged, there will still remain the critical question of procedure: for in many areas, at many levels of law, the inquisitorial is superior to the adversary system.

Yet to achieve an efficient inquisitorial system, it is necessary to have a judiciary trained in its techniques. The assumption that any lawyer can be a judge must first be exploded. Then, perhaps, the way will be open for a truly indigenous Malaysian jurisprudence.

Chapter 11

AGENTS

IDEAL AND ADVANTAGE

It is, as we may have discovered, virtually impossible to define law, for it changes as we observe it, evaporates as we seek to capture it. Each observation of any human being is made in the mirror of a mind that is itself constantly changing, variously selecting now one aspect as important, then another. Yet, as a lover may, in the midst of her changing fashions, see in his beloved some constant elements to love; so can a critical observer discern in the law certain common characteristics of order rather than anarchy; of consensus, rather than coercion; of moral values, rather than turpitude. For law is an art, not a science: it can only be understood with the aid of imagination, sympathy and intuition. The mind must distinguish the important from the unimportant: and here the illiterate accused may be wiser than his learned prosecutor. For it is the spirit of the law that matters, not its letter.

It is this spirit which the lay observer may expect to discover in the legal profession: but it is an unfortunate truth, that the legal profession is not highly regarded by the Malaysian public at large. Lawyers are even more unpopular than the courts in which they appear, the public appearing in general to regard them as a group of avaricious men and women who tend to regard their profession as a business and not a vocation. So, whilst many members of the Malaysian Bar pursue high ideals and are often eloquent spokesmen for the principles of liberty, truth and justice, there are others whose ambitions lie in material advantage and self-advancement. These are the lawyers who tarnish the image of lawyers, who give the profession a bad name.

PRACTITIONERS

The Malaysian Bar as an organised entity is of recent development, the Bar Council dating from 1974. In 1982, the Bar numbered 1,352 in West Malaysia, 220 in East Malaysia (131 in Sarawak and 89 in Sabah).[1] In 1982, the members of the West Malaysian Bar most were English barristers (in April, 901), followed by University of Singapore graduates (260), University of Malaya graduates (114), graduates of New Zealand universities (20) and of Australian universities (8). Of all these lawyers, more than half were at that time of less than seven years' standing at the Bar.

These figures reveal a curious state of affairs, illustrating the extraordinary fact that the majority of Malaysian lawyers in 1982 had received their legal education overseas. In Singapore, the university law school was not established until 1959, with graduates emerging in 1962: whilst in Malaysia, the first faculty of law was established in the University of Malaya in 1972, its first law graduates emerging in 1976, nineteen years after independence—a time lag surely verging on the astonishing. Furthermore, few if any Malaysian lawyers were trained as solicitors, the overwhelming majority being trained by barristers, as barristers—that is to say, as advocates, or as legal advisers operating through the intercession of a solicitor in direct contact with his client. Given the remoteness of an English barrister from the client for whom he acts, there was an unfortunate emphasis in training, on advocacy and litigation advice, rather than on the more mundane affairs that comprise the major part of a solicitor's life. Until the 1980s, therefore, the majority of local lawyers had received their legal education overseas. Since 1976, legal education has blossomed. Malaysian lawyers are now trained at five universities in Malaysia and Singapore (the University of Malaya, the Universiti Kebangsaan Malaysia, the Universiti Teknologi Mara, the International Islamic University and the National University of Singapore) and at over twenty private law schools in Malaysia.

Access to legal practice is also accorded to law graduates of recognised universities in the United Kingdom, Australia and New Zealand, although it should be added that a practitioner must be either a

[1] See Tun Suffian Hashim, 1982 Braddell Memorial Lecture [1982] 1 MLJ xxiii at xxxi.

citizen or a permanent resident. However, the output of local law schools is now formidable, amounting to around 800 graduates annually, with a large proportion coming from the International Islamic University. In all, there are upwards of 9,000 lawyers in West Malaysia (about half of them in the Klang Valley) and up to another 1,000 in Sabah and Sarawak: and the present annual intake into the legal profession is of the order of 1,100.

At one time recognition under the Legal Profession Act 1976[2] was granted to 66 United Kingdom university law schools, but following a critical review in 1999 the number accorded recognition was reduced (January 1, 2001) to 30: a diminution apparently confirming the prediction of Kingsley Amis in 1960, that with an increase in the intake of university students "more will mean worse."[3] At the same time, recognition of the external LLB of the University of London was withdrawn: a setback to many potential lawyers unable to enter local law schools.

Overseas graduates lacking professional qualifications must obtain a Certificate in Legal Practice, and pass or be exempted from an examination in *Bahasa Malaysia*. This Certificate was introduced in 1984, and is not easily obtained. Originally designed to assist less successful students in the United Kingdom, it seems likely in the course of time to become a common entrance examination.

Malaysian women are fast catching up with men in professional and academic accomplishment: indeed, "they account for half the nation's lawyers, 43% of the civil servants and 30% of all doctors."[4] There are several women judges, and women dominate the ranks of the magistracy—to its advantage. In consequence, and with access to local legal education, the development of an indigenous jurisprudence and an increasing emphasis on the study of Islamic law, the character of the legal profession itself is gradually changing. As Nazri Aziz, Deputy Minister in the Prime Minister's Department, said in 1997:[5]

---

2 Act 166.

3 *Encounter*, July 1960.

4 *Asiaweek*, September 10, 1999.

5 Speaking at the opening of the Commonwealth Legal Education Association Conference in Kuala Lumpur on September 9, 1997.

> Article 3 of the Federal Constitution states that Islam is the official religion of Malaysia and as such the importance of the *Syariah* can never be undermined but we are indeed trying to meticulously fuse the *Syariah* and the civil system synergistically and complementarily as part of the country's comprehensive and efficient legal systems. However ... such a process takes time ...

In the longer term, it is not unreasonable to suppose that the common law, the *Syariah* and, indeed, the civil law, will merge in a harmonious corpus of private and public international law.

Lawyers form a sort of privileged elite. The Malaysia establishment uses English as a medium of communication, while encouraging the use of Bahasa for official and educational purposes. The result is a division of society, almost into Disraeli's "Two Nations",[6] in which the rich are remote from the poor. Rahim Said makes the point very effectively when he observes[7] that "culturally, Malaysia operates on a system of intermediaries ... when one desires the assistance of someone in authority, one is expected to take an indirect approach which involves a number of intermediaries. This traditional pattern of behaviour and the exaggerated social distance maintained by the educated elites, further enhance the role of intermediaries. The high educational and occupational status of lawyers makes them almost inaccessible to the layman."

Such a state of affairs inevitably creates the office of contact man or tout, with touting "an integral part of criminal and accident practice among solo lawyers":[8] a practice so widespread that the Bar tends to close its eyes to its incidence. "[T]here is an extensive network of touts reaching into hospital emergency wards. Poor and ignorant accident victims would have little access at all, however [to the legal system] if the laws against contingency fees and touting were actively enforced."[9] The contingency fee, evidence of an agreement under which

---

6 Benjamin Disraeli, *Sybil* (1845): "I was told that the Privileged and the People formed Two Nations" (bk. iv, ch. 8).

7 "Touting Among Solo Lawyers in North Malaysia" [1980] 1 MLJ xii at xvi.

8 Ibid., xvii.

9 Machado and Rahim: "The Malaysian Legal Profession in Transition: Structural Change and Public Access to the Legal System" [1977] 2 MLJ lxxxiii at lxxxv: a concise and invaluable study.

a lawyer will undertake a case in return (if successful) for a slice of the damages awarded is common enough in the United States,[10] but is not valid under section 112 of the Legal Profession Act: although sections 114 and 116 of the Act permit agreements on fees.

The nature of training for the legal profession has until recently tended to require the financing of a lawyer's education by his parents or family, and this has meant that a majority came from the upper classes of society. Originally, a course in England, leading to admission to the Bar there, was an avenue to local admission; then a four-year course leading to a degree of Bachelor of Laws at the University of Malaya or the National University of Singapore offered another avenue; and then qualification from certain universities in Australia and New Zealand offered a further avenue. In 1977 the majority of practicing lawyers were Chinese and Indian, an imbalance reflected in reverse in the government legal service: an unsatisfactory state of affairs, on both counts. However, the recognition of the Advance Diploma in Law of the Institute Teknologi Mara in 1986 opened the door to more *bumiputera* lawyers, and now local graduates dominate entry into the legal profession. According to a ministerial statement in *The Star* (March 15, 2000), from 1995 to 1998 local public universities produced 2,540 law graduates and private institutions around 200 a year.

[10] On the matter of contingency fees, see P.A. Thomas, "Contingency Fees: A Case Study for Malaysia" [1978] JMCL 45, and J.L.C. Yew, "Ambulance Chasing and Contingency Fees in the Honourable Legal Profession: A Plea" [1972] 1 MLJ lx. The comments of Lord Denning in *What Next in the Law?* (1982) 105 ("Legal aid has saved us from the 'ambulance chasers' and from any danger of 'contingency fees' ") are also pertinent: as is the case of *Castanho v Brown and Root* [1980] 1 WLR 823, [1981] AC 552, where a plaintiff in a US court was awarded £1.5 million in damages, of which he received £800,000: more than he would have received, no doubt, in an English court. It is of interest to note that in 1989 a committee of the Malaysian Bar Council proposed a maximum scale of contingency fees for personal accident cases. All disbursements, including those relating to medical reports, and the cost of appearing on the case in court should, it recommended, be borne by the lawyer concerned, unless the court otherwise ordered. The scale of maximum fees proposed was for the first $10,000, 20%; the next $10,000, 17.5%; the next $10,000, 15%; the next $20,000, 12.5%; the next $50,000, 10%; the next $100,000, 7.5%; the next $200,000, 5% and above $400,000, 2.5% (*The Star*, March 14, 1987).

It is to the service of the poor that the attention of the legal profession needs to be drawn. A Legal Aid Act [11] already makes some provision for legal aid, but this is based upon a narrow means test,[12] and what is required is legal aid and reaching into the lower depths of society, but without the absurd extravagance of, for example, the British system. For the poor, the lawyer is regarded as the defender of criminals, and the rural poor at least ask, "Why should I see a lawyer when I have done no wrong?"[13] Like the private doctor, the private lawyer goes where the money is; in 1977 less than 7 per cent of the lawyers then in practice were to be found in the far north and east coast of Peninsular Malaysia.[14]

Yet rapid changes are taking place. Already the legal profession is becoming more representative of the people, even if it still cannot be regarded as close to the poor. Many reforms are still necessary, not least in relation to the matter of the contingency fee—a reform which may well be accepted by the Bar Council, then to be regulated and controlled. Various proposals to this end have been made. It is time they were acted upon. Malaysian legal practice must be adapted to the needs of the people.

JUDGES

The Malaysian judiciary has grown out of the British Colonial Legal Service, an organisation which, in the days when Britain had a Colonial Office, was responsible for the appointment of lawyers to government service in colonial territories. The Service evolved at a late stage in the development of the British Colonial Service, however, and in some respects the service might have been regarded as an illusion, for its officers in fact served under particular colonial governments, and not directly under the Crown. What was a basic feature of the service was the reality of transfer and promotion within British colo-

[11] Act 26.

[12] Based upon definitions of "disposable capital" and "disposable income": but see Part IV of Act 26.

[13] Gurdial Singh, "Legal Problems of the Rural Poor in Malaysia" [1978] JMCL 251 at 263.

[14] Machado and Rahim Said, op. cit., lxxxv.

nial territories: a fact which may explain the uneven quality of the local judiciary.

The first British judge in Malaysia was the quick-tempered John Dickens in Penang, and the last the deliberate James Thomson in Kuala Lumpur. Between these two lie a host of more interesting personalities, whose names remain in the law reports but whose careers are (outside the old Colonial Office annual lists, a useful source for the legal historian) unknown. Recruited for the most part from private practice, they tended to have in general a healthy contempt for much governmental action.

Yet, as the court structure developed with various reforms and constitutional changes, the judiciary in Malaya began to acquire a character different from that it enjoyed in its early days, and a close relationship began to develop with the local legal service: so that the two began to merge, although their functions remained distinct and separate. In 1936 Raja Musa bin Raja Haji Bot became the first local officer to act as deputy Legal Adviser in the Federated Malay States: and two years later, he was an acting judge. His appointment paved the way for other local appointments, and with the ending of the Japanese Occupation these increased. In 1948 Abdul Hamid bin Mustapha, Azmi bin Mohamed and Tuan Syed Sheh Barakbah joined the Colonial Legal Service, and the doors to local recruitment were fully opened.

Even so, it was not until 1958, in what a gifted local lawyer called "the turning point in the history of Bar in this country",[15] that two local private practitioners, Ong Hock Thye and Ismail Khan, were appointed to the Bench. And it took another five years before a local officer, Abdul Kadir, became Attorney-General, and another year before Sir James Thomson retired as the first Lord President of Malaysia. And not until 1983 was a woman, Puan Siti Norma Yaakob, appointed, from the post of Chief Registrar, to the Malaysian Bench.

In spite of the appointments of 1958, the Bench has largely remained the preserve of the government lawyer, who sees judicial advancement as part of the promotion structure of the judicial and legal service. This fact has inevitably served to import a particular philosophy to the Bench. A judge may caustically observe that a case is "yet another illustration of a bureaucratic botch by a misinformed land offi-

[15] R. Ramani, in [1958] MLJ lx.

cial",[16] but a closer look at the report will indicate that the judge is one of the few judges recruited from private practice. Such a comment does not spring readily to the lips of an ex-civil servant.

The consequence of a recruitment policy based on government lawyers is reflected in the prevailing judicial philosophy. If one accepts the theory of "the dominance of conclusion" of Saleilles, as quoted by Cardozo[17] ("one wills at the beginning the result: one finds the principles afterwards; such is the genesis of all judicial construction") then the consequence of making a civil servant a judge brings to the bench an understanding of, and generally a sympathy with, government policy.

Out of this understanding come certain strengths, certain weaknesses. On a survey of judicial decisions since *Merdeka*, one writer[18] can observe that "it is really in the area of constitutional and administrative law that the Malaysian judiciary was found to be in serious want. The judges showed little imagination and easy susceptibility to executive direction." On the other hand, "in private law cases ... [they] have displayed a sense of willingness to consider every case on its own particular merits. The doctrine of binding precedent, though religiously applied, has now and then been disregarded where its application evoked injustice."[19]

On the matter of *stare decisis*, the doctrine seems to have first appeared in Malaysia in 1906.[20] As far as precedent from outside Malaysia is concerned, the tendency is to seek to escape it; and with the breaking of ties with the Judicial Committee of the Privy Council, the doctrine will have only a domestic relevance. In future, it seems likely that the courts will revert to the policy of the Straits Settlements courts in the 19th century, when "it seems clear that a prior decision

[16] Abdoolcader J. in *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ at 40.

[17] *The Nature of the Judicial Process* (1921), 170.

[18] Christopher Foo Kah Foong, "Judicial Decision-making in Malaysia," University of Malaya, LLB Academic Exercise, 1980, 147.

[19] Ibid.

[20] According to Mohd Naseemuddin Ahmad, "*Stare Decisis* and its Development in Malaysia" [1975] JMCL 59 at 67, referring to *Salleh and Hussein v Rex* [1908] SSLR 27.

was overruled or not followed because it had become obsolete or unfit in the circumstances of the case in question."[21]

Islamic legal philosophy, which tends increasingly to colour Malaysian judicial philosophy, does after all permit a certain latitude. As Ibn Khaldour wrote,[22] "If yesterday thou hast given a judgment but upon reflection thou findest reason today to correct thy opinion, do not hesitate to follow the truth as thou seest it, for Truth is eternal, and it is better to change to the Truth than to persist in error." At this point philosophy can properly dominate law: which is as it should be for, as Cardozo says of the judicial process,[23] it is "in its highest reaches ... not discovery, but creation."

Precedents multiply. It becomes increasingly important to hold on to the basic principles on which the law is built. It is these very foundations which the public expect the legal profession to protect, for they are part of the heritage of the many civilisations that make up Malaysia. As guardians, the judges can work to social justice only to a limited degree. The Lord President, Tun Mohd Salleh Abas, was in 1984 quoted as saying[24] that the decisions of Malaysian judges "rest on law which may or may not coincide with social justice. The court is not a barometer to test this issue because we have no right to overrule government policy unless it is contrary to law and [?or] the Constitution." This comment can be construed on the one hand as a short affirmation of positivist philosophy, on the other as a firm declaration of the supremacy of the Constitution: but it does hint at a subservience to policy at perhaps the expense of the individual.

The trouble is that some observations from the Bench have gone further than to suggest an adherence to policy. In 1977 a federal judge had occasion to consider a law which retrospectively denied a person subject to the Restricted Residence Enactment the rights conferred by Article 5(4) of the Constitution (which requires an arrested person to be produced before a magistrate within twenty-four hours of his arrest.

---

21 Ibid., 66.

22 *Les Prolegomenes D'Ibn Khaldour*, Part I, de Slane (trans.), Geuthner, Paris, 449.

23 Op. cit.

24 *The Star*, March 7, 1984.

He observed[21] that the question whether such a law "is 'harsh and unjust' is a question of policy to be debated and decided by Parliament, and therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution ..." The remedy lay not in the courts, but the ballot box.

Whether such a decision is an abdication of judicial responsibility or a brave affirmation of the limits of judicial activism is a question not easily answered. At its birth, the fathers of the Constitution expressly permitted Parliament to dictate what restrictions on liberty might be necessary or expedient, and did not use such a plastic adjective as "reasonable" in relation to such restrictions: so, from the outset, Malaysian courts lacked that freedom of manoeuvre accorded to Indian judges under the Indian Constitution, and have been subordinate to Parliament in an area in which they could hope to be most "creative"—or, to avoid that dangerous and overworked adjective, more responsive to individual needs, when those needs are set against those of society in general.

Given the nervousness with which Malaysian judges approach any conflict between the individual and the State, they have shown themselves in general fairminded in principle and alert in judgment. Yet a feeling may persist, in the mind of the observer, that the judges form part of, and consciously or unconsciously serve to protect, that elite group within society loosely known as the establishment. This is a common criticism of judges and lawyers generally. Even more than the ordinary lawyer, the judge is aloof from the poor; indeed, as a judge his social life is restricted, a factor often dissuading a competent practitioner from accepting appointment to the Bench.

For the spirit of the English judiciary, with all its virtues and faults, lives on in Malaysia. By 1987, only two local law graduates had been appointed to the Bench, and the rest of the judiciary was the product of the English system. Clearly, this state of affairs will change, and the Bench itself acquire a purely Malaysian character. When the change

[21] Raja Azlan Shah F.J. in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187.

occurs, it may be that the qualities required of a judge will have been reassessed.

In Thailand, judges constitute a special type of lawyer. An open examination, with written and oral tests, is conducted for the purpose of selecting judicial cadets. The examination is open to men and women of at least twenty-five years of age who are Bachelors of Law and barristers-at-law, and have had two years' experience of legal work. A successful candidate will be trained for one year in such subjects as penology and Buddhism: on arriving on the Bench he will, unlike, say, his English counterpart, be versed in those areas of human activity into which normal professional practice will be unlikely to take him.

Such a system of course makes a career out of the Bench: but one may ask, why not? Malaysia has suffered much from the arrogance and insensitivity of career colonial judges unfamiliar with the language and customs of the people, and there is no reason to perpetuate a system in which judicial expertise is assumed to exist on appointment. A new Civil Law Act, a system of judicial cadetships, and a Bench of judges alert to the background of every dispute put before them: these could reshape the administration of justice in Malaysia, and bring justice closer to the people than it has been in the past.

FAILURE TO COMMUNICATE

When a formal indictment was served upon him at Nuremberg, Hermann Goering said contemptuously, "Lawyers! They will be no use in this trial. What is required is a good interpreter. I want my own private interpreter."[26] Though the request was reasonable, it was denied. Goering was sentenced to be hanged, but cheated the hangman by committing suicide. Although ruthless, he was astute enough to know that any trial raises a problem of communication. "Only connect," wrote E.M. Forster.[27] Leonard Woolf's great novel of Sri Lanka, *The Village in the Jungle*, illustrates the tragedy that can flow from a failure to communicate, to connect, to understand.

---

[26] Airey Neave, *Nuremberg*.

[27] *Howards End* (1910), motto on title-page.

In an entertaining study of the subject, Teo Say Eng writes[29] that "without [the interpreters' service], all the Malaysian courts would come to a standstill." The importance of the interpreter in a society which uses Malay, English, Iban, Tamil, Punjabi and a variety of Chinese and other dialects cannot be overemphasized. Language is vital to all human intercourse: and in relation to the subtle distinctions of the law, it is essential that these be translated with the utmost accuracy and clarity; for the trial process itself is, albeit the best we can devise for the time being, but a crude instrument in man's search for justice.

Interpreters in the Malaysian courts generally start their careers as student interpreters, graduating by examination to "certified" and "senior" status. Few receive much in the way of instruction, and none receives any court room training, the theory being (and it smacks of English pragmatism) that interpreters learn as they work. "Each court in Malaysia," writes Teo,[29] "is usually staffed with a set of interpreters able to interpret between English and Malay, Tamil, Punjabi and Chinese. Supernumerary staff will be made available if one witness wishes to give evidence in one of the less common Chinese dialects." The more experienced interpreters attend on the High Court, the less experienced in the lower courts.

Since English and Malay are the main languages of the courts, those unfamiliar with either of these languages are inevitably confused by what is going on in court. Indeed, Goh Bee Chen writes[30] that "Chinese litigants who cannot understand these two languages are dumbfounded by court proceedings," and the powerful adjective is surely merited. Inability to understand the framework of the case in which evidence is given must handicap both witness and court.

In these circumstances, the need for skilful and sympathetic interpreters is obvious. Their importance justifies the establishment of a service within the judicial and legal service of the government, for over the foreseeable future the problems of interpreting will remain. Appropriate training for all interpreters, and a status that recognises

[29] "The Role of Interpreters in the Malaysian Court," University of Malaya, LLB Academic Exercise, 1984, 1.

[29] Op. cit., 19.

[30] Op. cit., 202.

the importance of the profession: these should be the objectives of any minister charged with responsibility for justice.

LOW-COST SERVICES

At the other end of the scale from the lawyers and the judiciary are the coffeeshop lawyers, petition-writers and those lively, ever-abused figures of the lawyer's world, the touts. The humble petition-writer is often to be seen at his little table on the five-foot way, having emerged from the more general task of letter-writing: this is, after all, an age of specialisation. In 1977 two observers[31] found petition-writers "to be providing useful, low-cost services, including legal services, such as the preparation of agreements, land transfer papers, and pleadings for civil suits. In some secondary towns, petition writers do a considerable amount of conveyancing work and pay lawyers to attest the papers for them."

These worthy men, who "write, type or in any way prepare petitions, letters or other documents for other persons for reward or a fee," received due recognition under the colonial regime: and a wealth of legislation, dating from the 1930s and still on the statute book attests to the fact that every state of West Malaysia, including the Federal Territory, appreciates their merits. Under these laws petition-writers are licensed (to quote the Perlis Enactment of 1935) provided they are "of good repute and of good character ... and possessed of reasonable qualifications for writing petitions"—whatever these qualifications may be.[32]

These pillars of society apart, the touts are seen as the jackals of the legal world: yet they, too, perform that essential task of intermediary, already noted in relation to the lawyers they serve. The word "tout" has acquired a pejorative flavour, and the tout perhaps deserves better of life. Given another name, how useful he might become; given a controlled function, how respectable.

---

31 Machado and Rahim Said, op. cit., lxxxvi.

32 See Hooker, *The Personal Laws of Malaysia*, 192-5. To some extent, licensing depends on the discretion of the local district officer.

BLOSSOM OF THE LOTUS

All these agents work the engines of Malaysian legal system. Whether that system is appropriate to the needs of Malaysian society is a major question: but one no less important relates to the qualifications and character of those who administer the system, and without whose sympathy and benediction no system can work satisfactorily. For law is above all about people and their lives, their collisions and arguments with each other, their misery and joy. A bad system administered by good men is likely to work good, a good system administered by evil men, ill. The spirit is everything.

Omitted from this brief and sketchy survey is any reference to the police. The Royal Malaysian Police dates from 1806, with the establishment of a police force in Penang. In 1824 Malacca followed suit, and in 1867 the Perak Armed Police were founded. By 1920 there were police forces in all states in Peninsular Malaysia. At present (2000) the force numbers some 79,000 men and women, operating within and a hundred police districts, of which 2,655 are of or above the rank of Assistant Superintendent of Police.

The police represent as it were a neutral force, in the sense that they serve to administer the penal side of the law, and are but agents of those who frame the law: in which context, the three principals involved are Parliament, the political process and the electoral system. To some extent, indeed, all the agents referred to here are puppets of those who make and manipulate the whole political system. In seeking to study Malaysian jurisprudence, this study omits those who design the machinery of the system itself.

For at this point one must move out of law into politics. It is a curious fact that the Federal Constitution, for example, in no place refers to the existence of politics and political parties: yet without the existence of the latter it would be impossible for the *Yang di-Pertuan Agong* to identify that single member of the *Dewan Rakyat* "who in his judgment is likely to command the confidence of the majority of the members of that House":[11] yet that appointment is the pivot on which the whole of the federal government turns. Political parties must exist, for such a confidence to be obtained; how these parties are formed takes us into another area of law, that relating to societies; and how these

[11] Constitution, Article 43(2)(a).

parties are financed would take us into deeper, and perhaps darker waters.

With these matters the jurist is not concerned. He gazes at the blossom of the lotus, indifferent to the mud at its roots: yet it is the mud which nourishes the system and produces the flower. Traditional jurisprudence looks at the whole area of law, will seek to identify the sources of law: and yet it will fail to trace its origins to the ambitions of those hopeful, energetic politicians who have their own particular visions of a model Malaysian society. Those who write on jurisprudence can write blandly of the principles of morality, of professional opinion as a persuasive source of law, of law as a piece of "social engineering": but in the modern state human appetites, working through political parties often funded by far-sighted backers who seek a return on their investment, shape the course at least of statute law. It is sometimes in opposition to these, that the agents of law referred to in this chapter operate.

Chapter 12

CRIME

THE HISTORY of Malaysian criminal law[1] since 1786 shows a steady move towards an increasingly humanitarian system, even if the twin abominations of hanging and whipping still remain on the statute

[1] We are not concerned here with a specific definition of that elusive term, "a crime". There is a classic maxim of law, *actus non facit reum nisi mens sit rea*, an act does not make for guilt unless its doer has a guilty mind. That "guilt" can range from the intentional or wilful, to the careless or negligent act. And there are wrongs or offences of "absolute liability", where the state of mind of the doer is irrelevant.

There is much research yet to be done into Malaysian criminology. Some statistics are available. In the first ten months of 1986, for example, "there were 10,734 cases of violent crimes, including murder, attempted murder and armed robbery" (*New Straits Times*, January 1, 1987). In that period there were 315 murder cases, compared with 327 for the whole of 1985. "A substantial number of the murder cases involved Indonesian illegal immigrants who were killed as a result of fights at construction sites. A police spokesman said investigations into the murder cases were hampered by lack of information from the public. There appears to be a sense of apathy towards such cases." (Ibid.) Estimates of the number of illegal immigrants from Indonesia varies from 330,000 (according to the Indonesian Director-General of Immigration [*The Star*, January 21, 1987] who estimated that 200,000 had entered Peninsular Malaysia and another 130,000 East Malaysia) to a million (according to the Malaysian Trade Union Congress). On April 11, 1998, the *International Herald Tribune* stated that the "the government says there are 800,000 illegal foreign workers in Malaysia. Unofficial estimates put the number as high as 1.5 million." Most come from Indonesia, followed by Bangladesh, India, the Philippines, Pakistan and Myanmar.

As a matter of interest, the following tables of criminal statistics may be useful in assessing the progress of society. Unfortunately, at the time of going to press, more recent statistics are not available.

STATISTICS ON INDEX CRIME—WHOLE OF MALAYSIA 1976-1986

VIOLENT CRIME

Offences	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
Murder	230	250	240	263	179	258	225	303	293	327	386
Attempted Murder	86	55	47	63	78	52	55	51	63	59	84
Gang Robbery With Firearms	45	18	19	30	40	51	48	50	61	55	56
Gang Robbery Without Firearms	217	309	322	332	342	354	384	376	460	632	621
Robbery With Firearms	764	335	424	417	449	456	477	668	760	950	1022
Robbery Without Firearms	2583	3053	2873	3772	3906	4076	3601	4242	4710	6244	7331
Rape	289	303	312	388	368	360	441	460	470	530	688
Voluntarily Causing Hurt and Grievous Hurt (Sections 324-326 of the Penal Code)	1524	1796	1750	1998	2019	1955	1931	2059	2163	2684	2601

PROPERTY CRIME

Offences	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
Housebreaking & Theft by Day	2533	3352	4675	5492	5250	4434	3890	4392	4478	5092	5171
Housebreaking & Theft by Night	12300	12466	12547	14014	14418	15297	15945	17385	18430	20413	20374
Theft of Van/Lorry	143	157	179	178	254	257	222	242	372	466	557
Theft of Motorcars	899	1052	1220	1325	1382	1557	1764	1829	2271	3140	3813
Theft of Motorcycle/Scooter	4764	4366	5743	6426	6646	6773	7724	9600	11280	13654	16056
Theft of Bicycle	8650	8291	7560	6978	7259	7090	5793	5068	5039	4673	3832
Other Theft	26567	29489	29177	29290	28133	27948	25232	27035	27089	30305	32508

Source: Royal Malaysian Police

book. Indeed, progress has been rapid, given the initial tensions between the philosophy of indigenous Malaysian law, Islamic jurisprudence, and the outside pressures of advanced opinion in that Western world with which Malaysia has so many contacts.

Crime and punishment go together, as manifestations of the law of *kamma*, of action and reaction, cause and effect. Certain crimes are accepted as being against humanity itself: in 1984 the Warnock Committee in England was concerned with the matter of experiments upon human embryos, an issue raising the question of the right to life itself. Natural law is again an active force in human affairs, especially since the Nuremberg trials of 1945 laid down as a principle of international law that inhumane acts are "crimes against humanity", whatever the internal law of a country may dictate. So, just as the landing of the Americans on the moon in 1969 may be said, in the realm of technology, to mark the greatest achievement of 20th-century civilisation, it may well be that the Nuremberg trials mark the furthest advance of mankind, so far, towards the acceptance of a common law of mankind.

According to Winstedt,[2] the Malays of old "instinctively preferred a legal system fixed and humane as their primitive custom had been": a fact facilitating the adoption of the Indian Penal Code of 1860 (although the Code in its origins dates from 1834) in the Malay States. Writing of Terengganu in 1828 an English writer, Begbie, wrote[3] that the administration of justice there was "distinguished by the same laxity that prevails in all the Malay States ... Fining, mutilation and capital punishments are a terror to all evil doers, and even of these the former appears to be either unknown or rarely practised."

Earl, writing in his *Eastern Seas* in 1835[4] wrote that the many Arabs in Terengganu had "succeeded in the partial introduction of the Mahomedan Code of laws; and their law of succession, which gives the chief power to the strongest, not to those who have the most right, has occasioned the constant commotions which take place in this, and every other Malay State." However, he added, "many of the *pangerans* ... are in favour of the *Undang-Undang*, and *Adat Melayu*, the old Ma-

2 *The Malays: A Cultural History* (1961), 107.

3 Quoted in Winstedt, ibid., 107.

4 (1835, repr. 1971), 186.

lay codes, so that between the two there is no law at all, and every man must be the redresser of his own grievances."

The Koranic penalties were based on a different philosophy from that of the early Malays. Of theft, it is written,[2] "as to the male or female thief, cut off his or her hands: a punishment by way of example, from God, for their crime; and God is exalted in power." But, the passage continues with more mercy, for "if the thief repent after his crime and amend his conduct, God turneth to him in forgiveness." Islamic jurists agree that petty theft is exempted from such punishment: and a sense of mercy runs through the Islamic law of homicide, for "if any remission is made by the brother of the slain, then grant any reasonable demand and compensate him with a handsome gratitude."[3]

Crimes relating to sex were another matter. Those taken in the act of adultery were liable to be stoned to death, an extreme penalty saved from caprice by reason of the strict nature of proof required. It is unlikely that all these moral penalties were generally acceptable: but the administration of justice had, after all, a link with the revenues of the state, a link virtually overlooked in contemporary surveys of law, when the salaries of judges and magistrates are not affected by the amount of fines they may impose.

It was not always so. Anderson, writing in 1824,[4] quotes Francis Light as saying that "the King [of Kedah] is a weak man, too fond of Money, very relax in the execution of the Laws, not so much from a principle of clemency, as timidity ... He receives a deal in presents and fines; every person who has any demand to make, or suit to prefer first presents a Sum of Money which he thinks adequate to the demand; if the King approves of the Sum, he signs the Paper, and the Suit is obtained, unless another person comes with a greater Sum". The ill-fated Birch, writing of the Perak of the 1870s, records[5] that "all the chiefs, within their respective Districts, are Magistrates, and can inflict fines.

---

2 *The Koran Interpreted*, 135 Sura V, Verse 41 (A. Arberry trans. 1976). For a useful survey, see David F. Forte, "Islamic Law and the Crime of Theft: An Introduction," in 34 Clev. St. L. Rev. (1985-86), 47.

3 Ibid.

4 *Political and Commercial Considerations Relative to the Malayan Peninsula* (1824, repr. 1965), 153.

5 *The Journals of J.W.W. Birch 1874-1875*, 380.

When the fine is above $25 it all goes to the Sultan. When below that sum it is appropriated by the chiefs who inflicted it. No accounts or records are kept. The mischievous effect of such a rule cannot be disputed, and it even extends to the Sultan himself, who prefers fining a man when a murder is committed to inflicting capital punishment, because he pockets a larger fee."

The influence of the English was, therefore, considerable. Winstedt says[9] that "it was English jurisprudence that first showed the Malay any distinction between constitutional, criminal and civil law." It was after all not easy for a dedicated Muslim to distinguish crime from sin, for the all-encompasssing nature of Islamic law, embracing the whole of an individual's waking life, even now makes the distinction sometimes a fine one. At what point in a guilty act should the penal law intervene? State legislation has to some extent solved the problem, by legislating for offences in relation to Muslims: but once an offence is created, the issue of abetment can arise. A local precedent has been cited for the proposition that since a woman can be convicted of the abetment of rape, a crime she could not commit, then those non-Muslims abetting the commission of offences by Muslims can be rendered culpable in the eyes of the law: an argument that may well trespass on the principle of freedom laid down in what is perhaps the most important article of the Constitution.

In 1909, Conlay, a British officer posted to Terengganu, "was appalled by the administrative apparatus he had to deal with—a corrupt and inefficient regime very like [that] found in Kelantan. The police, twelve in number, were lawless and the people honest."[10] The struggle between Islam and a secular law continued. One day, sometime between 1916 and 1925, Humphreys, the British Adviser in Terengganu, arrived at a meeting of the State Council, to find "everyone wearing long faces. A woman had been accused of adultery, they said. It was a very serious crime; the charge was backed by evidence, and what did the British Adviser propose to do? Humphreys had the woman brought forward. Then he took the whole council and the accused as well out to the site of a road-building operation where there were piles of stones to be used for metalling. The Holy Koran, he reminded them,

[9] Op. cit., 108.

[10] Heussler, *British Rule in Malaya* (1981), 203.

prescribed that adulterers should be stoned to death. As the responsible authorities, they would no doubt wish to administer the punishment. He left them to it, and nothing more was heard of the matter."[11]

Based on a large body of learned writings, Islamic law took deep hold in certain areas. Abdullah Alwi Haji Hassan writes[12] that "Kelantan enjoyed the reputation of being vigorous and strict in its application of Islamic criminal law during [1937 to 1886]. Wan Ahmad, the Sultan of Pahang (reigned 1863-1914), had occasion to remark on the severity of punishment of offenders and the application of Islamic criminal law in Kelantan ... The judicial system was solely, at this time, based on pure Islamic law, and customary law was permitted to be applied in so far as it did not conflict with the principles of the former law." The writer notes, however,[13] that the Kelantan system "had no parallel in pre-colonial Malay States with the exception of Johor"; that state being close to Singapore, a modern Islamic system emerged there at an early stage, formally beginning with the establishment in the 1880s of a religious department.

Even in Kelantan, however, the reign of Islamic law was to be short, for by the turn of the century the laws applied in the courts of Kelantan (except the *shari'ah* courts) "did not reflect the purely Islamic legal norms but appeared to be a chaotic mixture between Islamic law and customary observances in the state."[14] With a new structure of courts established in 1904, under British rather than Thai influence, Islamic law and Malay customary law ceased to be applied in criminal cases, and Islamic law withdrew to the sphere of personal law, enforced by the *shari'ah* courts. Even in this isolated Muslim state, the principles of the English legal system were increasingly felt.

[11] Ibid., 215. In Mukalla, South Arabia, in 1965, the writer visited the prison, where the Arab superintendent said that, a few years earlier, a religious court in the Hadhramaut had sent an adulteress to be stoned. "I put the woman in the wadi," he explained, "then my men ranged in front of her, with piles of stones. They threw a few at her. Then I told her, that's enough, now, go!" He was a kind man.

[12] "Kelantan: Islamic Legal History before 1909," *Malaysia in History*, vol. 23 (1980), 13-14.

[13] Ibid., 17.

[14] Ibid., 18, quoting W.A. Graham (1904).

The influence of these principles on the legal development of Malaysia began, of course, in Penang in 1786 and Malacca in 1824. In these settlements, founded by the East India Company, there was a tendency to look to Indian law: a body of law then in course of moving towards a codification of its essential elements. With the Charters of Justice of 1807, 1826 and 1855 there was (possibly not in pursuance of the intentions of those who framed them) an adoption of the principles of English law. Yet these, administered by officers of the East India Company, were coloured by Indian experience, and when the great Indian codes emerged—a code of civil procedure and limitation of actions in 1859, penal law in 1860, criminal procedure in 1861 and evidence and contract in 1872—these offered brilliant beacons in the cloudy landscape of 19th-century Asian law.

As soon as Penang and Malacca could break away from the principles of purely English law, a change that could only come with the establishment by local legislation of local courts in 1873, it was possible to apply the Indian codes with a confidence hitherto lacking. In 1871 the Indian codes of penal law and criminal procedure were formally adopted in both places, with the Indian evidence code in 1893: precursors of a strong Indian influence in subsequent Malaysian legislation, just as India had earlier been, and was later to be a source of inspiration in the realm of Malaysian constitutional law.

These reforms in the law, often of a dramatic character not wholly appreciated even several decades after *Merdeka*, had their repercussions in the Malay States. In 1884 Perak formally adopted the Indian Penal Code; and the provisions of that code, and its ancillary code on criminal procedure, gradually trickled into the Malay States through the agency of British officers and Malay magistrates, who must have seen (both groups) in their provisions considerable improvements on their own domestic laws. While the Federated Malay States did not formally adopt the Indian Penal Code until 1905, its principles were probably accepted and applied before that date. Gradually, the system of administration of justice became rationalised, fines going into state revenues and no longer forming part of the personal prerequisites of the judge. Even so, in parts of Malaysia such as Sarawak, fines may still be regarded as designed "not so much to punish the offender but to appease the gods and the spirits."[15]

[15] Sirau, op. cit., 46 fn.

Under the influence of liberal 19th-century ideas, Malaysian concepts of crime and punishment gradually developed. The Malaysian penal system is, for good or bad, as one observer writes,[16] "largely modelled on the British penal system." At first concerned only with punishment, it has tended to develop a reformative character, so that there has been a spread of rehabilitation centres, centres for protective custody and approved schools, seeking to equip the prisoner for civilian life, on his abrupt release from the security of prison to the uncertainty of a free life. As Oscar Wilde wrote,[17] "dreadful as are the results of the prison system—a system so terrible that it hardens their hearts whose hearts it does not break, and brutalises those who have to carry it out no less than those who have to submit to it—yet at least amongst its aims is not the desire to wreck the human reason. Though it may not seek to make men better, yet it does not desire to drive them mad." A policy designed to deter often makes things look worse than they are: even the penalty of life imprisonment is in fact only one for twenty years,[18] and remission can reduce this by one-third. On the other hand, punishment designed to reform could produce the horrors of *A Clockwork Orange*.[19] With doubtful degrees of success, legal philosophy has sought to make punishment deterrent, preventive, reformative and retributive: and perhaps in the end, only that which is retributive gets close to the norms of justice.

In line with the Victorian philosophy so clearly set down by the prisoner Oscar Wilde, Malaysian prison laws, now dating from 1952 and 1953,[20] are based upon a policy set out, curiously enough, not in the parent statute, but in the rules made under it. Here, the tenor of prison administration is defined as discipline and order, with fairness; prison officers must lead by example and treat their wards "with kindness and humanity"; and their object is to foster self-respect and a

[16] Gunasegaram Singaravelu, "The Treatment of Offenders in Malaysia," University of Malaya, LLB Academic Exercise, 1981, 35.

[17] Petition from Reading Gaol to the Home Secretary, July 2, 1896.

[18] Penal Code (Act 574) section 57.

[19] *A Clockwork Orange* by Anthony Burgess (Heinemann, 1962).

[20] Prisons Ordinance 1952 (81 of 1952) and Prisons Rules 1953 (LN 326/53). See now Prison Act 1995 (Act 537); Sarawak, Caps. 24, 25; Sabah, Ordinance 7 of 1956.

sense of personal responsibility on the part of every prisoner, inculcating habits of good citizenship and hard work and so encouraging them "to lead a good and useful life on discharge."

To these ends, prisoners are on admission classified, partly to facilitate their training and partly to minimise "the danger of contamination" from hardened offenders and the like. With a view to encouraging good conduct and industry, and to facilitate reformative treatment, prisoners sentenced to over one month's imprisonment are entitled to remission of one-third of their sentences. Women are similarly entitled, and they (together with men over fifty-five years of age, and those under sentence of death) are exempted from whipping. Prison punishment may in general extend to confinement in a punishment cell, on a limited diet, for up to thirty days, and up to twenty-four strokes with a rattan of not more than half-an-inch in diameter; and solitary confinement is limited to ninety days in a year, for any prisoner. Such are part of the minutiae of prison life and discipline. The state of any society may be determined by the manner in which it treats its prisoners.

Whipping illustrates one of the more severe features of the Malaysian system of justice, seen at its most extreme in the penalty of death by hanging, the convicted criminal being (in a time-honoured phrase, now mercifully forgotten in its country of origin) hanged "by the neck till he is dead."[21] Otherwise, imprisonment is the norm, although the modern paraphernalia of police supervision, bonds for good behaviour and the like, exist. One peculiar feature of Malaysian law, however, lies in the law relating to restricted residence.

Originally conceived in 1933 as a remedy for crime in the Federated Malay States,[22] the law now runs throughout the whole of Malaysia. Under the Enactment, the Minister may order a person to reside in a particular area, either for life or for a term to be specified by the Minister. Exactly what the grounds for such an extraordinary order may be are not made clear; all the law requires from the Minister is a reasonable suspicion that a person should be so confined; and whether the inhabitants of the chosen area are consulted is obscure: probably they are not. The only guide offered by the law to the Minister is a sug-

[21] Criminal Procedure Code (Act 593), section 277.

[22] Act 377.

gestion that the person so confined is given to seditious activities, incitement to violence, or breaches of the peace. That the law is actively in use is suggested by a series of cases on the Constitution, beginning with the first case seeking to interpret the Constitution, in 1958.[23] Indeed, in 1976 Article 5(4) of the Constitution was amended with retrospective effect, to cover all those arrested or detained under the law relating to restricted residence, and to exempt them (or rather, their captors) from the requirement of production before a magistrate within twenty-four hours of arrest. In 1977, the Federal Court ruled the amendment constitutional.[24]

Another curious feature of the Malaysian criminal law is to be found in the Prevention of Crime Ordinance of 1959.[25] Under the Ordinance, members of secret societies, drug traffickers and traffickers in women and girls and certain habitual criminals, together with persons banished under the Banishment Act[26] or subject to orders under the law relating to restricted residence, may be arrested; made the subject of an inquiry by a person appointed by the Minister for that purpose; and if the inquiry officer so recommends, and the Minister agrees, the name of the person so arrested is entered on a special register.

The consequences are strange. The Ordinance can well be regarded as unique. If, for example, a person so registered is found "near any place in which any act of violence or breach of the peace is being or has just been committed" he will, unless he can satisfactorily account for his presence there, be guilty of an offence. Furthermore—and this serves to highlight another aspect of this extraordinary law—if the person so registered commits any one of a number of specified offences under the Penal Code, the Societies Act and the Corrosive and Explosive Substances and Offensive Weapons Ordinance of 1958, he will be liable to imprisonment for a term twice as long as the maximum prescribed for the offence, and also to whipping.[27] In all, the Ordinance is an original attempt to deal with a critical situation: the statute book of the period 1958-1961 being littered with interesting at-

[23] *Chia Khim Tze v Menteri Besar, Selangor* [1958] MLJ 105.

[24] *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187.

[25] Act 297.

[26] Act 79.

[27] Act 297, section 17.

tempts to deal with particular problems presented by crime, of which the Kidnapping Act of 1961[28] and the Prevention of Crime Ordinance are the most extraordinary.

The belief in the efficacy of positive law engendered by these measures led to the development of a theory of mandatory and often draconian punishments for particular offences regarded as attacking the very foundations of society. This philosophy reaches its nadir in the Dangerous Drugs Act of 1952 as amended in 1983.[29] Under this Act any person who is found in possession of (*inter alia*) 15 grammes or more of heroin or morphine is presumed, until the contrary is proved, to be trafficking in such drug, and is thereupon liable to the death penalty.[30] Again, where any person is found guilty of any offence under the Act which is not punishable by death, and the subject matter of the offence is 5 grammes or more of heroin or morphine, or 250 grammes or more of prepared or raw opium, he is punished with imprisonment for life or a term of not less than five years, and whipping with not less than six strokes.[31]

It seems doubtful whether any of these severe laws had anything more than a temporary, tonic effect on society. Legislators rest content with having pursued a policy of deterrence; rehabilitation centres are established for the reformation of those addicted to drugs; propaganda campaigns are mounted on the evils and perils of drugs, *dadah*;[32] yet still the poison spreads. Legislation cannot solve the ills of society, which have roots too deep for the lawmaker who assumes that all read, understand and obey his every command. At this point, where the ills

---

[28] Act 41 of 1961: now Act 365.

[29] Act 234.

[30] Ibid., sections 37 and 39B.

[31] Ibid., section 39A.

[32] Extending (quite properly) to announcements of the death penalty for drug trafficking on incoming MAS flights. Many Westerners still seem to suppose that they carry their own mild, domestic law with them. The Deputy Home Minister reported in the Dewan Negara on December 3, 1986 that there were 21 prisons in the country, containing (as at the end of August 1986) 19,329 prisoners. According to a report, "Grim Reminders to Traffickers," by Nigel Lilburn (*New Straits Times*, August 13, 1986), "more than half the inmates in Malaysian prisons are there because of drugs."

of society cannot be mended by the incantation of a lawyer, the legislator must hand over his duties to the philosopher who can find in the truths of religion and philosophy the essence of human personality; to the artist, who in his work will give men an understanding of each other; and in the writers whose ideas fashion the forward movement of society and shape the thoughts of youth.

In Malaysia, the death penalty is mandatory for a limited number of crimes. Of these, the most important are those of murder (section 302 of the Penal Code[33]) and drug trafficking (section 39B of the Dangerous Drugs Act[34]), as noted earlier. In addition to the crime of murder, section 121A of the Penal Code invokes the death penalty for certain offences relating to the *Yang di-Pertuan Agong* and the Rulers. Furthermore, a mandatory death penalty also arises under the Internal Security Act[35] (sections 57 and 59) and the Firearms (Increased Penalties) Act[36] (sections 3 and 3A). Capital punishment is therefore a norm of Malaysian law, apparently explicitly justified by Article 5(1) of the Constitution, under which "No person shall be deprived of this life or personal liberty save in accordance with law." The death penalty remains as retributive and deterrent, an emotional response by society to such offences as it abhors. Logic has little or no place in it. Were the system of criminal justice infallible, then a case for such a penalty might be made out: but the system is fallible, subject to miscarriages of justice.

In another age, hanging and whipping will be as alien to society as the finding of guilt by the insertion of hands in boiling oil, recorded in the 18th century by Hsieh Ching Kuo (d. 1794) of trials in Kelantan: or the penalty of being boiled to death imposed on the Bishop of Rochester's cook, in the England of Henry VIII.[37] Until then, the legal philosopher must seek to devise punishments appropriate to the crime, the criminal, and society, ever mindful of the imperfect character of human justice.

---

[33] Act 574. From 1975 to February 1, 1997, 639 persons were sentenced to death: *The Sun*, March 13, 1997.

[34] Act 234.

[35] Act 82.

[36] Act 37.

[37] 22 Henry VIII c. 9: "It is ordained and enacted by authority of this present Parliament that the said Richard Rose shall be therefore boiled to death ..."

Chapter 13

CORRUPTION

IF THE OBJECT of creating a legal system is to maintain peace and harmony within society by ensuring that justice is done to all, without fear or favour, then it is essential that the system be kept free of corruption. The word "corruption" is difficult to define. A contemporary writer[1] offers a contemporary meaning:

> The perversion of anything from its original pure state, used particularly of accepting money or other benefit in consideration of showing favour to or benefiting the donor, and of the degrading influence of obscene publications.

Disregarding the matter of obscenity, itself a special source of corruption, the definition is a useful guide. Another writer, Syed Hussein Alatas,[2] who has made a study of the subject, observes that

> we have ... three types of phenomena contained in the term corruption: bribery, extortion and nepotism ... Essentially there is a common thread running through these three types of phenomena—the subordination of public interests to private aims involving a violation of the norms of duty and welfare, accompanied by secrecy, betrayal, deception and a callous disregard for any consequence suffered by the public.

The word "corruption" itself has an odd history, one indicating the confusion attendant on its exact meaning. At one time, "to corrupt" meant "to seduce a woman from the path of virtue", and the example

---

1 Walker, *The Oxford Companion to Law*, 195.

2 *The Sociology of Corruption* (1968), 11-12.

was so apt, that it came to mean to seduce an official from the way of duty. In or around 1765 bribery tended to be confined to the judicial function, and Blackstone's *Commentaries* defined bribery as "a crime committed by a judge or other person concerned in the administration of justice", a definition also covering lawyers as officers of a court; but as the boundaries of political action were extended, definitions became broader. Corruption arises from many vices, but all seem to involve (to quote the *Shorter Oxford Dictionary*) "the destruction or spoiling of anything", the transformation of what is sound "into an unsound, impure condition". The Arab will speak of a good man as one possessing a "white heart", one free from evil. We know virtue when we meet it, but virtue itself is difficult to define; lack of virtue is more common, more easy to identify, but still elusive of definition.

Poverty breeds corruption. One method of reducing corruption is to ensure that all those in the public service who are most liable to the temptations of bribery and extortion are paid a reasonable salary, and that this is constantly reviewed and kept in line with the cost of living. At the same time, and on a more general front, it should be the policy of government to seek to reduce the gap between rich and poor, so that no startling anomalies exist. To produce an egalitarian society is not possible; contrary to the belief of Rousseau and his supporters, men are not and never will be equal. The best that can be done is to aim at a reasonably just distribution of wealth, but one not achieved by corrupt means.

For the lawyer, corruption, whatever form it takes, whatever definition is adopted, is an insidious evil, striking at the very heart of a system of justice. Just as the norm of the law is the reasonable man, so is the norm of justice the honest and impartial public officer. Without such an officer, all else is useless, all else ends in disharmony. Corruption poisons the system as surely as bad medicine. Whatever the difficulties may be, the majority of honest folk must ever seek to extirpate corruption from the system, by all lawful and proper means.

The Islamic scholar Ibn Khaldun (A.D. 1332-1406) "considered the root cause of corruption to be the passion for luxurious living within the ruling group. It was to meet the expenditure on luxury that the ruling group resolved to corrupt dealing."[1] Even earlier, Wang Ah

[1] Quoted, ibid., 9.

Shih (A.D. 1021-1086), the Chinese reformer, saw "bad laws and bad men" as "the two ever-recurrent sources of corruption ... He classified human beings into two groups, the morally mediocre and the morally high. Changes of fortune did not affect the latter. The danger comes when moral mediocrities gained control of Government ... In the last analysis the two absolute prerequisites against corruption, he believed, were power-holders of high moral calibre, and rational and efficient laws. Neither," observes Syed Hussein Alatas,[4] "could function one without the other. The one conditioned the other. Both had to be present for any effort to be successful."

In Imperial China, under the Ch'ing dynasty, the position of a district magistrate was in some important respects similar to that of the district officer in pre-*Merdeka* Malaya. Like that officer, the magistrate combined judicial, executive and sometimes, by delegation, legislative functions. Both were strangers to the district, both appointed for a limited time: so they had no ties, family or otherwise, with those over whom they had authority. Like his predecessor in China, the district officer found no class of professional advocates to impede or assist him—whichever philosophy one adopts in relation to the necessity or otherwise of the legal profession.[5] Both, too, were subject to disciplinary regulations relating to the acceptance of gifts from members of the public.[6] The British district officer was paid a salary sufficient to meet his reasonable requirements. However, in China "from the time of Yung Ching (1723) the central government paid the magistrate *yang-lien yin* ('money to nourish honesty') but this salary was insufficient to meet his public expenses and private expectations. It was

---

4 Ibid., 7-8.

5 In this context John T. Noonan, Jr notes, in *Bribes* (1983), 769, "what is conspicuous in China are (1) the absence of advocates, a class with a professional interest in preserving the court from bribery; (2) a political system that encourages charges of corruption against magistrates; (3) a religious tradition that emphasizes the paradigm of an unbribeable deity."

6 In Sarawak in the 1950s a civil servant who received a gift from a member of the public in circumstances which rendered its return a matter of embarrassment was required to deliver the gift to the Treasury. The Accountant-General put a value on the gift, and the civil servant could then, if he wished, on payment of the assessed value of the gift to the Government, take possession of the gift itself.

taken for granted that he also received *lou-kuei* ('customary fees') ... Magistrates regularly retired with substantial fortunes."[7] The British district officer retired with a modest pension.

The punishment of tattooing was used in China in relation to corrupt officials who, on a first conviction, were tattooed with the words *tsang-fan* ('bribery criminal') on their arm: a second conviction entailing a similar tattoo on the face. It seems that as society advances, punishments become less extreme; mutilation is replaced by fines, and branding and tattooing by temporary ignominy. These changes reflect an increasingly humane approach to punishment: but sometimes doubts arise as to the adequacy of the contemporary sanction of fines and imprisonment within a society which tends to praise the criminal and despise the victim.

In the socialist state, corruption seems to present a special problem, since under such a regime the state may control all imports, notably those of luxury goods. The only means of access to such imports may be, therefore, either membership of the party controlling the state, or a bribe to the responsible official. Since socialism spawns bureaucrats as exuberantly as a stagnant pool breeds mosquitoes, officials control almost all aspects of life. The curious investigator need go no further than modern Yangon, to observe the economic consequences of the socialist state: but the pattern is repeated with variations across the world. Indeed, socialism demonstrates the fact that a system of government can of itself give rise to, and often exist upon, a great corruption of officialdom.

Sporadic attempts at the control of corruption have been made in the field of legislation. The Penal Code (modelled on the Indian Penal Code) offered, and continues to offer, a basic form of control, by making it an offence for a public servant to take anything other than legal remuneration "as a motive or reward for doing or forbearing to do any official act."[8] While an Indian writer[9] has observed of the (Indian) Pe-

[7] Noonan, op. cit., 768-9; a footnote based on Watt, *The District Magistrate in Late Imperial China* (1927) and T'ung-Tsu Ch'u, *Local Government in China Under the Ch'ing* (1962).

[8] Penal Code, section 161.

[9] Suresh Kohli, "The Psychology of Corruption," in Suresh Kohli (ed.) *Corruption in India* (1975).

nal Code definition of a corrupt person, that it offers "a one-sided, one-dimensional legal interpretation of corruption", for some years the provisions of the Code, coupled with a tight discipline within the civil service, served to keep corruption in check in Malaysia. The problem became more acute. In 1967 an Anti-Corruption Agency was established, to give way in 1973 to a National Bureau of Investigation intended to invigorate attempts to reduce corruption.[10] Even this was thought inadequate, and in 1982 the National Bureau was replaced by the Anti-Corruption Agency.[11] This Agency is under the control of a Director-General, who is appointed by the *Yang di-Pertuan Agong* on the advice of the Prime Minister[12] and holding office "at the pleasure of the *Yang di-Pertuan Agong*, subject to the advice of the Prime Minister."

The Anti-Corruption Act of 1997, under which the Agency is now established, contains several features common to much legislation, itself designed to fortify the provisions of the Penal Code: for in 1961 the Prevention of Corruption Act had been enacted[13] for "the more effectual prevention of corruption." The Act of 1961 created a presumption of corruption where any "gratification" (a term given a wide meaning) had been paid to or given to or received by a person employed in a "public body" (another term given a wide meaning). It provided that where a person accused of corruption cannot satisfactorily account for his pecuniary resources, or if his property is disproportionate to his known source of income, then this fact may be accepted as corroborative of corruption; it extended to Malaysian citizens outside Malaysia; and it imposed a maximum penalty of seven years' imprisonment and a fine of ten thousand dollars.

In spite of its presumptions, the Act of 1961 and the provisions of the Penal Code proved inadequate and while remaining on the statute book, were supplemented by new legislation made under Article

---

10 See Biro Siasatan Negara Act 1973 (Act 123).

11 See Anti-Corruption Act 1997 (Act 575).

12 It is perhaps unfortunate that the appointment is not imported into the Constitution itself, in a similar manner to that of, for example, the Auditor-General since it is clearly desirable that it be seen to be an appointment free of political influence.

13 Act 57.

150(2) of the Constitution, in the form of the Emergency (Essential Powers) Ordinance 1970.[14] The Ordinance was promulgated so that "immediate action" could be taken against ministers, deputy ministers, parliamentary and political secretaries, member of state legislative assemblies and public officers generally. The Ordinance enables the Public Prosecutor to freeze the bank accounts of anyone using "his public position or office for his pecuniary or other advantage", and provides a maximum penalty of fourteen years' imprisonment and a fine of twenty thousand dollars.

In 1997 the earlier Acts were consolidated in the Anti-Corruption Act 1997. The progress of the law on corruption has therefore been towards progressively heavier penalties[15] and prompter procedures than the Criminal Procedure Code and the Penal Code could provide yet, as with the legislation relating to drug trafficking, it seems that the evils at which the law is aimed continue. Legislation is not enough, a fact confirming the opinion of two writers on corruption who, in offering certain cures for corruption, observe that "there are no short cuts."[16] Their cures include the spread of popular education and the evolution of a public opinion "which rejects corruption either because it is morally wrong or because it is scientifically inefficient, or both"; "the diffusion of power, wealth and status now enjoyed primarily by politicians through society as a whole"; "the raising in prestige and the increase in the number of skilled accountants and auditors, and the recognition of their equal status in development programmes with administrators, engineers, industrialists and agriculturalists"; and "the vigorous enforcement" of laws concerned with corruption.

---

[14] Ordinance 22 of 1970. Apparently annulled by resolution of the *Dewan Rakyat* with effect from January 8, 1998, but the annulment has not so far (February 2000) been tabled before the Dewan Negara: see *New Straits Times*, February 29, 2000.

[15] Section 16 of the Act of 1997 provides a mandatory general penalty in relation to five sections of the Act (covering, *inter alia*, offering or accepting a bribe) of imprisonment for not less than 14 days and not more than 20 years and a fine of $10,000. Of this penalty an ironic comment has been made by Tan Sri Harun Hashim, that "the law will certainly wipe out petty corruption": *New Straits Times*, August 21, 1997.

[16] Simpkins and Wraith, *Corruption in Developing Countries* (1963), 208.

All this is true enough, yet without the exposure of corruption it is difficult for a public conscience on the subject to develop. Chandra Muzaffar,[17] a Malaysian observer, has said that "a free society is one of the finest checks against corruption. As long as people have the freedom to challenge and scrutinize public policies and political personalities there is hope that those in authority will be a little more wary of their actions." At the popular level, the publicity afforded by television, press and radio can offer the best of checks against corruption, especially when that publicity is fortified by a vigilant Parliament. In this latter context, the institution of the parliamentary question and the public accounts committee can do much to keep the public conscience alive.

Yet in modern society "some of the very worst acts of which men can be guilty are acts which are commonly untouched by Law and only faintly censured by opinion."[18] Corruption tends to fall within these acts, and sometimes a certain cynicism sets in. As the same writer observes,[19]

> It is much to be questioned whether the greatest criminals are to be found within the walls of prisons. Dishonesty on a small scale nearly always finds its punishment. Dishonesty on a gigantic scale continually escapes. The pickpocket and the burglar seldom fail to meet with their merited punishment, but in the management of Companies, in the great fields of industrial enterprise and speculation, gigantic fortunes are acquired by the ruin of multitudes and by methods which, though they evade legal penalties, are essentially fraudulent. In the majority of cases these crimes are perpetuated by educated men who are in the possession of all the necessaries, of most of the comforts, and of many of the luxuries of life, and some of the worst of them are powerfully favoured by the conditions of modern civilisation. There is no greater scandal or moral evil in our time than the readiness with which public opinion excuses them, and the influence and social position it accords to mere wealth, even when it has been acquired by notorious dis-

[17] Aliran, *Corruption* (1981), 32.
[18] Lecky, *The Map of Life* (rev. 1900), 80.
[19] Ibid., 81.

> honesty or even when it is expended with absolute selfishness or in ways that are positively demoralising.

Lecky was writing of the world portrayed in Trollope's novel, *The Way We Live Now*, but the indictment is topical, and not limited to Victorian England. Indeed, a modern writer tells us that "today, the inescapable and indisputable fact is that the rich and mature democracies are not immune to the cancer of corruption."[20]

Syed Hussein Alatas[21] notes that "in the light of a contextual and historical analysis, it appears that the Asian traditions contain values and articulate trends against bureaucratic corruption as well as other forms of corruption." "Lead the people by laws and penalties," said Confucius, "and they will merely avoid being caught but will have no sense of shame. Lead them by virtue and decorum and they will, realizing a sense of shame, strive for humanity." A powerful authority can indeed set an example. A prime minister dedicated to the elimination of bribery can exert a profound influence in the elimination of a general corruption.

The American writer Noonan offers four reasons why bribery, one of the main components of corruption, is "likely to continue to be morally condemned".[22] This is because, he affirms, bribery is "universally shameful", a "sellout to the rich", a "betrayal of trust" and a violation of "a divine paradigm". Whether these are valid or not, he suggests, at the close of a majestic survey of worldly corruption, that "the practice of bribery in the central form of the exchange of payment for official action will become obsolete. The movement to restrict by law many forms of reciprocal exchange with officeholders incorporates the thrust of a dominant moral idea."

It is pleasant to suppose that such optimism is justified, but as long as man's appetites remain as they are, so long will corruption remain.

---

[20] Philip A. Thomas, "Political Corruption and the Law in the United Kingdom," [1998] 1 MLJ lxi at lxiii. In an apparent reference to bribes paid by companies to officials, "the World Bank estimated that overall countries paid out US$80 billion (RM304 billion) in bribes every year": *The Star*, February 25, 2000.

[21] Op. cit., 78.

[22] Noonan, op. cit., 702 *et seq*.

In this wicked world moral ideas are not as powerful as we might wish them to be, and perhaps, like a dash of poison in a sweet drink, the immoral serves to render the virtuous more virtuous and intolerable. In the realm of politics corruption can be curtailed, but seldom eliminated. In the administration of justice, it must never be permitted to develop, and be extirpated wherever observed.[23]

[23] In 1999, 7,829 "tip-offs" were received by the Anti-Corruption Agency, 283 persons arrested (154 of them civil servants) and 159 persons charged: *New Sunday Times*, January 23, 2000.

Chapter 14

LIMITS

REALITY AND DREAM

For modern man, law is generally understood as a word relating to legislation: made-made law (the adjective is itself significant) existing in the form largely of commands and directions, of principles regulating the behaviour of individuals, corporations and the community. Concepts of social control are translated into words, the words are embodied in policies, the policies are adopted by governments, and governments arrange for them to be translated into law: that is to say, into rules to which certain sanctions are attached, and in return for which the interests of the majority are supposed to be advanced.

In the progress of a country towards independence, and in the manner in which it meets the challenges of independence, the nature of legislation as a means of progress is often taken for granted. After all, in the case of a former colonial territory, the magic of independence is enshrined in certain constitutional documents, such as an Act of the Imperial Parliament and an Order in Council; and there is often a ceremony of transfer of power in which these are physically handed over to the first minister of the newly-independent state. Some mystic concatenation of words has, it seems, created out of nothingness the longed-for state of independence. The correct words have been put into the correct formulas, clothed with the awesome dignity of the language of the law: and behold, a proclamation of independence has created the illusion of freedom and happiness!

Surrounding these events is the progress to self-government, marked, in a democratic state, by free elections held under a secret ballot conducted by impartial officials. These elections require the existence of at least one, probably several political parties: and indeed, it is due to the existence of such parties that any political constitution

works—although seldom, if ever, does any draftsman of a constitution let such a reality break into the wording of his draft. Why this should be is a difficult question to answer: but so it is. The dynamic force of the constitution—a political party enjoying the support of a majority of the electorate—is kept outside the framework of the constitution itself, and exists under the cloak of a general law on associations or societies.

Within the constitution, however, is a delightful catalogue of powers, often including first and foremost, in the case of a unitary state, the power to legislate for "peace, order and good government" (or some such phrase); while in the case of a federal state a splendid list of detailed items upon which the federal or state legislatures may make laws is set out. The constitution itself is the crown of the legislative structure of the state, and its catalogue of powers is intoxicating, conferring (so it seems) a plenitude of abilities within which a politician may promise much, even achieve more. The powers are used in the formulation of policy; because they are legal in origin, the law is seen as the appropriate instrument by which policy can be advanced; so that all too frequently policy is reduced to draft legislation which, presented to the lawmakers, satisfies their desire to exercise useful and constructive power. The draft legislation is formally approved by the head of state, becomes law, is put on the statute book and brought into force; and lawmakers then turn to the next matter requiring legislative action.

In the whole of this process little attention, if any, is paid to the limits of legislation, that is to say, to the extent to which a policy requires, and can successfully be implemented, by a law put on the statute book. Indeed, at times it seems as if the lawmakers suppose that the mere incantation of a few legal spells will, in themselves, create a world that corresponds more exactly to the Utopia of the lawmakers' dreams. In pursuance of such a policy we have seen, and continue to see, legislative prohibitions upon such ineradicable human activities as gambling, the consumption of alcohol and other drugs, and prostitution: prohibitions in themselves often nugatory, and which all too often result in corruption within the public service.

The thoughtful reader is therefore invited to spend a little time in considering what limits there are to the effectiveness of legislation: in

other words, to consider the gap between the reality of everyday life, and the unrealised dream of the lawmaker. "There ought to be a law about it," is often the response of the individual to any unhappy situation he considers remediable by legislative action. Let us endeavour to ascertain, albeit in a vague and superficial manner, the extent to which legislation is a panacea for the ills of our society. After all, there is a limit to what even an apparently omnipotent legislature or lawmaker—say, the *Yang di-Pertuan Agong* acting in an emergency—can do in the way of change. Any new law collides with a settled body of public opinion, morality, habit. A law winding up all trade unions, for example, would no doubt be regarded as generally objectionable, in spite of the fact that the abolition of the bureaucracy of the unions themselves and the industrial peace that such abolition might create, when allied to freedom of contract, could be regarded as desirable social objectives; whereas a law winding up, say, insurance companies, might be regarded with acclaim. And the media—the press and television services—can manipulate public opinion. Law is not what you command, but what you can get away with.

SYMBOLS OF LANGUAGE

The first obstacle to legislative action lies in the nature of language itself. Flexible as language is, there are limits to the extent to which it can convey thought. In their very nature, words are ambiguous, and in many cases the simpler the word, the more burdened it is with several layers of meaning. Often, the meaning of a word can only be established by clearing away the patina of time, as a skilled restorer will clean a picture or carving in order to discover the original beauty of the artist's concept. Words, too need careful study, if their early virtue is to be discovered.

Yet we use words carelessly. They are the traffic of the market place, the minor coinage of our intercourse with others, the small change of society. As such, we treat them with, in general, a lack of understanding of what we are saying, with a failure to appreciate all the wonder, history and poetry that may be parcelled up in one or two syllables of an everyday word. We are richer than we know: but even when we do begin to appreciate the value of this legacy from our ancestors, we still, all too often, do not see the perils inherent in the use

of language. The point is well made by an American writer, Ronald P Sokol:[1]

> We retain a strong tendency to forget the symbolic nature of language and insist that there is an identity between the word and the idea. So strong is this tendency that even when we are actively aware of it in ourselves and in others, it remains difficult to cope with.

The tendency is sometimes seen in legislation, sometimes in the law courts themselves. For example, in a 1977[2] report dealing with a claim against the estate of a deceased Chinese, a former professor at Nanyang University was called in a Singapore court as an expert witness on Chinese calligraphy. The judge told the witness

> that his use of phrases like 'criticism by the masses' and 'praise of the people' had led the court to form the opinion that the witness could possibly be a communist. When [the witness] declared he was 'anti-communist', the judge said that the witness ought not in the first place to have used terminology associated with communists.

The dissociation is sometimes difficult to contrive, for like the witness we are often the victims of ideas associated with the words we use. Language is an imperfect instrument, a temporary crutch towards that degree of understanding which is likely to arise out of intuition or telepathy and to be enjoyed by man in the future as it was, it seems, by man in the past. As the evolution of Chinese calligraphy suggests, in many ways the hieroglyphic is less likely to lead to confusion than its successor, the printed word. We are probably still in an early stage of human evolution, however, and must make the best use of what means of communication we have: and for this purpose, the printed word, with all its imperfections, remains a primary asset, and an indispensable tool for the legislator.

---

1 *Language and Litigation* (Charlottesville, Virginia) (1967), 30.

2 *Straits Times*, April 29, 1977.

Like human beings, language must change, to remain alive; yet in the course of that change, it should not be debased. Orwell, in his famous novel, *Nineteen Eighty-Four* (1949), deals in an appendix with "the principles of Newspeak": a penetrating anticipation of the manner in which, to an increasing extent, language can be manipulated for political purposes, and used to further the ends of tyranny. The thought is echoed by a modern poet. "The only duty a writer has as a citizen," said W.H. Auden,[3] "is to defend language. And this is a political duty. Because, if language is corrupted, thought is corrupted." To keep within the limits of meaning, and avoid the corruption of language: this is one of the tasks of the lawmaker.

PIECES OF A JIGSAW

While, therefore, the very nature of language and the printed word in some respect enlarges, and in other respects limits the powers of the lawmaker, all new laws have to fit into the structure of existing law. Some happy souls speak of law as a 'seamless web', as if the intercourse of human beings, as manifested by the laws they make, would fit into some sort of regular, harmonious picture, according with the restless, turbulent spirit of society. But the statute book itself, admittedly but a part, even if an essential part of the law, is no seamless web. The demands of policy, of the day-to-day urgencies of government and people, create patches, rents and stress within the fabric of the law.

So, the state of the existing statute book imposes certain limits on the lawmaker. To start off, there may be a new, consolidated edition of all existing statutes: in which event there is, as it were, a new beginning, the creation of a new edifice upon a new foundation. More often than not, however, there is a vast, amorphous mass of statute law, into which any new item of legislation should fit, as exactly as a piece into a jigsaw puzzle.

Under a federal constitution such as that of Malaysia, all items of legislation should be *intra vires*, that is to say, they should be within the powers conferred by the Constitution under which they are made. In a unitary state, such as Singapore, other considerations may arise: but in Malaysia the Federal Constitution dictates a pattern of conformity

[3] Charles Osborne, *W.H. Auden*, 332.

from which the lawmaker cannot properly stray—unless he desires a confrontation with the judiciary. Rules and conventions of constitutional law therefore impose limits within which the lawmaker must operate: although if these rules and conventions impose limitations too strict for society and its leaders, they may well be changed or abolished, either in conformity with existing rules of law or, if these are of no avail, then by revolution. Such drastic, final action, however, brings us into the realm of political necessity. Practice in, for example, Pakistan illustrates the difficulties faced by such an essential institution as the judiciary, in the face of a revolutionary situation, when the ingenious concept of the *grundnorm* of Kelsen was invoked in the course of arguments seeking to reconcile illegality with legality, usurpation with propriety. For the conscientious judge, bound by a solemn oath to support a particular constitution, the dilemma is an awful one.

SPECKLED CHILD

So far, we have briefly considered the structure of language and existing law as limits on legislative action. There is another, and much more formidable limit imposed by the nature of public morality itself. The philosopher Kant found that two things filled his mind with "ever-increasing wonder and awe"; these he defined as "the starry heavens above me and the moral law within me." The foundation of all morality, and ultimately all law, man's moral law is indeed a matter for wonder, springing as it does from natural law itself.

The concept of natural law is, although not so far formalised into any philosophical structure, well-known in Malaysian jurisprudence. It has its roots deep within the people, and is illustrated by many traditional sayings. We have noted that *Air di tulang lambungan, tumannya di cucur atap*, water on the rooftop runs down to the eaves, is simply a poetic way of observing that things must behave according to their nature and the law of nature. *Bapa burik, anak rintik*; the father is spotted, the children are speckled; what is this, but an eloquent expression of a natural truth? In these and many other proverbs, the Malays of old worked out their concept of that natural law common to all mankind, and observed how it could conflict with man-made law, positive law, that artificial weapon of social progress, or regress.

Lord Devlin took the view that "society cannot ignore the morality of the individual any more than it can his loyalty; it flourishes on both and without either it dies".[4] For Devlin, a distinguished lawyer, morality was the proper concern of the law: a point of view to an extent opposed to that of John Stuart Mill, who considered that law should not be used more than is necessary to protect public order and the individual against that which is injurious or offensive. To what degree either school of thought is correct is the subject of nice debate, sharpened by the increasing conflicts between codes of so-called fundamental rights and ordinary laws which are, or in their application tend to be, restrictive of those rights.

A contemporary example of this conflict is to be found in cases arising under the European Convention for the Protection of Human Rights and Fundamental Freedoms: a convention inspired by the Universal Declaration of Human Rights, proclaimed by the General Assembly of the United Nations in 1978. With the accession of the United Kingdom to the European Community in 1972, the European Convention has acquired an increasing importance in England; and has now been incorporated in the Human Rights Act 1998 of the United Kingdom.

It is notorious that limitations must be set on many apparently absolute rights. Freedom of speech, religion and the like appear at first sight as fundamental, not to be qualified; but a moment's reflection illustrates the need for limitation. Such limitation may be assessed by the lawmakers themselves; it may be assessed by the courts in general; or it may be determined by a particular tribunal, seeking to interpret a general rule of limitation. Malaysia prefers limitation by Parliament; India, limitation by the judiciary; Europe, limitation by a special court, the European Court of Human Rights, in accordance with the principles of a particular convention.

Article 8 of the European Convention gives, for example, everyone "the right to respect for his private and family life, his home and his correspondence." However, interference with that right is permitted "in accordance with law and [as] is necessary in a democratic society in the interests of natural security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for

[4] *The Enforcement of Morals* (1968).

the protection of health or morals, or for the protection of the rights and freedom of others."

The Article came into sharp relief in October 1981, in a case known as the *Dudgeon Case*.[5] The complaint before the European Court was that, by reason of the law of Northern Ireland (under which Mr Dudgeon, who lived there, had not been prosecuted) homosexual relations in private between consenting adults was a criminal offence; following the Wolfenden Report of 1957, the law of England had been altered in order to put such relations outside the scope of the criminal law; and Mr Dudgeon was therefore subject (under the unamended law of Northern Ireland) "to greater interference with his private life than [were] male homosexuals in other parts of the United Kingdom and heterosexuals and female homosexuals in Northern Ireland itself." While no ruling was made on the complaint, the court concluded that "Mr Dudgeon [had] suffered and [continued] to suffer an unjustified interference with his right to respect for his private life" and that "there [was] accordingly a breach of Article 8."

The Wolfenden Report had taken the view that homosexual behaviour between consenting adults in private was part of the "realm of private morality and immorality which is, in brief and crude terms, not the law's business." The Wolfenden committee regarded the function of criminal law as, in this field

> to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are especially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official, or economic dependence, *but not* to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined.

This view of the criminal law on homosexuality had been adopted by the lawmakers of England, but not of Northern Ireland: hence, Mr Dudgeon's complaint. The European Court consequently had to con-

[5] Report, European Court of Human Rights, Strasbourg, October 22, 1981.

sider whether the prohibition of homosexual behaviour between consenting adults in private was valid according to the criteria of Article 8 of the European Convention. What, exactly, then, was the meaning of "necessary in a democratic society"?

According to the European Court, "necessary" (in a democratic society) "does not have the flexibility of such expressions as 'useful', 'reasonable', or 'desirable', but implies the existence of a 'pressing social need' [sufficient to justify] the interference in question." It was for the government to assess the initial need for legislation, for the Court to review it. The Court took the view that the "two hallmarks of [a democratic society] were tolerance and broadmindedness" and that "there must exist particularly serious reasons before interferences on the part of public authorities can be legitimate."

The Court therefore decided that its task was "to determine ... whether the reasons purporting to justify the 'interference'... [were] relevant and sufficient under Article 8(2)... [while not being] concerned with making any value-judgment as to the morality of homosexual relations between adult males." The Court continued,

> the moral attitudes towards male homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards cannot, without more, warrant interfering with the applicant's private life to such an extent. 'Decriminalisation' does not imply approval, and a fear that some sectors of the population might draw misguided conclusions in this respect from reform of the legislation does not afford a good ground for maintaining it in force with its unjustifiable features.

So,

> to sum up, the restriction imposed on Mr Dudgeon under Northern Ireland law, by reason of its breadth and absolute character [was], quite apart from the severity of the possible penalties provided for, disproportionate to the aims sought to be achieved.

I have cited this case at some length, since the principle of proportionality is a relatively new one in the field of law, and is likely to be de-

veloped in all areas beginning with the penal law. It has already been raised as a powerful argument against a mandatory death penalty in relation to drug offences;[6] and since it is based on a sense of reasonableness that should be inherent in every law, will almost certainly be deployed in the course of argument on the constitutional propriety of much Malaysian legislation. However, such a discussion takes us away from *Dudgeon's Case*, and, in particular, away from the two dissenting judgments delivered in that case: and both of these merit mention, since they illustrate the fine line that exists between the nature of law and the nature of morality.

For it remained for a minority of two judges to put into words what might well be the view of that group often called the silent majority. In a world dominated by the media and intellectual opinion, the views of the majority of people—being of a traditional, orthodox and non-novel character—have little or no value to those who seek to reform others. In consequence, it is sometimes a bold judge who has the courage to express what critics see as a reactionary view; albeit that such a view represents that of the majority whose opinion, in a democratic society, should be decisive.

In his dissenting judgment, Zekia J., a judge from Cyprus, sought to go to the essential problems of the case. "Christian and Moslem religions are all united in the condemnation of homosexual relations," he said, adding that "moral conceptions to a great degree are rooted in religious beliefs." Turning to the issue of democracy, he observed that

> a democratic society is governed by the rule of the majority. It seems to me somewhat odd and perplexing, in considering the necessity for respect for one's private life, to underestimate the necessity of keeping a law in force for the protection of morals held in high esteem by the majority of people.

[6] See, for example, the arguments in the case of *Ong Ah Chuan v Public Prosecutor* [1981] AC 648, an appeal from Singapore to the Privy Council, although the matter of disproportionality was not discussed by the Privy Council. The argument that a mandatory death penalty for unlawful possession of 15 grammes of heroin is unconstitutional (under the Singapore or, by analogy, the Malaysian Constitution) is powerfully set out in David Pannick's *Judicial Review of the Death Penalty* (1982).

In all, he thought that the State was entitled to "a margin of appreciation": in other words, in case of doubt, the judge should favour the validity of a law duly passed by an elected legislature, rather than hold against it.

His views were fortified by those of Walsh J., who sought to answer that difficult question, "Is there a realm of morality which is not the law's business or is the law properly concerned with moral principles?" On the one side, there were the writings of Mill and, in modern times, Hart; on the other, those of such as Devlin, who considered that morality is a proper concern of the law: a concern manifest in many aspects of the criminal law. For example, euthanasia, suicide pacts, abortion, incest, duelling, all these involved purely private acts, yet who argues that they are outside the scope of the law? There were, too, such matters as cruelty to animals, racial discrimination, the control of gambling: "it would appear," the judge commented, "that the United Kingdom does claim that in principle it can legislate against immorality."

Walsh argued, in favour of the impugned legislation, that "experience has shown that exploitation and corruption of others is not confined to persons who are young, weak in body or mind or inexperienced or in a state of physical, moral or economic dependence"; and then he came down firmly on the side of Devlin:

> If the law is out of touch with the moral consensus of the community, whether by being either too far below it or too far above it, the law is brought into contempt. Virtue cannot be legislated into existence but non-virtue can be if the legislation renders excessively difficult the struggle after virtue. Such a situation can have an eroding effect on the moral ethos of the community in question. The ultimate justification of law is that it serves moral ends.

Here, the shades of the Chinese legalists must have nodded approval of the opinions of a remote barbarian.

TO CREATE OR CONSERVE

There are no definite boundaries to the investigation of the limits of law, it seems, and the philosopher may echo the words of Burke:

> No name, no power, no function, no artificial institution whatsoever, can make the men of whom any system of authority is composed, any other than God, and nature, and education, and their habits of life have made them. Capacities beyond these the people have not to give. Virtue and wisdom may be the objects of their choice; but their choice confers neither the one nor the other on those upon whom they lay their ordaining hands.

Even so, the people who create the democratic system look to the judiciary for virtue and wisdom: and in the activities of the judges themselves it is possible to find certain limits. As the academic will know (even if the judge may not) a judge at any level of his activity may be, as it is said, "creative" or "non-creative". If he[1] makes new law, gives existing law a turn in a new direction, discovers a new *ratio* to an old decision and thereby launches a new era of legal thinking: then, and in such wise, is he regarded as creative. He thereby enlarges the limits of the law, or diminishes them: but, whatever he does, he creates a new situation, injects into law a new idea invested with judicial authority and, by making new law, acts as a legislator. The facts of the case before him, so fortuitously, perhaps capriciously created, have by the alchemy of his mind, the obstinacy of a litigant and the blended arguments of counsel, established new boundaries.

The factors here are the product of chance: a dispute that cannot be resolved by agreement, legal advice, arbitration or any other extra-judicial process is brought before a judge or a bench of judges in accordance with an exacting set of rules relating to procedure and evidence; the facts are sifted, assessed in the light of existing law, and then resolved in accordance with a principle that may be an enlargement or a contraction of the field of existing law.

So observed, human law is an organic whole, never to be seen as fixed and immutable but always subject to the natural laws of change and decay; adopting itself to the needs and fashions of altering times, from one day to the next subject to imperceptible change, from generation to generation subject to often dramatic alteration. Yet always there are limits. To the inferior courts, the appellate judges act as re-

[1] When I refer to "he", I also refer to "she". Malaysia can look forward to some creative women judges.

straining, stabilising factors on judicial innovation or exuberance: and should the highest tribunal itself be seized by such radical impulses, the fact that it is as a general rule bound by its own decisions, and can be corrected by legislative intervention, acts as a further limitation on a power already circumscribed by many factors.

In general we can affirm, therefore, that the role of the judge is passive insofar as the material put before him is concerned, for he does not originate the process in which he involved: he is an actor, albeit an important one, in the middle act of a play in whose first and last acts he will not as a general rule appear. Once involved, he can from time to time depart from the script (to continue the metaphor) and thereby create new limits; as a lawmaker, he then acquires a power of which he may not consciously be aware; but, power it is.

Where a written constitution exists, the judges constitute in effect the guardians of that constitution. Owing the creation of their office to the constitution, and in most instances having taken an oath of office to protect that constitution, it is inevitable that they take upon themselves the role of interpreting the constitution. It is in the nature of that interpretation that another limit exists upon the power of lawmakers.

Let us take a simple, contemporary illustration. Suppose that the constitution forbids inhuman or degrading punishment: a principle often adopted in these times by those who draw up charters of fundamental rights and freedoms. Suppose, too, that a law made under the constitution provides in the case of certain crimes for the death penalty, or for whipping. The lawmakers may have seen nothing inconsistent in all this; but a judge adopting the modern, liberal philosophy of the west may well consider these penalties unconstitutional, and strike down the statute accordingly: when, clearly, awkward constitutional issues would arise. Ah, you observe, it would be a bold judge who asserted such an interpretation: but times change, and opinions with them. In 1948 members of the Japanese judiciary,[5] when upholding the constitutionality of the death penalty, observed that the Constitution of Japan

[5] Justices Shima Tamotsu, Fujita Hachiro, Iwamatsu Saburo and Kawamura Matsuke; quoted in Pannick, op. cit.

> should not be regarded as eternally approving the death penalty ... as a nation's culture develops to a high degree, and as a peaceful society is realised on the basis of justice and order, and if a time is reached when it is not felt necessary for the public welfare to prevent crime by the menace of the death penalty, then both the death penalty and cruel punishments will certainly be eliminated because of the feelings of the people.[3]

A judge may, in his decision, reflect the views of the more enlightened minority of a society: but who can tell at what point the views of the avant-garde become those of the majority?

The condition of law, then, like that of society is never static; nor can it be. Reflecting the restlessness of the minority, the ambitions of the majority, society progresses now at one speed, now another; now spurred on by rapid technological advances, now pondering and digesting these advances, but never stationary, never still. It is in nature of man to strive for the unattainable, to see no limits to his abilities. Yet for the lawyer there must, at any given moment, be limits to his law.

[3] On this subject, see for example *Riley and Ors v A.G. of Jamaica* [1983] AC 719, especially the dissenting judgment of Lord Scarman and Lord Brightman. The Constitution of Malaysia does not expressly prohibit torture or inhuman or degrading treatment, but such a provision might be said to be necessarily implied.

Chapter 15

MODEL

"IN INDIA AND ELSEWHERE in the Third World," writes a shrewd observer,[1] "law *provides* social data, rather than reflecting them." To a large degree this is true of the present condition of Malaysian law. A perusal of the written laws of Malaysian would offer an outsider a misleading impression of the state of Malaysian law: in many respects, the modern statute book is little more than a political manifesto.

Yet as earlier chapters may have indicated, it is possible to look at Malaysian law in a social, political and historical context and see it as, say, a garden growing over an ancient site, an old building subject to constant redesign, reconstruction. On the surface is living evidence of an active, mixed society, united by common bonds of citizenship and allegiance, yet still divided by many differing cultures and political distinctions, living in cities and towns, villages and longhouses, in rich and poor dwellings. At this point we may take comfort in the words of a wise historian[2] who wrote that "regrettable as it may seem to the idealist, the experience of history provides little warrant for the belief that real progress, and the freedom that makes progress possible, lies in unification". For him, "vitality springs from diversity":[3] and in that very diversity itself are the seeds of freedom.

Yet beneath the surface of existing law we find shallow evidence (from the comparatively short period of less than a century) of colonial

---

1 J.M. Duncan Derrett, review of *Traite de Droit Compare*, Tome III, by Leontin-Jean Constantinesco, 32 ICLQ 1041. In this context, one may forgive the sloppiness of a term such as "Third World".

2 B.H. Liddell-Hart, *Why Don't We Learn from History?* (1972), 83.

3 Ibid.

law, a body of rules worked out by aliens who, like the Roman imperialists, were indifferent to theory, concerned only with practice. Dominated by administrators, their legal system, coloured by their own philosophy, worked for a rough, often brutal justice in which economic development was the objective. Digging deeper, beyond the relics of that brief but highly influential era, we discover evidence of older systems of law, some indigenous to Malaysia, others originating in India, China, Sumatra and elsewhere. It is from these varied origins that Malaysian jurisprudence takes its modern character: and if it has all the semblance of a Western legal system, it should not be supposed that it is in fact western in the character or philosophy. It is Malaysian in its roots, Malaysian in its operation.

Out of the mixture of peoples, races and cultures now called Malaysia, then, a common law as well as a common culture is emerging. In referring to a *common law* I refer here not to the English but to the Malaysian common law, an indigenous creation peculiar to one part of Southeast Asia. Now isolated from this development, the Republic of Singapore develops its own curiously bland legal system, when compared with the richness that is within Malaysia. Yet it develops its own advanced virtues, and has the same origins as the Malaysian legal system.

In the foregoing chapters, an effort has been made to outline the origins and character of what can properly be called Malaysian jurisprudence, and to indicate some of the influences and trends now manifest. These are the product of human beings, and, as such, subject to that happy caprice, folly and wisdom common to all mankind. Fortunately for the progress of the world, neither man nor woman is a wholly rational, logical creature. In the development of Malaysian law we need not seek reason, for we shall find something of greater consequence than that, something which we may properly style wisdom, an intuitive sprit operating collectively upon a society.

Looking around contemporary Malaysia, it is possible to observe a few dedicated, creative human beings touched with that especial divinity we may call, not unjustly, genius. The professions of the law, politics, art, philosophy and literature nourish these rare spirits, and with them to keep alive the lights of freedom we may be confident that, whatever the future may hold, those values enshrined in such

concepts as justice, truth, freedom and beauty will not perish. To this extent the doctrine of elitism, of leadership by the wisest and best within society, is invaluable. Discredited in the west, it lives in the East, to the general advantage of a society that sees perils in rigid, economic egalitarian doctrine. Let political rights be equal, and the foundation of a free society is laid.

From time to time a plea is made for a complete set of the written laws. Such tidiness is attractive to the civil servant and the academic, but is questionable whether there is any particular merit in a neat set of volumes entitled *The Laws of Malaysia*. Law is never static. While it may be convenient for some to possess such a set of the laws, let the modern invention of the computer achieve it. For the ordinary citizen, the spirit of law flourishes best in an untidy garden, with a nice degree of uncertainty. And were this not so, the legal profession would cease to exist, and law cease to be the fascinating, endless study that it is.

Of all the legacies of the colonial era, the most significant was the development of an honest, disciplined and unified civil service, with all that this implies in the way of policy and the rule of law. This was a great achievement, and led to the transfer of power in 1957 being effected in a model manner.[4] Independence released energies that earlier were dormant or suppressed. Legislation was seen as a powerful instrument of policy. So the tempo of government quickened, laws multiplied and such devices as statutory corporations (*quangos*,[5] in modern jargon) were established in order to further the development of government policies in a more expeditious and flexible fashion than the norms of a strictly-regulated, highly-disciplined civil service could allow. Since *Merdeka* this particular tendency has increased, and *quangos* themselves tend to give birth to companies incorporated under the ordinary companies legislation: so bypassing the controls existing over the parent corporation, and unfortunately offering opportunity for corruption on a large scale. Here, perhaps, is an over-effective blossoming

[4] The writer was in the civil service in Malaysia from 1950 to 1962, and saw the transfer at first hand, as well as that in South Yemen in 1967: the former, a success, the latter, a disaster.

[5] *Quangos* are quasi autonomous national government organisations. "They are among the worst modern instances of political nepotism" (Walker, *Oxford Companion to Law*, 1980, 1022).

of the law, with the garden becoming a wilderness, the wilderness a jungle. The rule of law demands, in the end, control.

Without law, then, corruption increases, society disintegrates. With law, society can prosper, progress. Yet all discriminating legislation offends in principle the concept of the rule of law, to be justified only on the grounds offered by Aristotle. The law must aim at justice, but the search is not easy, for any form of privilege, whether it be based on riches or poverty, is offensive to the concept of equality and, when imposed by law, at once introduces disharmony. In England legislation on race relations has, for example, compelled citizens to think in racial terms and in consequence has created and, until repealed, will continue to create tension and unhappiness within that community. All citizens should be treated equally, and the law should be indifferent to race, colour and creed.

In the realm of morality, there have been significant changes over the past few decades. The Straits Settlements Civil Marriage Ordinance of 1940[6] introduced the concept of the monogamous civil marriage; repealed and replaced by the federal Civil Marriage Ordinance of 1952,[7] the concept finally prevailed, to obliterate all polygamous marriages (other than those under Islamic law) with the Law Reform (Marriage and Divorce) Act of 1976.[8] The intelligent Chinese fiancee had long understood the advantages of a civil marriage followed by a traditional marriage ceremony: a procedure blending law and custom to her benefit; so that the principle of monogamous marriage has become, if not triumphant, at least dominant throughout Malaysia.

The dominance is illustrated by the movement to monogamy in Muslim law. In Singapore, the Administration of Muslim Law Act[9] restricts the freedom of the Singapore Muslim to marry more than one wife, and similar restrictions in Malaysia appear to work towards a norm of monogamy, with all that this implies in the way of family and social stability. For it is on the basis of the family that the legal system is still constructed.

---

6 S.S. Ordinance 9 of 1940.

7 Federation of Malaya Ordinance 44 of 1952.

8 Act 164.

9 Cap. 3 section 96.

Having sketched these varied considerations, it is possible to construct a model of Malaysian law. Even so, it is necessary for the reader who wishes to develop a concept of Malaysian jurisprudence for himself (and this is, after all, what matters) to beware of borrowing ideas from the West. As an Englishman I think in English, write in English and naturally use the ideas of English law. These are valid enough in their own way, although Heaven knows that many need revision; but it is for the Malaysian to develop his own ideas, to look at the origins and growth of Malaysian law with an eye unclouded by the prejudices and theories of the past. Of course, as Krishnamurti says,[10] "our action is based on knowledge and therefore time, so man is always a slave to the past." This we cannot avoid, for the past is our springboard to the future, and a basic knowledge of the elements of our own history helps us to understand ourselves and our future.

Yet the knowledge we acquire is inevitably based upon a collection of subjective truths of varying authority, just as a judgment is itself based upon an assessment of evidence of differing qualities. We have to do the best we can, conscious of the limits of our energy and ability. The idea of the relevant on which the Evidence Act 1950 is based is not in itself bad, provided that it is not used to suppress that "whole truth and nothing but the truth" required of the average witness. Justice and harmony are, after all, the object of our system and the limits of our enquiry must be such as to satisfy that inner voice we term conscience.

So the Malaysian legal system must be interpreted in Malaysian terms. This should be obvious, self-evident: but the temptation to refer to the great scholarship of English and American texts, is, for much of the time, too great to be resisted. There they sit on the library shelves, the majesty and wisdom of past and present generations of faithful common law lawyers, and every course of training in the common law draws us to them, as moths to flame. Even in private practice, the Malaysian lawyer will be tempted to use that ingenious invention, the telex, and to appeal to a barrister in an Inn of Court for advice.

Resist this siren lure! There is a growing body of Malaysian jurisprudence; the Malaysian lawyer must surely know what is best for Ma-

[10] Quoted in Mary Lutyens, *Krishnamurti: The Years of Fulfilment* (Discus, 1984), 204.

laysia; and when he reviews the whole body of Malaysian jurisprudence and meditates upon its concepts and principles, he need have no lack of confidence in his own ability to provide the best and most appropriate solution for client and court. Tunku Abdul Rahman once said that it was better to govern oneself badly, than to be well governed by others, and this is a truth of law as well as of politics. The proper solutions to the problem of Malaysian law grow out of Malaysia, and are not to be found elsewhere.

Resist, too, fashion in language! Ensure that in the development of a Malaysian legal vocabulary, the nature of language itself is not debased. In England, the home of the English language, words begin to lose their meaning. As is now well known, "industrial action"[1] there means "industrial inaction"; "sensitive policing"[2] of an area means "no policing"; "execute" is used for the "murder of a hostage" by any group having ostensible political aims; and in the realm of education, a student may gain an O level pass at, say, grade E: in others words, a *fail*. It is not to England that Malaysia should turn, even for the English language.

How, then can a model of Malaysian law be described? In its framework it is a sturdy construction, based on sound principles. Some of these are indigenous, others have been borrowed. Traditions of the past have been retained where necessary, even at the cost of a certain appearance of the feudal and archaic; and these have been accepted by the majority of the people, even by those who have felt, and feel, that some legacies of the past work to injustice, and need radical change. Tradition and consensus, precedent and procedure, these ensure stability; and within a democratic system of government, change can be achieved by peaceful means, without the violence, and consequential injustice, of revolution. In all, Malaysian jurisprudence offers a fair system for living, as well as an engaging model for study.

So we can offer a model of sorts of Malaysian law, taking the fundamental principles of the Constitution, and those of the *Rukunegara* as a guide. The foundations of Malaysian law exist in the form of acces-

[1] In the United States, a strike is still a strike, and not "industrial action", but then, the Americans do not favour cant in politics.

[2] It may be that we owe this dreadful abuse of language to an eminent lawyer, Lord Scarman.

sible written and case law, a competent Bar and an independent Bench. The architects of change are the legislators and the judges, on whose shoulders rests the responsibility for the peaceful progress of Malaysian society. The need for a firm rule of law, wisely enforced, at all levels of society becomes increasingly obvious.

Yet the secret of law is after all part of the secret of the art of living itself. The laws we inherit, the laws we invent, these are but minor matters of life. A lawsuit is, however, momentous to the parties or, indeed, society, in perspective as trivial and inconsequential as a cocktail party. If the lawyer seeks to discover the truths of law, the investigation will occupy the whole of his life. That investigation will give him constant inspiration; a constant re-testing of principles; a constant, critical analysis of practice; and a constant willingness to reform when convinced (with difficulty) that reform is necessary.

The peoples of Malaysia are the heirs of great cultures. In their fusion of those cultures, in their adaptation to the pressures of modern life, to the increasing pace of change, they are demonstrating the unique value of law as a vital force capable of creating a happy society, a continuing condition of peaceful progress. Out of national law grows international law and out the latter will ultimately come, we may not unreasonably hope, a state of universal peace. At all levels law is necessary to the welfare of mankind. And yet, at the end, we are compelled to consider the limits of law and government itself, and to echo the words of that wise, forthright man, Samuel Johnson:[1]

How small, of all that human hearts endure,
That part which laws or kings can cause or cure.

[1] Added to *Goldsmith's Traveller*, 429.

Chapter 16

FUTURE

THE WORLD OF TECHNOLOGY has already overtaken the legal system of the west. Law reports, statutes and subsidiary legislation have been recorded on that new working tool, the computer, from which information can be retrieved in the twinkling of an eye. To sit at a keyboard, to watch a display screen and in a moment to extract from the equivalent of a vast, complete law library all the cases and legislation the researcher may need on his selected subject; to note the passages in which judge X, Y or Z has commented on the issue; and by the press of a button to produce a copy of the very text required: this is indeed a revolution in the way of legal research.

And this is but one—if perhaps the latest, most refined and sophisticated—aspect of the impact of contemporary technology on law. In the office of the practitioner the word processor has radically altered the method of drafting complex legal documents. The text of a model document is fed into the processor; suitable additions, deletions and amendments are made in the appropriate places of the viewed text; and then, beyond the fallibility of a typist, a flawless draft is produced.

It may be, too, that in the way of resolving issues put before the courts, Boolean algebra will be adopted. Skilled lawyer-observers, familiar not only with the relevant written law and cases, will consider the character, abilities and record of the judge or judges: translate their predictions into algebraic terms: and predict the ultimate decision. After all, is not the human brain itself a highly advanced, but unfortunately extremely erratic computer? Consider the prediction of such a decision, attained free of the emotions engendered by argument and above the stress and strain of human life with its moods, angers, illnesses, prejudices and irrationalities: how could such a decision be

challenged? It may be that a sort of judicial colossus will be created, endowed with the wisdom and precedents of the past, viewing all with the detachment of a god and usurping the functions of even the best of mortal judges.

Mercifully, such a state of affairs is beyond Malaysia, even beyond the west, where litigation is entrusted to the skill of lawyers still caught up in the clumsy minuets of a procedure regulated by complex rules. We still believe that "it is in the interests of the proper administration of justice [that] it is of the utmost importance that every cause, however defective, and every criminal, however bad, should be fully defended, and [that] it is therefore indispensable that there should be a class of men entrusted with this duty."[1] Not only men, but also women: their existence as independent advocates is the foundation of the Malaysian common law system.

Exactly how long the existing legal system, with all its oddities, will continue, is uncertain. Take, for example, such a subject as litigation relating to personal injuries, one of the more fertile areas of legal activity. In England, according to a report of 1986,[2] High Court cases in England take four, five, six or more years from accident to conclusion, with costs forming from 50 per cent to 70 per cent of the damages awarded: and even in the county courts there a case can take three years or more, with costs forming from 125 per cent to 175 per cent of the damages awarded.

It is clear that modern life is changing at an ever-increasing rate, and that politics trespasses more and more upon law. Of necessity the

---

[1] Lecky, *The Map of Life* (rev. 1900), 101.

[2] See Chapters 4, 5 and 6 of the consultative document published by the Lord Chancellor's Department: *Law Society's Gazette*, Vol. 83, 946. A letter in *The Star* (September 9, 1986) from "Victim" suggests that in Malaysia "simple cases, especially civil ones, take years to settle." The writer notes: "Our judicial system is adopted from the British where lawyers are appointed on behalf of the plaintiff and defendant. This the first flaw of the system. They use fat legal words and lots of paperwork to make the whole process look so difficult that the layman cannot represent himself in court." In urging the establishment of a Family Court, the president of the All-Women Lawyers' Association Malaysia stated that "contested" divorce petitions take between 18 months and two years to be resolved". (*The Sun*, February 18, 2000).

legal profession is aware of these ominous facts: but in the realm of legal education tradition is still dominant, while syllabuses, methods of teaching and even examinations are already obsolescent. Soon, it may well be, students will stay in their own homes and organise their own law courses; textbooks will give way to video terminals and television screens. Skill will lie not in knowledge itself, but in the means of access to knowledge. Increasingly, the printed word will give way to the transient, electronic symbol. "Black letter law", the law of book learning, will become unimportant.

The dangers are great. A modern philosopher, Gilbert Highet, has noted that one of the reasons for the collapse of the western Roman Empire "was evidently that men and women began to have too good a time, and simply stopped thinking."[3] Thought is essential to the progress of law, and without it not only the mind but the conscience begins to rot. Unfortunately, the pressures of modern life suggest another collapse, the same philosopher observing[4] that

> as the use of radio and motion pictures spreads further, and as techniques of propaganda channelled through them improve we may expect to see the world becoming not more reasonable but more wildly excitable, pugnacious and pessimistic, madly revering and wildly hating, brave and frightened and seldom intelligent.

In the fevered eye of television, politics, philosophy and law all become a part of "show business", mass entertainment in which thought and reason are displaced by waves of sentiment, each leaving the observer more listless, bored and indifferent, a ready victim for the next assault upon his emotions. And since there is much "pure and almost spontaneous malevolence in the world",[5] a malevolence that thrives on untruth and the distortion of truth[6] and the cynical manipulation of the mind of the viewer, there is every reason for the lawyer to hold on to the foundations of his belief in the essential goodness of law. The "wild

[3] *The Mind of Man* (1954), 47.

[4] Ibid., 168.

[5] Lecky, *The Map of Life* (rev. 1900), 79.

[6] A fact known of old to those who framed the oath of a witness, to tell "the truth, the whole truth, and nothing but the truth".

excitement" of which Highet speaks is the enemy of law itself. The law's stately minuets are designed to diminish the excitement that creates error.

In a world in which food, information and entertainment are increasingly provided in a standardised form by multinational corporations, the human being ceases to be an individual and becomes (in the vivid word of Singapore founding father Lee Kuan Yew) a digit. In consequence, lawmakers tend to turn to mandatory sentences—each one a denial of the quality that makes each human being (like every snowflake) different, one from another.

One interesting aspect of Malaysian law in its development since *Merdeka* has been the extent to which it has been subject to Islamic influence. To a large degree this development is manifest at the State level, since "Islamic law and personal and family law of persons professing the religion of Islam" (the list is a comprehensive one and set out as item 1 of the State List in the ninth schedule to the Constitution) is a matter for the State legislatures, not the Federal Parliament. Kelantan, in particular, has been in the vanguard of State legislation on Muslim affairs,[7] although other States have not been idle in tackling issues of behaviour with a belief in the efficacy of positive law.

At the federal level, affairs have proceeded more slowly and delicately, partly by reason of the nature of federal legislative powers, and partly by reason of the fact that the federal legislature is compelled, to a greater extent than a State, to pay a sensitive regard to non-Muslim

[7] The Syariah Criminal Code 1985 (Kelantan Enactment No. 2 of 1985) is the latest in a series of state laws that includes a notable Syariah Criminal Procedure Code 1983 (Enactment No 9 of 1983). Punishment is becoming more severe. It is notable that the power to punish "in respect of offences against precepts of the Muslim religion by persons professing that religion", conferred under section 2 of the Federal Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355) was in 1985 enlarged from a fine of $1,000 and six months' imprisonment to a fine of $5,000, imprisonment for three years, and whipping up to six strokes (At A612 of 1984). The power was adopted. Under a 1966 enactment of Kelantan (2 of 1966, s. 61), for example, consumption of intoxicating liquor entailed, for a first offence, a fine of $100 and one month's imprisonment. Under 25 of the Kelantan Code of 1985 the penalty can now be a fine of $5,000, three years' imprisonment and whipping for six strokes, the maximum permitted by the federal Act.

interests. While "Islam is the religion of the Federation", Article 3 of the Constitution goes on to provide that "other religions may be practised in peace and harmony in any part of the Federation". The Federation has no "pan-Malaysian head of Islam"[8] and is a secular state, having Islam as the state religion: this occasions a careful approach to legislation. In 1983 the Islamic Banking Act[9] was enacted, in order to regulate "Islamic banking business", that is to say, "banking business whose aims and operations do not involve any element which is not approved by the religion of Islam". After this limited incursion into the field of banking, there has been discussion on the matter of insurance, with doubts expressed as to whether the conventional principles of insurance are in accord with the *Syariah*. But the intrusion is small. In general, the Islamic influence on federal legislation is gentle and reasonable.

From time to time views are expressed on a general assimilation of secular and Islamic law. It is notable that these opinions are expressed almost exclusively by Muslims, and that there is little enthusiasm for them from others acquainted with the secular law. Indeed a Lord President, Tun Mohd Salleh bin Abas, has said[10] that existing laws should not be replaced by Islamic laws before they are fully understood; "such action," he observed, "could cause chaos. This could affect businesses which in turn could jeopardise economic stability ... If there was nothing in the secular law which was in conflict with Islamic principles, it is better to retain it ... The best changes are those which are done imperceptibly."

These are wise words. The law of Malaysia is indeed a plant of slow growth, but it is nonetheless sensitive to all winds that blow. Caution in reform is a sound policy, for a loss of confidence, particularly at that international level which regulates much of the economy of Malaysia, would have unfortunate results. In this context, the experience of such a country as North Yemen is significant. Ruled as an Imamate until 1962, and subject to the *Syariah*, it was found desirable, following the promulgation of a commercial code in 1976, to set up commercial

---

8 Tun Mohamed Suffian bin Hashim, *An Introduction to the Constitution of Malaysia* (2nd. ed.), 24.

9 Act 276.

10 *The Star*, August 25, 1986.

courts in tandem with the *Syariah* courts. These courts administer a growing body of commercial law approved by the religious authorities: a *Syariah* judge sitting with the commercial judge. In this fashion Yemeni law develops in a manner reconciling the objectives of both secular and religious authorities.

Maitland[1] once wrote—and as his use of English language was ever careful and concise, his words may be deliberately obscure—"Theology itself must become jurisprudence, albeit jurisprudence of a supernatural sort, in order that it may rule the world." There are vast difficulties—not only in the way of theology—in adapting religious dogma to contemporary business, especially when the latter is based increasingly upon international practice. A particular custom develops, there is an interval while the moralists and theologians consider it. Just as jet-lag is a problem for the air traveller, so is time-lag a problem for the moralist. To reconcile the demands of law, morality and religion is never easy, especially in an increasingly materialistic world: yet, neither should it be, for a suitable tension within society keeps its critical faculties alive. One day, perhaps, jurisprudence will rule the world. But, not yet.

For the Malaysian lawyer, much remains to be done. The legacy of an imperfect common law system has its merits, of that there is no doubt: but it tends to favour overmuch the antique and the trivial, as well as the pragmatic; and tradition creates a blindness to the defects of the law. As this text endeavours to argue, the time has come to break away from certain features of the system and to replace it by one more in keeping with the character of the Malaysian people, one weaving together the more appropriate aspects of all the legal systems to which Malaysia is heir. This should not be part of a revolutionary process, however, but planned as a gradual, evolutionary change. Men and women and especially the lawyers among them are by nature conservative: to quote a favourite philosopher for a final comment:[2]

> The distrust of human character which the experience of life tends to produce is one great cause of the [c]onservatism which so commonly strengthens with age. It is more and more felt that all

[1] Pollock and Maitland, *History of English Law* (2nd. ed.), I, 3.

[2] Lecky, op. cit., 82.

> the restraints of law, custom and religion are essential to hold together in peaceful cooperation the elements of society ... [Men] learn also to appreciate the danger of pitching their ideals too high, and endeavouring to enforce lines of conduct greatly above the average level of human goodness.

Lawyers reflect that conservatism, that level of human goodness; but now that an increasing number of Malaysian lawyers are educated in Malaysia, there is no need to look to England, still less to Singapore, for inspiration. That inspiration is here, within Malaysia, in the spirit of its people. In the end, the law for the Malaysian must be purely Malaysian law.

This is not to affirm that the principles of international law and practice should be rejected. If these are consonant with justice and acceptable to a civilised state,[13] then Malaysia can and should keep in the mainstream of the progress of world law. But until the distant date when nations are no more, Malaysia must ever seek to develop its own law, in its own way. For every legal system, like a constitution, "states or ought to state, not rules for the passing hour, but principles for an expanding future."[14]

---

[13] See, for example, Stephenson L.J. in *Trendtex v Central Bank of Nigeria* [1977] Q.B. 529 at 567-570.

[14] Cardozo, *The Nature of the Judicial Process* (1921), 83.

APPENDIX

THE LAW OF SARAWAK

Extracts from *The Law of Sarawak 1927-1935*
Compiled by T. Stirling Boyd, Chief Justice of Sarawak
Revised up to December 31, 1935

1936. Government Printing Office, Kuching
(Printed by Bradbury, Wilkinson & Co, London)

ORDER NO L-4, 1928

(To provide for a general rule in the absence of specific legislation)

[Enacted 16th February, 1928]
[Gazette 16th February, 1928]
[Operation 16th February, 1928]

It is hereby enacted by His Highness the Rajah as follows:

1. This Order may be cited as Order No L-4 (Law of Sarawak) 1928, and shall come into operation on 16th February, 1928.
2. The Law of England in so far as it is not modified by Orders and other Enactments issued by His Highness the Rajah of Sarawak or with his authority, and in so far as it is applicable to Sarawak having regard to native customs and local conditions shall be the law of Sarawak.

NOTES FOR THE GUIDANCE OF OFFICERS IN INTERPRETING ORDER NO L-4 (LAW OF SARAWAK)

1. The Orders which have so far been published in Sarawak deal only with certain branches of the law and it is necessary that rules should be laid down for dealing with cases which they do not cover. An Order has therefore been enacted providing that English law is to be used where Sarawak Orders are silent, but in interpreting this Order regard must be had to several considerations.
2. Obviously the whole of English law is not appropriate and whether any particular rule of law or any particular statute should be applied depends partly on whether the rule or statute deals with cases which occur in Sarawak and partly on whether it is practicable or expedient to carry out its provisions having regard to the particular circumstances. Thus buying and selling of goods is a matter of everyday occurrence and the Sale of Goods Act 1893 (which is a codification of the English common law on the subject) can therefore be usefully applied in Sarawak, but it is obvious that statutes such as the National Health Insurance Acts, the Workmen's Compensation Acts or the Income Tax Acts must be limited to the United Kingdom.
3. In considering whether English law is appropriate a Court must also have regard to native law and custom and it is here that the chief difficulty will lie. The main principles are that English law is to be applied as far as possible and native law and custom are to be maintained in so far as they are not repugnant to good administration, or, as it is sometimes expressed, to humanity, morality and public policy. These two principles may be, and often are, at variance, and the question for the Court to decide is which is to prevail.
4. In English law the word custom has several meanings, and customs which have the force of law may be either general, in the sense that they bind everybody, or, particular, in the sense that they only bind the parties to a contract because the custom is an express or implied term of the contract. The rules

on the relation of law and custom are somewhat complicated and it is unnecessary to discuss them fully as they are not entirely applicable to a State like Sarawak where other considerations apply.

5. The laws and customs of eastern races differ widely from those of England and in one aspect it is a highly philosophical problem to determine if and how they can be coordinated. In practice, however, it will usually be found that it is comparatively easy to decide what modifications in English law are allowable and whether or not any particular custom should or should not be upheld. Thus it is clear that the custom of headhunting could never be approved by the Courts, and equally clear that it would be oppressive in Moslem countries to refuse legal recognition to the Moslem practice of polygamy, though by English law polygamy is a penal offence. This is not the occasion to examine the subject in detail, but it may be useful to point out some of the relevant considerations which to some extent necessarily overlap.

6. (i) Is the custom general and inveterate, or is it confined to a small number of people and of comparatively recent origin?
If it is a custom of great antiquity and can be shown to be of general application more regard should obviously be given to it than if it were of modern growth and applicable only to a few people. In English law a general custom will not be upheld if it can be shown that it is not immemorial.

(ii) Is it reasonable?
This test, though obviously admissible, must be applied with caution particularly in the region of religious belief. However unreasonable some customs may appear to a western mind it may be impossible or undesirable to eradicate them, and an attempt to put them down too drastically might well be disastrous. Experience has shown that it is extremely dangerous and unwise to meddle with matters which have their root in religious belief or superstition.

(iii) Does the custom offend against morality?
This test, like the previous test, must also be applied with caution, and morality must be interpreted in a broad sense with reference to the creed, education and general circumstances of the person concerned. It would be unwise, even if it were possible, to impose upon a people a standard of ethics which they are incapable of apprehending, and the law is concerned not with any particular code of morals or religion but with the principles underlying all codes of morals. Thus, to take the example cited above, it would be unjust and oppressive in a Moslem country to punish a Moslem for bigamy. On the other hand, if the practice of "*hara kiri*", or self-immolation, which is deeply rooted in some eastern races ever came up for judicial review it might well be a moot point whether it should be upheld as an inveterate custom with religious authority or whether, in accordance with English law, it should be treated as a crime tending to injure both the individual and the State.

(iv) Does the custom offend against public policy?
Practices, apparently harmless is themselves, may in special circumstances, be inimical to the welfare of the State, and cannot therefore be supported. The practice of forming secret societies, though not a custom in the legal sense, may be quoted as an example. Such practices would, of course, normally be controlled by specific orders.

7. Between the two main classes of native customs, that is to say those which should, and those which should not, be given the force of law, there is a large body of customs, usages and beliefs which may be said to occupy a neutral position, and a Court would regard them not as law but as factors to be taken into consideration in deciding the issue between the parties, or, in a criminal case, in deciding the proper sentence. Thus, to take an English example, in a trial for bigamy at the Old Bailey in 1883 it appeared that not only the prisoner himself

but also his first wife and all her family believed his marriage to be void because the wedding ring was of brass and not of gold. This state of mind, though it is no defence to an indictment for bigamy, would properly be taken into consideration in deciding what sentence to inflict, and similarly certain native beliefs and superstitions, however unreasonable they may be, should, if honestly held, be considered in mitigation.

8. Exceptions to the established rules of English law and morality should be admitted only with great caution, for the object of good government is not only to preserve law and order, but also to educate the people to a better appreciation of the principles of justice which prevail in a civilised community. While the power of the Court in deciding between English law and native customs is discretionary it must be remembered that the discretion must be exercised judicially and not capriciously, that is to say it must be based on definite principles. Some rough rules have been indicated above, and it may perhaps be said generally that English law should be suspended in favour of eastern customs which are repugnant to it only when the native law and custom is reasonable and when to enforce the English rule would be oppressive. What is reasonable and what is oppressive is a matter of opinion which must be determined by the Court. The difficulty will remain of applying abstract principles to concrete cases, and this can be surmounted by only insight and experience and by a just appreciation of fundamental principles.

BIBLIOGRAPHY

Ahmad bin Mohd Ibrahim, *Family Law in Malaysia and Singapore*, Singapore: Malayan Law Journal, 1978 (2nd. ed., 1984).

Ahmad bin Mohd Ibrahim, *Islamic Law in Malaya*, edited by Shirle Gordon, Singapore: Malaysian Sociological Research Institute, 1965 (reprinted 1975).

Ahmad bin Mohd Ibrahim, *Sources and Development of Muslim Law*, Singapore: Malayan Law Journal, 1965.

Ahmad bin Mohd Ibrahim, *Towards a History of Law in Malaysia and Singapore*, The Inaugural Braddell Memorial Lecture 1970, Singapore: Printed at the Stamford College Press, 1970 (reprinted 1992 by Dewan Bahasa dan Pustaka).

Anwarul Yagin, *Law and Society in Malaysia*, Kuala Lumpur: International Law Book Services, 1996 (reprinted 1998).

Ball, John Preston, *Indonesian Legal History: 1620-1848*, Sydney: Oughtershaw Press, 1982.

Bartholomew, G.W., *The Commercial Law of Malaysia: A Study in the Reception of English Law*, Singapore: Malayan Law Journal, 1965.

Bartholomew, G.W., "The Singapore Legal System," in Riaz Hassan (ed.), *Singapore Society in Transition*, Kuala Lumpur: Oxford University Press, 1976.

Bartholomew, G.W., "The Sources and Literature of Singapore Law," in G.W. Bartholomew (ed.), *Malaya Law Review Legal Essays*, Singapore: Malaya Law Review, 1975.

Batumalai S., *Islamic Resurgence and Islamization in Malaysia: A Malaysian Christian Response*, foreword by Dr Ghazali Basri, Ipoh: St. John's Church, 1996.

Bodde, Derk and Clarence Morris (eds.), *Law in Imperial China: Exemplified by 190 Ch'ing Dynasty Cases*, translated from the

Hsing-an-hui-lan, with historical, social and juridical commentaries, Cambridge, Massachusetts: Harvard University Press, 1967.

Braddell, R. St. J., *The Law of the Straits Settlements: A Commentary*, with an introduction by M.B. Hooker, a reprint of the 1915 edition, Kuala Lumpur: Oxford University Press, 1982.

Chandra Mohan Shunmugam and Sukumaran Rama Kutty, "The Introduction and Development of Trial by Jury in Malaysia and Singapore," (1966) 8 *Malaya Law Review* 270-82.

David, Rene and John C. Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law*, 3rd. ed., London: Stevens and Sons, 1985.

Derrett, John Duncan Martin (ed.), *An Introduction to Legal Systems*, London: Sweet & Maxwell, 1968.

E. Maung, *Burmese Buddhist Law*, Rangoon: Daw Than Tint Mya Sapay, 1970.

Engel, David M., *Code and Custom in a Thai Provincial Court: The Interaction of Formal and Informal Systems of Justice*, Tucson, Arizona: Published for the Association for Asian Studies by the University of Arizona Press, 1978.

Engel, David M., *Law and Kingship in Thailand During the Reign of King Chulalongkorn*, Ann Arbor: Center for South and Southeast Asian Studies, University of Michigan, 1975.

Faculty of Law, University of Malaya, *Developments in Malaysian Law* (Essays to Commemorate the 20th Anniversary of the Faculty of Law, University of Malaya), Petaling Jaya: Pelanduk Publications, 1992.

Fyzee, Asaf Ali Asghar, *Outline of Muhammedan Law*, 3rd. ed., London: Oxford University Press, 1964.

Gardner, Brian, *The East India Company: A History*, London: R. Hart-Davis, 1971.

Gautama, Sudargo and Robert N. Hornick, *An Introduction to Indonesian Law: Unity in Diversity*, Bandung: Penerbit Alumni, 1983.

Green, L.C., "Native Law and the Common Law: Conflict or Harmony," (1970) 12 *Malaya Law Review* 38-59.

Gullick, J.M., *Indigenous Political Systems of Western Malaya*, London: University of London, Athlone Press, 1958.

Hall, D.G.E., *A History of South-East Asia*, London: MacMillan, 1955.
Harding, A.J., *Law, Government and Constitution in Malaysia*, Kuala Lumpur: Malayan Law Journal, 1996.
Hickling, R.H., *Essays in Malaysian Law*, Petaling Jaya: Pelanduk Publications, 1991.
Hickling, R.H., *Essays in Singapore Law*, Petaling Jaya: Pelanduk Publications, 1992.
Hickling, R.H., *Malaysian Public Law*, Petaling Jaya: Pelanduk Publications, 1997.
Hooker, M.B. (ed.), *Malaysian Legal Essays*, Kuala Lumpur, Singapore: Malayan Law Journal, 1986.
Hooker, M.B. (ed.), *Laws of Southeast Asia*, Vol. 1, The Pre-Modern Texts, Singapore: Butterworths, 1986.
Hooker, M.B., *Adat Law in Modern Indonesia*, Kuala Lumpur: Oxford University Press, 1978.
Hooker, M.B. (ed.), *Adat Laws in Modern Malaya: Land Tenure, Traditional Government and Religion*, Kuala Lumpur: Oxford University Press, 1972.
Hooker, M.B., *A Concise Legal History of South-East Asia*, Oxford: Clarendon Press, 1978.
Hooker, M.B., *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws*, Oxford: Clarendon Press, 1975.
Hooker, M.B., *Native Law in Sabah and Sarawak*, Singapore: Malayan Law Journal, 1980.
Hooker, M.B., *The Personal Laws of Malaysia: An Introduction*, Kuala Lumpur: Oxford University Press, 1976.
Hooker, M.B., *Readings in Malay Adat Law*, Singapore: Singapore University Press, 1970.
Hooker, M.B., "A Source Book of Adat, Chinese Law and the History of the Common Law in the Malay Peninsula," Singapore: Malayan Law Review, 1967.
Htin Aung, U., *Burmese Law Tales: The Legal Elements in Burmese Folklore*, London, New York: Oxford University Press, 1962.
Khoo, Kay Kim (ed.), *History of Southeast, South and East Asia: Essays and Documents*, Kuala Lumpur: Oxford University Press, 1977.
Kyshe, J.W. Norton, "A Judicial History of the Straits Settlements 1786-1890," (1969) 11 *Malaya Law Review* 38-179.

Lee, Y.K., "The Coroner in Early Singapore (1819-1869)," (1973) 14 *Malaya Law Review* 103-140.

Lev, Daniel S., *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions*, Berkeley: University of California Press, 1972.

Maine, Henry James Summer, *Ancient Law*, London: Dent, 1917.

Malinowski, Bronislaw, *Crime and Custom in Savage Society*, London: Routledge & Kegan Paul, 1926.

Mallal, Bashir A., "Law and Reporting in Malaya," (1959) 1 *Malaya Law Review* 71-86.

Mohd Taib Osman, *An Introduction to the Development of Modern Malay Language and Literature*, Singapore: Donald Moore, 1911 (reprinted 1986 by Times Books International).

Rais Yatim, *Freedom under Executive Power in Malaysia*, Kuala Lumpur: Endowment Publications, 1995.

Roberts-Wray, Kenneth Owen, *Commonwealth and Colonial Law*, London: Stevens, 1966.

Schacht, Joseph, *An Introduction to Islamic Law*, Oxford: Clarendon Press, 1964.

Sheridan, L.A. (ed.), *Malaya and Singapore, the Borneo Territories: The Development of their Laws and Constitutions*, London: Stevens, 1961.

Van der Sprenkel, Sybille, *Legal Institutions in Manchu China: A Sociological Analysis*, London: University of London, Athlone Press, 1962.

Whitton, Evan, *The Cartel: Lawyers and Their Nine Magic Tricks*, NSW, Australia: Herwick Pty Ltd, 1998.

Winstedt, Richard, *The Malays: A Cultural History*, 6th. ed., London: Routledge & Kegan Paul, 1961.

Wu, Min Aun (ed.), *Public Law in Contemporary Malaysia*, Petaling Jaya: Longman, 1999.

Wu, Min Aun, *The Malaysian Legal System*, 2nd. ed., Kuala Lumpur: Longman, 1999.

Yegar, Moshe, *Islam and Islamic Institutions in British Malaya: Policies and Implementation*, foreword by S.N. Elsentadt, Jerusalem: Magnes Press, Hebrew University, 1979.

Zweigert, Konrad and Heinz Kotz, *Introduction to Comparative Law*, translated by Tony Weir, 2nd. ed., Oxford: Clarendon Press, 1992.

INDEX

R.H. HICKLING (who also writes under the name Hugh Hickling) has spent most of his working life in Asia and has had a varied legal career. After serving in the British Navy during World War II, he practised Law in London, and then left for Sarawak in 1950 as the Assistant Attorney-General, and shortly thereafter, in 1956, became the Legal Adviser to the State of Johor. Later, he became the first Parliamentary Draftsman and Commissioner of Law Revision in the Attorney-General's Chambers in Kuala Lumpur.

After leaving Malaya in 1962, he has spent time in legal work in South Arabia, Thailand, Sri Lanka, Gibraltar, Yemen and Fiji, as well as in teaching law at the National University of Singapore, the School of Oriental and African Studies at the University of London, the University of Malaya, and the National University of Malaysia.

Hickling now lives in Malvern, England.

BOOKS BY R.H. HICKLING

LAW

Malaysian Law
Malaysian Public Law
Essays in Singapore Law
Essays in Malaysian Law
An Introduction to the Federal Constitution
Sarawak and Its Government
Memoir of a Wayward Lawyer

NOVELS

A Prince of Borneo
Crimson Sun Over Borneo
(formerly known as Lieutenant Okino)
Festival of Hungry Ghosts
Finding Hobbes
The English Flotilla
The Furious Evangelist

SHORT STORIES

Tales from the Royal Selangor Club
(formerly known as The Dog Satyricon)
The Ghost of Orchard Road & Other Stories
So Lucky! & Other Stories