CASE NOTES

A COLONIAL PRINCIPLE IN A POST INDEPENDENCE SETTING – THE RESURRECTION OF MACLEOD IN SARAWAK

Dato James Wong v.
Officer-in-Charge, Kamunting Detention Centre and Federal Secretary, Sarawak.[1]

When the judgement was delivered in the recent case of *Dato' James Wong* v. *Officer-in-Charge, Kamunting Detention Centre and Federal Secretary, Sarawak*, a case of very doubtful validity was resurrected from the colonial past and applied to the present, leading to an arguably doubtful conclusion. The case was *MacLeod* v. *Attorney General for New South Wales* ([1891] A.C. 455) and the principle of extraterritoriality stated therein was applied in Sarawak to explain the purported ambit and effect of the Preservation of Public Security Ordinance, 1962(hereafter referred to as the PPSO) and the regulations made thereunder, a federal law applicable to Sarawak.

The facts in this instant case revolved around the misfortunes of one Dato' James Wong, a member of the Council Negri, Sarawak. Detained initially in Kuching, Sarawak, Dato' James Wong was however subsequently removed to Kuala Lumpur and then to Kamunting, Perak for continued detention. Pursuant to Regulation 2 of the Preservation of Public Security Regulations, a detention order signed by the Federal Secretary, Sarawak, was duly served on him during the detention in Kuala Lumpur, and the question arose as to whether such detention order had been validly made. In other words, could it be made in respect of a person detained initially in Sarawak but subsequently present outside Sarawak? Seah J., sitting in the High Court of Borneo, seemed to assume that it could if the PPSO and its allied regulations could be taken to have had an extraterritorial effect, but not otherwise. The learned judge then proceeded to hold that those laws could not and did not have such effect, basing his conclusion on, firstly, the power of a colonial legislature to make laws having extraterritorial effect and, secondly, the precise effect of the PPSO and allied regulations on and after Malaysia day, that is, 16th September, 1963.

In coming to the conclusion as he did on the power of a colonial

[1] Originating Motion No. K1 of 1975, Kuching Registry (Unreported at time of writing)

legislature, the learned judge relied on *Macleod*, a decision of the Privy Council on appeal from New South Wales, which has been disapproved of in numerous cases since it was decided, including a case decided in Singapore, namely, *Re Choo Jee Jeng* ([1959] M.L.J. 217 before Ambrose J.). Aside from *Re Choo*, other cases include *Ashbury* v. *Ellis* ([1893] A.C. 339), *Attorney-General for Canada* v. *Cain* ([1906] A.C. 542) and *Croft* v. *Dunphy* ([1933] A.C. 156), with the last as the strongest authority against *Macleod*. Academic opinion too leans heavily in favour of regarding the principle laid down in *Macleod* as probably too wide. (See, inter alia, O'Connell, "The Doctrine of Colonial Extraterritorial Legislative Incompetence," (1959) 75 L.Q.R. 318, and Roberts-Wray, *Commonwealth and Colonial Law*, pp. 387–390).

The actual decision in *Macleod* was really on the law of bigamy in New South Wales which was governed by an Act which read "Whosoever being married marries another person during the life of the former husband or wife, *wheresoever such second marriage takes place*, shall be liable" to be charged and convicted of bigamy. (Section 54, Criminal Law Amendment Act, 1883 (46 Vict. No. 17)). Despite the very clear wording of this particular provision, the Judicial Committee of the Privy Council held that Macleod, who had remarried in the United States, was not guilty of bigamy. The Act, to the mind of the judges in that case, simply could not have had an extraterritorial effect. It would be "an impossible construction" of the statute to hold otherwise since New South Wales was then legally a colony of the Imperial Government, United Kingdom, and as such could not legislate extraterritorially. Lord Halsbury who delivered the judgement of the Judicial Committee asserted very categorically that to allow such an effect would not only be "inconsistent with the powers committed to a colony," but also "inconsistent with the most familiar principles of international law." If the first premise is unfounded on principle, as it is submitted it is, the second is doubly so for there is simply no *familiar* principle of international law to that effect, and further, a latin maxim (*"Extra territorium jus dicenti impune non paretur"*) was erroneously applied by the Committee. As was correctly indicated by Ambrose J., in *Re Choo Jee Jeng*, the reference to "*jus dicenti*" relates to the power to *adjudicate* not legislate (at 218). The maxim has been taken to mean that outside the territorial limits of a state its laws, even though extending thereto, can be disobeyed with impunity. It does not imply that a legislature, including a colonial legislature, cannot pass laws having extraterritorial effect.

Seah J. in *Dato' James Wong*, however, regarded *Macleod* as good authority and as such came to the initial conclusion that since the PPSO was passed at a time when Sarawak was still a colony, it followed that the Ordinance as well as the regulations made thereunder were not then

applicable nor operative outside the territorial limits of the state. Nor is the position any different now even though, since Malaysia, the PPSO and its regulations have become federal law by virtue of the Modification of Laws (Declaration of Federal Present Laws) (Sarawak) Order, 1965, made under section 74 of the Malaysia Act, 1963. Hence, the thread of the argument would seem to run as follows: if the PPSO and its regulations did not have an extraterritorial effect before Malaysia, they could not have such effect after Malaysia, even though they have been expressly made federal law. They are still restricted in operation to the state of Sarawak despite the change in status. Two comments can immediately be made here. Firstly, the conclusion that those laws have only a local operation flows from a premise which is based on the *Macleod* decision and is therefore doubtful in character. Secondly, to use a principle of extraterritoriality to consider the intraterritorial application of a federal legislation would seem very odd indeed. The discussions on the application of the principle were therefore perhaps misplaced, and it may be that a better course would have been to treat the case as involving pure statutory interpretation without recourse to the rather vague *Macleod* principle. In fairness, Seah J., did allude to this point, but the weightage given to *Macleod* as an initial premise underemphasized this more plausible ground.

In addition to section 74(3) of the Malaysia Act and the Modification of Laws (Declaration of Federal Present Laws) (Sarawak) Order, 1965, by which the PPSO and allied regulations were declared to be federal law, an earlier Modification of Laws (Internal Security and Public Order) (Borneo States) Order, 1963, declared the above-mentioned laws to have continued in force after Malaysia Day; and it was also expressly provided that the Interpretation Ordinance of Sarawak was to apply to interpret the laws included within the said Order. Viewed in this manner, the case becomes exclusively one of statutory construction of the actual wording of the relevant provisions. It becomes relatively easy, as a matter of statutory construction, to conclude that a statute cannot be presumed to have an extraterritorial application unless expressly so stated or the effect flows by necessary intendment. The PPSO when passed in 1962 did not have an extraterritorial effect and even after Malaysia Day should be regarded as continuing not to have such an effect despite its statutory transformation into federal law. It would need an express legislative provision on or after Malaysia Day to break this continuity in its area of operation. But Seah J., preferred to lay greater emphasis on *Mcleod* as an aid to construction. Further the learned judge, in choosing to decide the case on the ground of extraterritoriality alone, side-stepped nine other arguments advanced by counsel for Dato' James Wong so that opportunity was lost of considering their validity. For instance, was the detention order also invalid because it purported to have been signed by a person designated as Federal Secretary who, as counsel alleged, had merely a *de facto* as opposed to a *de jure*

existence?

Despite the rather unsatisfactory ground on which the decision of the case was based, the attitude of the court towards the question of personal liberty before it was encouraging, and in ordering Dato' James Wong to be released on his successful habeas corpus application, the principle of judicial independence was again manifested in Malaysia. But the applicant was most dramatically rearrested outside the court house. This somewhat indelicate use of executive power might have been necessitated by the emergency situation in Sarawak, but in the absence of explanation it was most unfortunate and appears to call into question some very broad constitutional issues.

Mohd. Ariff Yusof.

ISSUES OF SHARES

Baldev Singh v. *Mahima Singh*[1]

Many of us have heard the phrase "Ali Baba system of business" or variations thereof many a time. But it is submitted that few of us can match and give it as precise a definition of what it means as Hashim Yeop A. Sani J. ably did in the High Court in *Baldev Singh* v. *Mahima Singh*. The learned judge prefaced his judgment by aptly defining it as "business which carry Malay names but in actual fact is under the absolute control of non-Malays."[2] From the legal point of view, this case is worthy of comment in that it covers two rather difficult areas of company law. In the High Court action, the judgment dealt mainly with the position of a conflict between the minds of the directors of a company and the members in general meeting. In the Federal Court, the main question was whether a purported issue of new shares to certain employees of a company was "an invitation to the public to subscribe for shares" and thus violating one of the articles in the Articles of Association of a private limited company. It is submitted that both judgements pose some difficulty in terms of accurately stating the controlling law. Consequently, it is suggested to traverse the respective judgments beginning first with the High Court's judgment.

The facts of this case are interesting enough. They illustrate, albeit somewhat indirectly, some of the attendant legal problems that private

[1] [1974] 2. M.L.J. 206 (H.C.); [1975] 1 M.L.J. 173 (F.C.)

[2] *Ibid.*, (H.C.) p. 206 – 207.