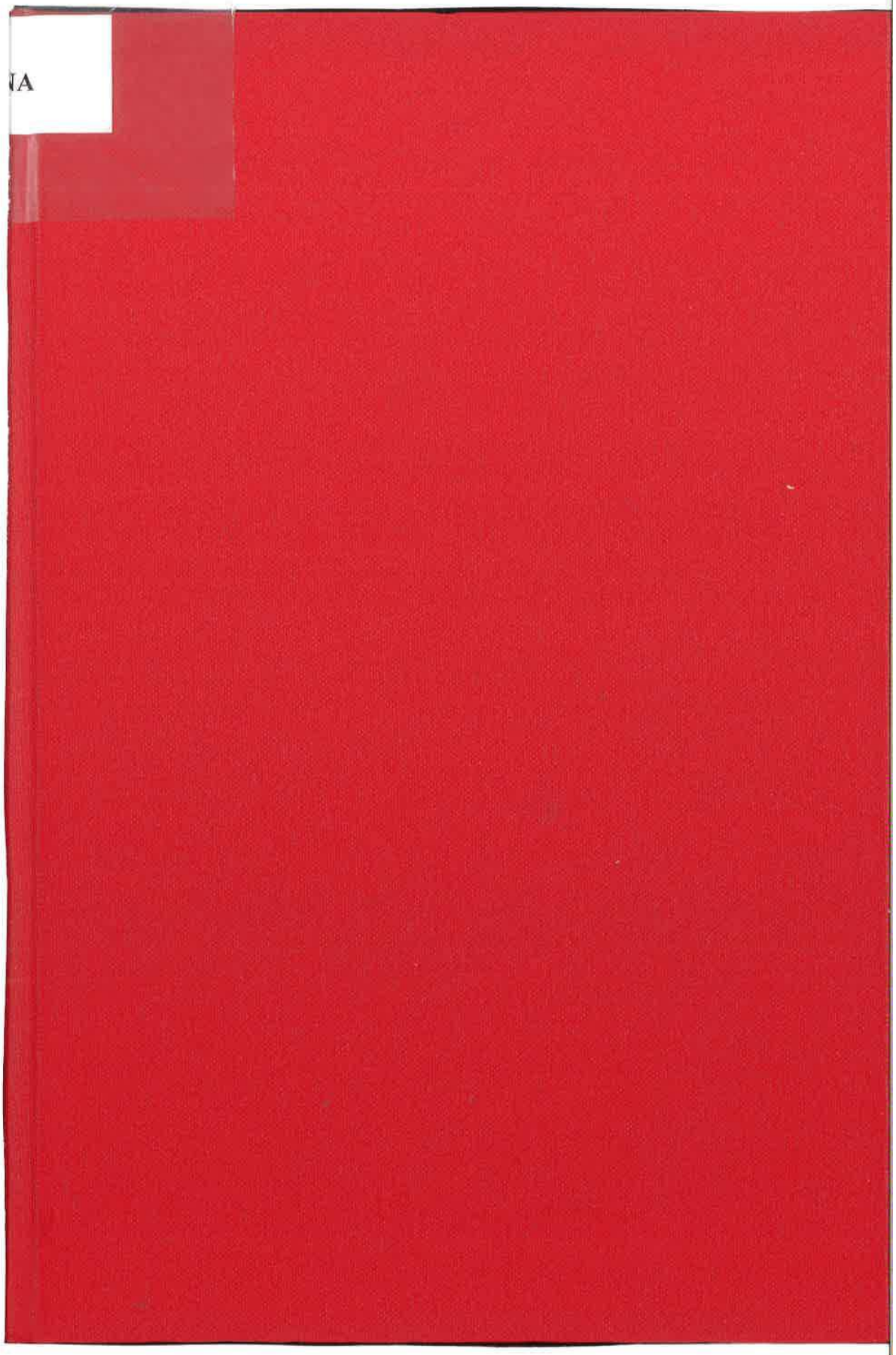
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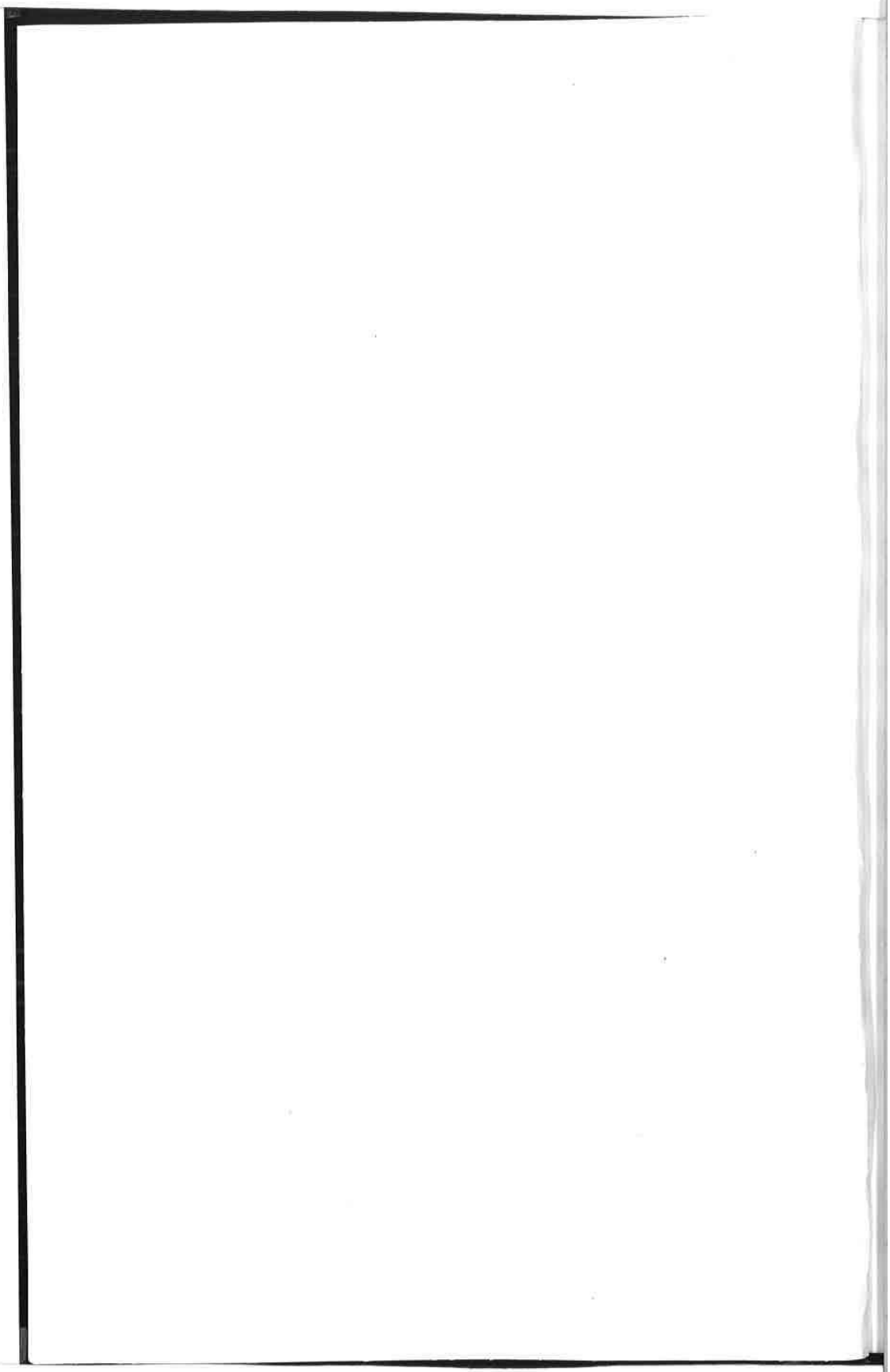

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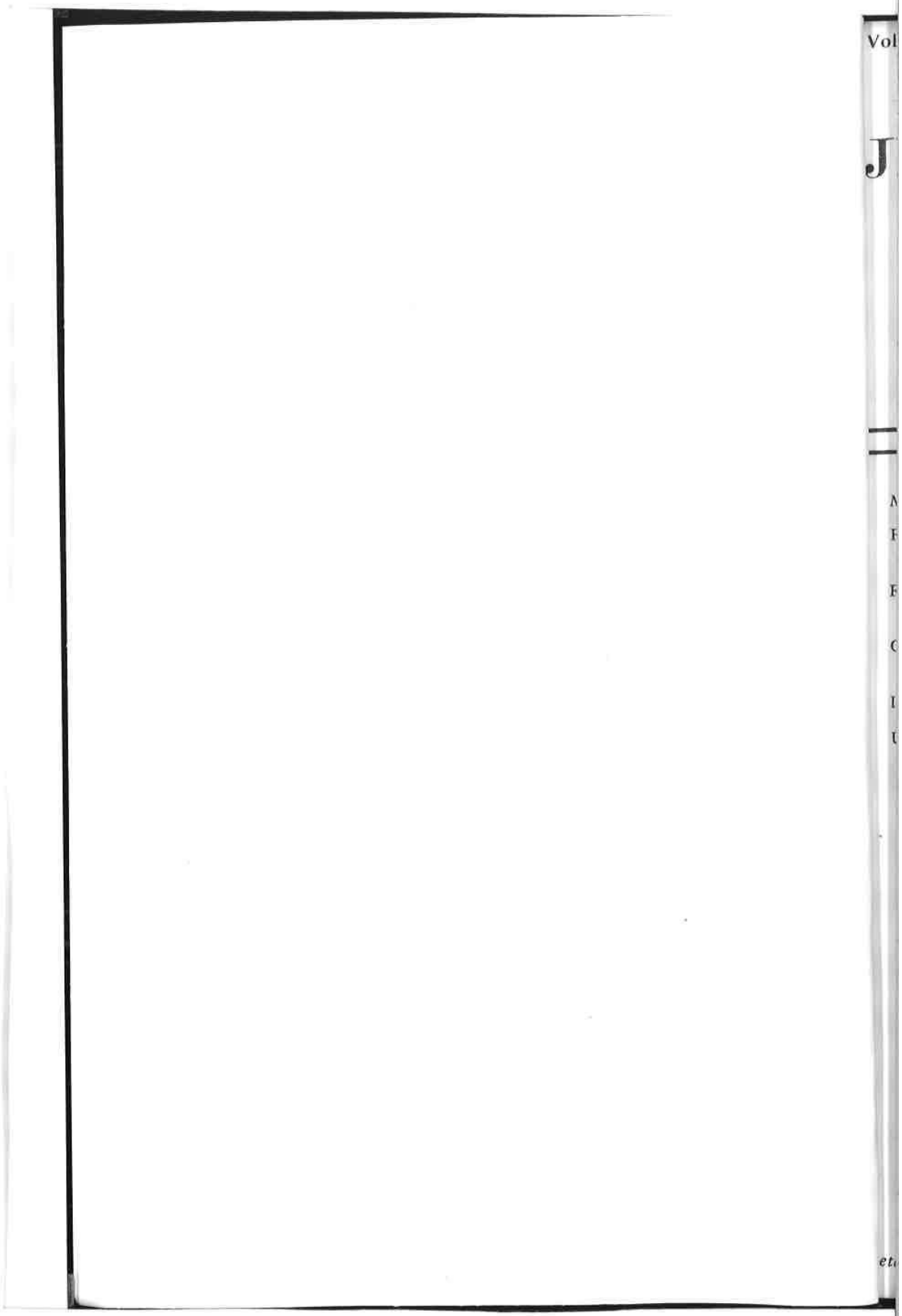

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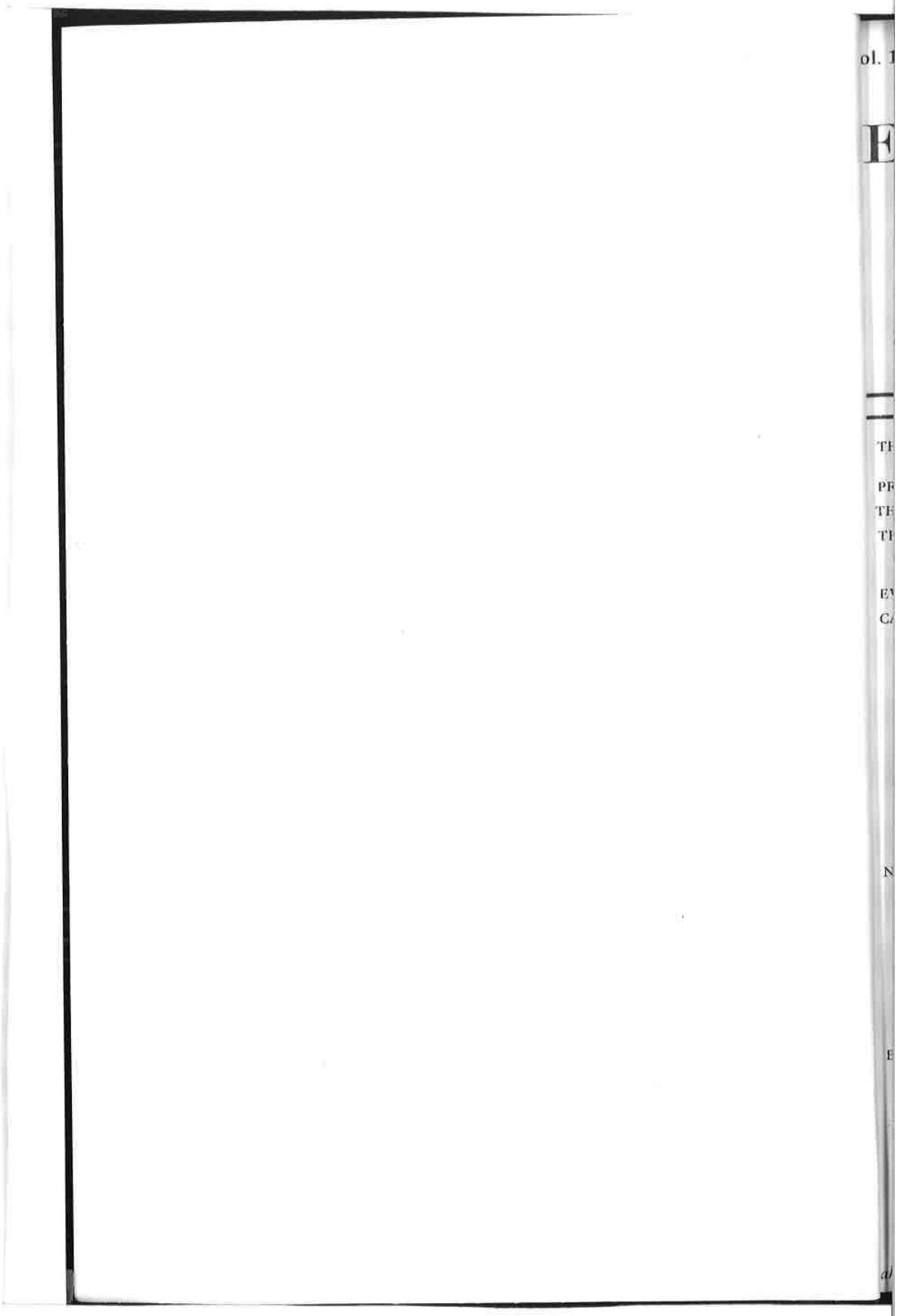

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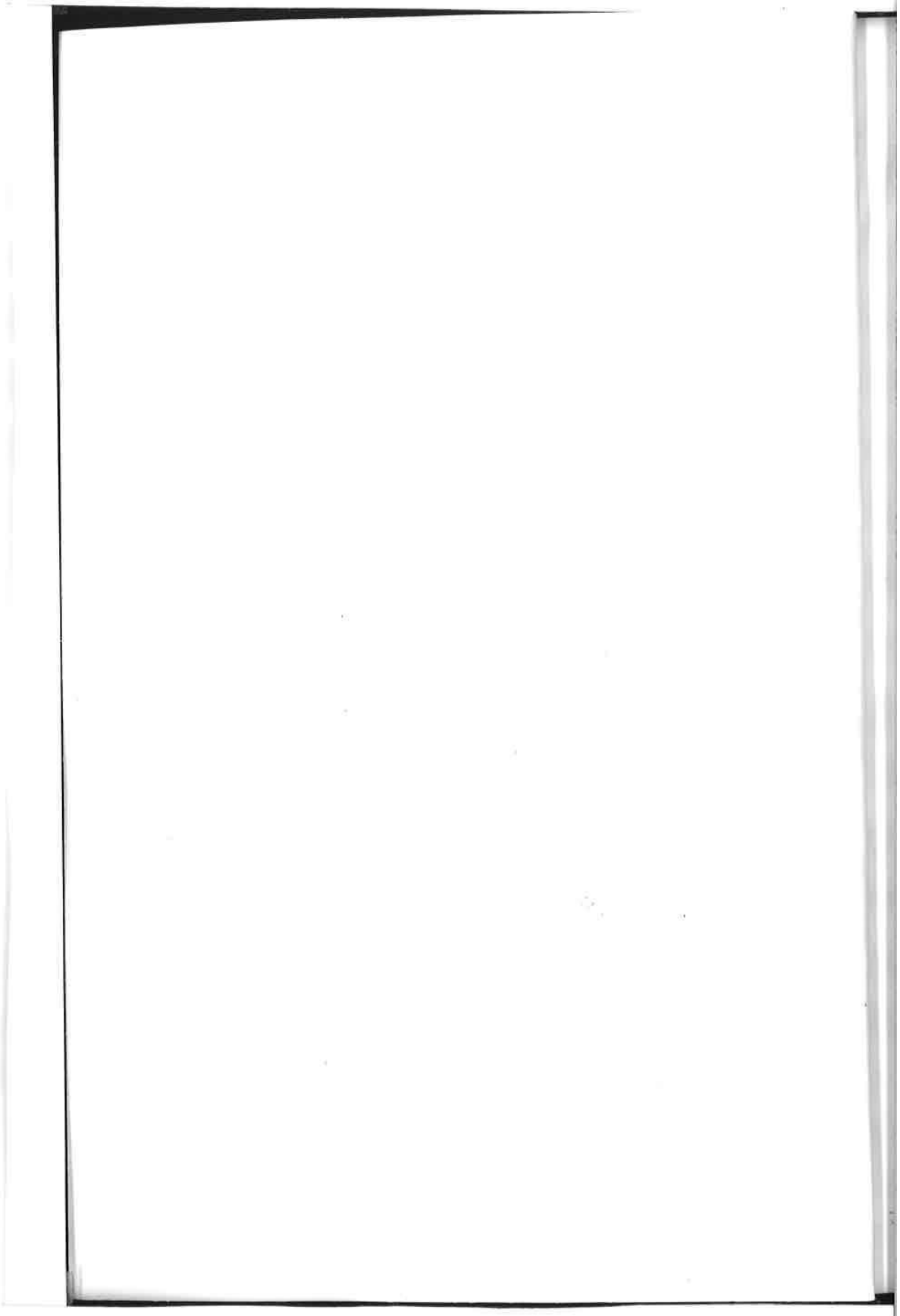

MALAYSIA AS A FEDERATION

The idea of a federation in Malaysia is not entirely new. Negri Sembilan originally consisted of nine States around Malacca who when they broke away from Malacca tutelage constituted a federation. During the nineteenth century there was violent dissension among the rulers of the various states of the federation and the British intervened. By 1889 all the rulers had accepted British protection after which some attempt at amalgamation was made and a federation of only six States was established in 1895. In 1898 they were made into a unitary State for most purposes with its capital at Seremban and the six States (Jelebu, Johol, Rembau, Sri Menanti, Sungai Ujong and Tampin), although they retain their Ruling Chiefs and customs, are headed by one legislature, one executive and a Yang di Pertuan Besar, who is elected by the Ruling Chiefs from among the members of the royal family of Sri Menanti.

The original federation of Negri Sembilan had no written Constitution but was based on the customary law and customary practices. Under the Malay form of federation, the office of Ruler or Yang di Pertuan Besar was a foreign, originally Hindu concept, which had been uneasily absorbed in the Minangkabau tribal system. The Yang di Pertuan Besar had the divine right of one whose ancestors had been the incarnation of Hindu Gods and who under Islam regarded himself the vicegerent of God on earth, but he had no real authority. He could levy no taxes except fees for cock fighting. For his maintenance he lived on land inherited from the tribal wife of the founder of the royal house and he was given formal traditional presents at his installation and on the occasion of marriages and other feasts. He was supreme arbiter and judge, if the territorial chiefs chose to invite him to adjudicate, which they never did. The Yang di Pertuan Besar should have been first in a State Council, but no council ever met, for the four territorial chiefs or *Undangs*, having got themselves absorbed into Minangkabau polity by accepting uterine descent and conforming to matriarchal custom, regarded themselves as petty kings and never collaborated except when threatened by foreign invasion. Below the Undang were the *Lembagas*, the real chiefs of the matrilineal Minangkabau tribes. The Lembaga was elected and under the Malay *adat* he had the power of marking the boundaries of tribal lands and settling the transmission of property on death or divorce and he had jurisdiction in cases of lesser crimes, torts and debts. The Lembaga's subordinates were the elders (*buapa*) elected by the members of the sub-tribes. His function was to deal with disputes among the members of the sub-tribe, and he was the witness for all formal

payments made by or to a member of his sub-tribe and for the declaration of the husband's separate property at marriage and at its return on divorce.

The democracy of Negri Sembilan was an indigenous tribal one which gave votes to women and protected the rights of the humblest. It had however two fundamental weaknesses. It insisted that the election of all its representatives, from the Ruler down to the tribal elder, must be unanimous. They were so intent on the principle of unanimity that they never realized the advantage of accepting a majority vote, so that before the British period minorities were always creating evil strife. Secondly, they were so suspicious of tyranny that they never gave the Yang di Pertuan Besar the power required to federalise their territory. The old nine States were never a homogenous federation. The big territorial chiefs never merged their individual interests in those of the federation and except in the face of foreign aggression each State was self-sufficient. It was the British creation of a Council with the Yang di Pertuan Besar as Chairman and the four Undangs as members and a majority vote which cemented the warring elements of the State.

In 1896 Negri Sembilan joined with the States of Selangor, Perak and Pahang to form the Federated Malay States. One of the principal reasons for the Federation was to have a single administrative unit by which the State of Pahang which was in serious financial difficulties owing to her small revenue and costly rebellions could be financed from the richer States of Perak and Selangor. It was also felt that unity would bring greater efficiency in all departments of public life. Specialist engineers and doctors were badly needed but it was difficult for a State to hire their services alone. A union of States would enable specialists to be employed for development purposes. The export of tin through Singapore demanded an efficient system of transport and in order to develop this, co-operation among the different States was necessary. It is also significant that this was a time when federations were being encouraged in Australia and Africa and it was felt that federation would enable the power of the Residents in the State to be checked. The instructions given to each Resident were to the effect that "the Residents are not to interfere more frequently or to greater extent than is necessary with the minor details of government; but their special objects should be, the maintenance of peace and law, the initiation of a sound system of taxation, with the consequent development of the resources of the country and the supervision of the collection of revenue, so as to ensure the receipt of funds necessary to carry out the principal engagements of the Government and to pay for the cost of the British officers and whatever establishments may be necessary to support them".[1] This was a great responsibility and power for one man; it became

[1] E. Sadka, *The Protected Malay States, 1874-1895* Kuala Lumpur, 1968, p. 102.

necessary to restrain some of them from exceeding their authority.

The Federation Agreement of 1896 created the post of Resident-General, who was to be the agent and representative of the British Government directly under the Governor of the Straits Settlements. The Resident-General's advice was to be followed by the Sultans on all matters except those touching Islam and Malay customs. It was provided that nothing in the Agreement was intended to curtail any of the powers or authority held by the Rulers in their respective State; the State Councils were to retain the power to enact legislation; and the appointment of the Resident-General was not to effect the obligation of the Malay Rulers towards the British residents. Although under the Agreement the States were to retain their legislative and executive powers, in effect federation meant to a great extent centralization at Kuala Lumpur. The federation was advantageous to the States concerned. It brought about co-ordination of work and co-operation among the States and these led to prosperity. The Police Force was reorganised by a Commissioner of Police, the financial system was reorganised by a Financial Commissioner and the work of extending and constructing railways was undertaken by a General Manager. The judicial system was reorganised by appointing a Judicial Commissioner, Public Prosecutor and two assistant Judicial Commissioners. A Land Code and a Mining Code were drawn up and a Conservator of Forests was appointed to look after the forests. With all these however the States were apprehensive of the overcentralisation. The Central Government came to have extensive executive powers. The executive power fell in the hands of the Resident-General, who came to take over nearly all the important functions of the Residents, as he controlled the important departments from Kuala Lumpur. The States were left to attend only to minor details. All the laws were drafted in Kuala Lumpur and sent along to the States which had to adopt them. The State Councils thus became nothing more than rubber stamps. One of the direct results of the Federation was the holding of a Rulers' Conference or Durbar. Two such Conferences were held; one in 1897 at Kuala Lumpur and the other in 1903 at Kuala Lumpur. At the first Conference certain laws were passed on to the State Councils to be approved by the State Governments. Thus the State Governments in effect lost their power to legislate. The power of the Federal Commissioner, the Legal Adviser and the other central offices grew at the expense of the State Governments. The Resident-General became a very powerful man and although the Federation Agreement provided for the Federal Council to meet at least once in every year, no meeting of the Council was called. The agitation of the Rulers and especially that of Perak led to a move for decentralization. In 1909 a Federal Council was set up. It was composed of the High Commissioner, the four Sultans, their four Residents, the Resident-General and four nominated members representing business interests. The

main purpose of the Council was to enable the Sultans to express their opinions on the running of their States; to give the business community a voice in the Federal Council; and lastly to permit better control of finances of the Federated Malay States. The powers of the Resident-General were cut – he lost the control of finance and was required to take into consideration the opinions of the Sultans and the business community in proposing laws for enactment. The next step was taken in 1910 when the Resident-General's office was reduced to that of Chief Secretary to the High Commissioner and the Federal Council was given complete control of the finances of the federation. However it soon became apparent that the establishment of the Federal Council did not in any measurable way benefit the Sultans but instead led to further centralization. The Rulers sat as ordinary members of the Federal Council and had no more authority than the business representatives and therefore could be out-voted on any issue. Unconsicously the administration gradually came to be more and more centralized in the office of the Chief Secretary. Further steps at decentralization were proposed in 1925. The High Commissioner Sir Lawrence Guillemard, suggested the abolition of the post of Chief Secretary, whose powers would be transferred to the Residents. The States were to have control over all Government departments except Railways, Customs and Excise, Post and Telegraphs which would be re-named as federal. The Rulers accepted these proposals but they were opposed by the business community. As a result a compromise was adopted.

In 1927 the Federal Council was reorganized. The Sultans withdrew from the Federal Council and the membership of the Council was increased to twenty-four – thirteen officials, the heads of federal departments and eleven unofficials representing the various communities and interests. The next step at de-centralization was taken in 1933, when a Federal Secretary replaced the Chief Secretary. The State Councils, which had been in decay, were reconstituted and non-Malay interests were given representation on them. The powers of the Chief Secretary were passed to the Residents and many departments, including agriculture, education, medical services and the Public Works Department, were transferred to the individual States. The Japanese Occupation of Malaya retarded all further constitutional progress. However the British Government made plans for the post-war government in Malaya and in 1943 it was announced that "the main aim of the Government as regards the political future of Malaya after its liberation will be the development of its capacity for self-government within the Empire". In 1945 the blue print which had been prepared for the Malayan Union of all the Malay States, Penang and Malacca (but without Singapore) was put into effect. The Union would be headed by a Governor with full powers over the Civil Service. The Sultans who had hitherto been heads of their own States were now to be advisers

only. They would sit in a Council of Rulers, which would give advice to the Governor, when the Governor asked for it. The Legislative Council was to comprise of an equal number of official and unofficial members. The unofficial members appointed were to represent as much of the population as possible. The Governor had the right to veto or to pass any law. Local and State Government were to be conducted through State and Settlement Councils. Citizenship was opened to the immigrant races with a residential qualification of ten out of fifteen years. The proposals for and the institution of the Malayan Union were opposed by the Malays who considered them as an affront to their traditional Rulers and the Malayan Union was eventually dissolved.

The Federation of Malaya was established on 1st February, 1948, by the Federation of Malaya Agreement, 1948, after agreements had been concluded between the British Government and the Rulers jointly. The Agreement established a federation consisting of the Malay States and Malacca and Penang with a strong central government. So far as the Malay States were concerned direct British jurisdiction was restricted to external affairs, defence and appeals to the Privy Council. Under the new Agreement each Ruler was to accept the advice of a British Adviser except in matters of religion and Malay custom and was to govern his State under a written constitution which conformed with the State and Federal Agreements. In form the Federation appeared as a loose one of quasi-sovereign States; but the compulsion of the Rulers to follow the counsel of their British Advisers together with the "reserved power" of the High Commissioner to enact legislation without the approval of the Legislative Council provided the means for an effective centralization of power. Part XII of the Second Schedule to the Agreement provided for the acquisition of Federal citizenship by operation of law and by application.

After the elections of 1955, which returned the Alliance Government to power, discussions took place between the British Government, the Rulers and the new Alliance Malayan Government, on the next steps towards independence. It was agreed that a Commission be set up to review the Constitution. The Commission consisted of Lord Reid and Sir Ivor Jennings from the United Kingdom, Mr. Justice Malik of India, Mr. Justice Abdul Hamid of Pakistan and Sir William McKell of Australia. In the introduction to its report the Constitutional Commission stated the general principles upon which it proceeded in making its recommendations. "We think it essential that there should be a strong Central Government with a common nationality for the whole of the Federation. Moreover we think it essential that the States and Settlements should enjoy a measure of autonomy and that their Highnesses the Rulers should be constitutional Rulers of the respective States with appropriate provisions regarding their position and prestige. We have made provision for a new

Constitutional Head for the Federation and for the Settlements becoming States in the new Federation. We have adopted without substantial change proposals for the acquisition of citizenship of the Federation which have been agreed by the main parties representing all races. We recognise the need for safeguarding the special position of the Malays, in a manner consistent with legitimate interests of other communities and we have given particular consideration to this need. We have framed our recommendation on the basis that Malaya will remain within the Commonwealth and we have found general agreement in this matter".[2]

The Commission duly submitted its report which was published on 21st February, 1957. The British Government, the Conference of Rulers and the Government of the Federation then appointed a Working Party to examine it in detail. On the basis of their recommendations the new Federal constitution, together with constitutions for Malacca and Penang, was promulgated on Merdeka Day, 31st August, 1957, and thus the Federation of Malaya became an independent sovereign country.

The constitutional machinery devised to bring the new constitution into force consisted of:-

(a) in the United Kingdom, the Federation of Malaya Independence Act, 1957, together with Orders in Council made under it;
(b) the Federation of Malaya Agreement, 1957; and
(c) in the Federation, the Federal Constitution Ordinance, 1957, and (in each of the Malay States) state enactments approving and giving the force of law to the federal constitution.

On 31st July, 1957, the Federation of Malaya Independence Act, 1957, passed by the British Parliament gave parliamentary approval to Her Britannic Majesty concluding with the Rulers of the Malay States an agreement for the establishment of the Federation of Malaya as an independent sovereign country. In particular the Act empowered Her Majesty to terminate her sovereignty and jurisdiction in respect of the settlements of Malacca and Penang, and all her other powers and jurisdiction in respect of the Malay States or the Federation as a whole. Also, the Act empowered the conclusion of an agreement to form the Malay States and the Settlements into a new independent Federation of States under a Federal Constitution.

On 5th August, 1957, the Federation of Malaya Agreement, 1957, was concluded between on the one hand the British High Commissioner on behalf of Her Majesty and on the other the Rulers. This agreement established a new federation of states called the Federation of Malaya consisting of the Malay States and the settlements as from 31st August, 1957 (Merdeka Day) and thereupon the settlements ceased to form part of Her Majesty's dominions and Her Majesty ceased to exercise any sovereignty

[2] Federation of Malaya Constitutional Commission Report, para. 15.

over them, and all powers and jurisdiction of Her Majesty or of the British Parliament in respect of the settlements or of the Malay States or the Federation as a whole came to an end. In the agreement were contained the new constitution of the Federation of Malaya and the new constitutions of Penang and Malacca.

The Federal Constitution Ordinance, 1957, was passed by the Federal Legislative Council to give the agreement and the three constitutions contained in it the force of law. Similarly, each of the legislatures of the Malay states also passed state enactments approving and giving the force of law to the Federal Constitution. The new Constitution of the independent Federation of Malaya thus came into operation on August 31st, 1957, and although amended in detail on several occasions it was not subject to any drastic revision until September, 1963, when the Federation was renamed Malaysia; and Singapore, Sabah and Sarawak joined the Federation. The constitutional changes and modifications required were effected by the Malaysia Act, which came into operation on the 15th of September, 1963. On August 9th, 1965, Singapore left the Federation and Malaysia therefore now consists of the States of Malaya and the Borneo States.

The Constitution of Malaysia provides for a parliamentary democracy based on the English model. The Head of State is the Yang di-Pertuan Agung who is elected from among the nine Malay Sultans to serve for a five-year term, and who must normally act on the advice of ministers. The Yang di-Pertuan Agung may act in his discretion in appointing a Prime Minister, in withholding consent to a request for the dissolution of Parliament and in summoning a meeting of the Conference of Rulers concerned solely with the privileges, position, honours and dignities of the Rulers and in any action at such meeting. The Prime Minister has to be a member of the House of Representatives commanding the confidence of that House. The Federal Parliament is bicameral, the lower house, the House of Representatives, being wholly elected. The upper house, the Senate, has two Senators elected by each State Legislative Assembly and a number of members nominated by the federal government. Elections are by secret ballot, the electorate being divided on the basis of territorial constituencies consisting of all adult citizens not subject to any special disqualification. The relations between the two Houses are constitutionally regulated following the precedent in the United Kingdom, the effect of which is that the Senate has virtually no power to oppose financial legislation which it may delay for one month only, while it may delay the passage of other legislation for one year.

Islam is the religion of the Federation but while each of the Rulers is the Head of the Muslim religion in his State and provision is made for the Yang di-Pertuan Agung to be conferred the position of Head of the Muslim religion in Penang and Malacca, no such provision is made in regard to the

Borneo States.[3] The function of the Conference of Rulers of agreeing or disagreeing to the extension of any religious acts, observances or ceremonies to the Federation as a whole does not extend to Sabah or Sarawak.[4] No Act of the Federal Parliament which provides as regards a Borneo State for special financial aid for the establishment or maintenance of Muslim institutions or the instruction in the Muslim religion of persons professing that religion, shall be passed without the consent of the Governor; and where any grant is given for such purposes by any provision of Federal law not having effect in either of the Borneo States, provision must be made for the payment of a proportionate amount for social welfare purposes in that State.[5] In the States of Malaya the State Legislature may enact a law controlling or restricting the propagation of any religious doctrine or belief among persons professing the Muslim religion but in the case of a Borneo State the Constitution may provide that no such law shall be passed unless it is agreed to in the Legislative Assembly on second or third reading or on both by a specified majoirty, not greater than two-thirds of the total number of members of the Assembly.[6]

Again while Malay is accepted as the national language of the Federation, it is provided that no Act of Parliament terminating or restricting the use of the English language in either House of Parliament by a member of or from the Borneo State shall come into operation until ten years from Malaysia Day; and no such Act of Parliament terminating or restricting the use of the English language (a) in proceedings in the High Court in Borneo and in appeals to the Federal Court therefrom; or (b) in the Legislative Assembly or for other official purposes in a Borneo State, shall come into operation until ten years after Malaysia Day and until it has been approved by an enactment of the Legislature of the Borneo States or the Legislature of the Borneo State, as the case may be.[7] Moreover any native language in current use in the Borneo State may oe used in native courts or for any code of native law and in the case of Sarawak, until otherwise provided by enactment of the Legislature, such native language may be used by a member addressing the Legislative Assembly or any Committee thereof.[8]

The Yang di-Pertuan Agung and the Rulers are constitutionally linked

[3] Federal Constitution, Article 3(1).

[4] *Ibid.*, Article 38(7).

[5] Federal Constitution, Article 161C.

[6] *Ibid.*, Article 161D.

[7] *Ibid.*, Article 161.

[8] *Ibid.*, Article 151 (5).

with the Muslim religion and Malay custom and the special position of the Malays in the public service, education, trade and business. Each Sultan is the head of the Muslim religion in his own State; the consent of the Conference of Rulers is needed before any constitutional amendment affecting the special rights of the Malays can be made and the Conference of Rulers must also be consulted on proposed changes in policy affecting such special rights. The dignity, precedence, privileges, rights and immunities of the Rulers are reaffirmed by the Federal Constitution; no Federal law affecting their position can be passed without the consent of the Conference of Rulers; and the State Legislatures have no power to amend constitutional provisions relating to the position of the Rulers and other Malay customary dignitaries.

The States which constituted the Federation of Malaya had on the whole a similarity of social and political institutions, although neither Penang or Malacca had Malay rulers. The Malays constituted the largest group of the native population and are about 55% of the total population. The Chinese constitute about 35% of the population and the balance of the population are made up mainly of the Indians, Europeans and Eurasians. Although the Malays are in a majority in the East Coast States of Kelantan and Trengganu, on the whole, the population structure was similar throughout the Federation of Malaya and the division of the Federation into States did not reflect any differences in social and political structure or communal stratification. With the entry of the Borneo States and still more of Singapore into Malaysia, significant local differences appeared. Singapore had a predominantly Chinese population and had ceased to have any effective Malay Ruler since 1877 if not earlier. The Borneo States cannot be considered as Malay countries in the Malayan sense, as out of a total population of about 2 millions, under half a million of them regard themselves as Malays. The Borneo States too have no Malay Rulers and the Muslim population constitute only 23.4% of all faiths practised in Sarawak and 37.9% in Sabah. In the new Federation therefore State boundaries do demarcate significant local units with significant local interests to defend.

Although four of the Constitutions of the States, namely, Johore, Kelantan, Perak and Trengganu, refer to a status known as "subject of the Rulers" and although the States having Rulers have nationality laws providing for the acquisition and loss of the status of subject of the Ruler, in effect, there was one citizenship law for the whole of the Federation. Under the Federation of Malaya Agreement of 1948 all subjects of the Rulers were given citizenship of the Federation by operation of law. With Malaysia, Federal citizenship was extended to Singapore and the Borneo States. The citizenship of Singapore was however retained; franchise and other rights in Singapore depended on possession of the citizenship of Singapore as distinct from Federal citizenship; and

conversely a citizen of Singapore could not exercise franchise rights in the other parts of Malaysia.

The Constitution follows the ordinary federal method of dividing powers so that the Federal and State governments are each within their own spheres co-ordinate and independent. The division of legislative powers between the Federation and the States is set out in three lists, the Federal List, the State List and the Concurrent List and all residuary powers not listed are placed within the competence of the States.[9] The distribution of powers in the Federation of Malaya reflected a very strong central emphasis. The exclusive powers of the Federal Parliament are very extensive; they include elaborately defined external affairs and defence powers; wide authority over internal security, including the police; very general powers over the criminal and civil law and the administration of justice, citizenship and aliens; extensive financial powers, including tax powers, broad control over loans and borrowing including borrowing by the States and general fiscal control of the economy, including power over foreign exchange, banking, currency and capital issues. The Federal Legislature was also given legislative powers with respect to the production, supply and distribution of goods; price control, and food control; corporations; industries and factories; exports; industrial property and insurance; shipping, navigation, fisheries, communications and transport; education, medicine and health; labour and social security, including trade unions, industrial and labour disputes and labour welfare; newspapers and other publications; and wireless, broadcasting and television. In contrast the legislative powers of the States were meagre; they include powers over the Muslim religion and the personal and family law of Muslims, various matters touching land tenure, local government and various works and services of a local character. The Concurrent List was short and included social welfare, town and country planning, public health, sanitation and disease prevention, drainage and irrigation. It is provided that if any State law is inconsistent with a Federal law, the Federal law shall prevail and the State law shall, to the extent of the inconsistency, be void.[10]

Not only were the powers of the States circumscribed but the Federal Parliament had power to legislate on State matters. Thus under Article 76 Parliament had power to make laws with respect to any matter enumerated in the State list for the purpose of implementing any treaty, agreement or convention between the Federation and any other country or any decision of an international organization of which the Federation is a member; or for the purpose of promoting uniformity of the laws, or if so requested by the legislature of a State. It was provided however that no

[9] Federal Constitution, 9th Schedule.

[10] Federal Constitution, Article 75.

such law with respect to any matters of Muslim law or the customs of the Malays shall be made until the government of any State concerned had been consulted and no such law made for the purpose of promoting uniformity or at the request of any State shall come into operation in any State until it had been adopted by a law made by the legislature of that State, in which case it will become a State law. Parliament was also authorized to make laws for the purpose of ensuring uniformity of law and policy with respect to various matters of land law, including land tenure, the relations of landlord and tenant, registration of titles and deeds relating to land, transfer of land, mortgages, leases and charges in respect of land, covenants and other rights and interests in land, compulsory acquisition of land, rating and valuation of land and local government. This exercise of the federal legislative authority is not subject to State approval except in so far as such law makes provision for conferring executive authority on the Federation, in which case it must be approved by a resolution of the Legislative Assembly of the State it it is to operate there. Land utilization policy was formulated by a federally controlled National Land Council; the federal authorities were entitled to prepare and give legislative effect to national development plans, conduct inquiries and research in any field, inspect State activities and give advice to State governments and officers. Moreover in times of emergency, after a proclamation of emergency has been issued by the Yang di Pertuan Agung, the Federal Parliament may make laws with respect to any matter if it appears to the Parliament that the law is required by reason of the emergency; but this power again did not extend the powers of Parliament with respect to any matter of Muslim law or the custom of Malays nor could it validate any provision inconsistent with the provisions of the Constitution relating to any such matter or relating to religion, citizenship or language.[11]

The division of executive powers followed that of the legislative powers. The executive authority of the Federation extends to all matters with respect to which the Federal Parliament may make laws and the executive authority of a State to all matters with respect to which the legislature of that State may make laws. It is provided that the executive authority of a State shall be so exercised as to ensure compliance with any federal law applying to that State and as not to impede or prejudice the exercise of the executive authority of the Federation.[12] In an emergency, the exeeutive authority of the Federation extends to any matter within the legislative authority of a State and to the giving of directions to the government of a State or to any officer or authority thereof.[13]

[11] Federal Constitution, Article 150.

[12] Federal Constitution, Article 81.

[13] *Ibid.*, Article 150 (4).

The Federal Parliament is also given power where the Constitution of any State does not contain the essential provisions set out in Part I of the Eighth Schedule to the Constitution, or provisions substantially to the same effect or contains provisions inconsistent with the essential pro-provisions, to make provision by law for giving effect in that State to the essential provisions or for removing the inconsistent provisions. Moreover where it appears to the Federal Parliament that in any State any provision of the Federal Constitution or of the Constitution of the State is being habitually disregarded, Parliament may notwithstanding anything in the Federal Constitution, by law make provision for securing compliance with those provisions.[14]

The legislative power of the States was further restricted by the fact that it had no power to legislate to create offences in respect of the matters included in the State List and even in respect of the Muslim law, the Muslim courts constituted by the State enactments were not to have jurisdiction in respect of offences except as conferred by Federal law.[15]

This division of powers between the Federation and the States remained substantively unchanged in respect of the original eleven States of the Federation but the State and concurrent powers of Sabah and Sarawak are much wider. The State list for the Borneo States includes Native law and custom, the incorporation of authorities and other bodies set up by the State law, the regulation and winding-up of corporations created by State law, ports and harbours (other than federal ports and harbour), the regulation of traffic in ports and harbours, cadastral land surveys, libraries, museums and ancient and historical monuments (other than those declared to be federal) and in Sabah, the Sabah Railway. The Supplementary Concurrent List for the Borneo States includes:-

(1) Personal law relating to marriage, divorce, guardship, maintenance, adoption, family law, gifts or succession, testate and intestate;
(2) Adulteration of foodstuffs and other goods;
(3) Shipping under 15 registered tons, maritime and estuarine fishing and fisheries;
(4) The production, distribution and supply of water power and of electricity generated by water power;
(5) Agricultural and forestry research, control of agricultural pests and protection against such pests; prevention of plant diseases;
(6) Charities and charitable trusts;
(7) Theatres, cinemas, cinematograph films; and places of public amusement;

[14] *Ibid.*, Article 71.

[15] *Ibid.*, 9th Schedule List II Item 1.

(8) Elections to the State Assembly during the period of indirect elections;

(9) (In Sabah only till 1970) Medicine and health.[16]

The variations of the State List and Concurrent List in respect of the Borneo States do not (as they did in the case of Singapore) affect subjects of the first level of governmental importance but under the terms of the Malaysia Agreement, as implemented in the Immigration Act, 1963, the Borneo States retained wide powers of control of entry into and residence in the States, including power, with certain specified exceptions, to treat Federal citizens seeking entry to or residence in the State as if they were non-citizens.

The Malaysia Act did extend the powers of the States generally by giving them legislative power to create offences in respect of matters included in the State List and by giving power to Parliament to extend the legislative powers of the States. It was provided that the power of Parliament to make laws with respect to a matter enumerated in the Federal List included power to authorize the Legislatures of the States or any of them, subject to any conditions or restrictions that Parliament may impose, to make laws with respect to the whole or any part of that matter.[17] In respect of the Borneo States power was given to the Yang di Pertuan Agung to extend the legislative powers of the State and to extend the executive authority of the State.[18] The power of the Federal Parliament to pass uniform laws with respect to land or local government was made inapplicable to the Borneo States and the Borneo States were also excluded from national plans for land nationalization and local government development, unless and until they desired their application.[19]

The original draft Constitution of the Federation of Malaya included a clause in the Article relating to the distribution of legislative powers between the Federation and the States that nothing in the Article should "render invalid any provision of a federal law if in pith and substance it relates to any of the matters enumerated in the Federal List or the Concurrent List or render invalid any provision of a State law if in pith and substance it relates to any of the matters enumerated in the State List or the Concurrent List". This clause has not been included in the Constitution but it has been suggested that as it expresses a principle of interpretation it may still be adopted for the construction of the provision for distribution of powers in the Constitution.

[16] Federal Constitution, 9th Schedule.

[17] Federal Constitution, Article 76A.

[18] *Ibid.*, Article 95C.

[19] *Ibid.*, Article 95D and 95E.

The Constitution provides that the judicial powers of the Federation shall be vested in a Federal Court, in the two High Courts of the States of Malaya and the Borneo States and in such courts as may be provided by federal law.[20] All the courts apart from the Shariah Court, which deal with Muslim law, and Native Customary Courts are federal courts. The High Courts have unlimited original jurisdiction in civil and criminal cases. Appeals go to the Federal Court, which has also an original jurisdiction on constitutional matters referred to it by the Head of State. There is an appeal from the Federal Court to the Yang di-Pertuan Agung, who under the present arrangements refers such appeals to the Judicial Committee of the Privy Council. Judges of the Federal Court and the High Court are appointed from legally qualified persons by the Yang di-Pertuan Agung acting on the recommendation of the Prime Minister who is required to consult the Lord President of the Federal Court (except when selecting a Lord President), the Chief Justices of the High Courts (when appointing a Federal Court Judge or a Chief Justice) and the Chief Ministers of the Borneo States (when appointing a Chief Justice for the Borneo States) or the Chief Justice concerned (when appointing a Judge to the High Court). The Constitution provides for the security of tenure and remuneration of the Judges and restricts discussion of judicial conduct in the legislatures. The removal of a Judge of the Federal Court or of a High Court is placed outside the competence of the executive and legislature and entrusted to a tribunal of Judges and ex-Judges. Among the functions of the judiciary is that of considering the validity or otherwise of Acts of Parliament and enactments and ordinances of the State legislatures. Disputes between the Federal and State authorities as to the application of the division of powers are therefore referred to the courts and in the last resort to the Judicial Committee of the Privy Council, as the final court of appeal.

Under the Constitution the Federation is in effect the main taxing authority. Apart from rents on State property, interest on State funds, receipts from land sales of State property and the revenue of local authorities, the only sources of State revenue are revenue from toddy shops, lands, mines and forests and from licences, entertainment duties and receipts in respect of specific State services. The financial needs of the States are met by annual capitation and road grants by the Federal Government. Provision is made for a State Reserve Fund, out of which grants may be made to the States. The States are also guaranteed a minimum of 10% of the export duty on tin produced in the State and Parliament may provide in the case of the States of Malaya that each State shall receive such proportion as may be prescribed of the export duty on minerals (other than tin) produced in the State. The Borneo

[20] Federal Constitution, Part IX.

States are empowered to make laws for imposing sales tax and they are assigned import and excise duty on petroleum produces and export duty on timber and other forest products. They are also assigned the revenue from fees and dues from port and harbours other than federal ports and harbours. The States are therefore to a greater or less extent financially dependent for grants-in-aid from the Federal Government. They are also subject to federal control in raising loans; a State may not borrow on the open market but only from the Federation or for a period not exceeding twelve months, from a bank approved for that purpose by the Federal Government.[21]

The appointment and disciplinary control of public servants in the Federation are vested in the Public Service Commission and a number of specialist Service Commissions, including a judicial and legal service commission. Some of the States have their own State Public Service Commissions; in those which have not, the State Public Services come under the Federal Public Services Commission. The Public Service Commission has branches in the Borneo States. The States are restricted in making alterations in their public service establishments by the provision that no State shall, without the approval of the Federation, make any addition to its establishment or the establishment of any of its departments or alter the rates of established salaries and emoluments if the effect of doing so would be to increase the liability of the Federation in respect of pension, gratuities or other like allowances.[22]

The Constitution provides for a number of organizations which provide consultation and co-operation between the governments in the Federation. The Conference of Rulers which stands outside the Federal and State legislative and executive organs has a variety of functions and compositions. It is composed of the Malay Rulers and the Governors of Malacca, Penang, Sabah and Sarawak but the four Governors take no part in the election of the Yang di Pertuan Agung or in discussions of the privileges, position, honours and dignities of the Rulers. The Conference of Rulers can block certain bills, has to be consulted on certain appointments, including that of the Lord President of the Federal Court, the Chief Justices and Judges of the High Courts, can take decisions as to religious acts and observances, chooses and can remove the Yang di Pertuan Agung and can deliberate on questions of national policy. When deliberating on matters of national policy the Yang di Pertuan Agung shall be accompanied by the Prime Minister and the other Rulers and Governors by their Mentri Besar or Chief Mentris. The National Finance Council is a consultative body on matters of finance, especially in relation to the making of grants and

[21] Federal Constitution Part VII.

[22] *Ibid.*, Article 112.

loans to the States. The National Land Council has the function and control of the utilization of land in the Federation; while the National Council for Local Government has the duty of formulating a national policy for the promotion, development and control of local government throughout the Federation.

The Constitution of Malaysia is contained in a written document and so are the Constitutions of the various component States in Malaysia. The Federal Constitution is declared to be the supreme law of the Federation. The provisions for amendment of the Federal Constitution are contained in Article 159 of the Constitution. Amendments to certain Articles namely Articles 38 (Conference of Rulers), 70 (Precedence of Rulers and Governors), 71(1) (Rights of Rulers) and 153 (Reservation of quotas in respect of scholarships and permits for Malays) may only be passed with the consent of the Conference of Rulers. Recently it has been provided that amendments relating to certain sensitive issues would also require the consent of the Conference of Rulers. These include amendments to the provisions of Article III (Citizenship), Article 152 (The National Language), Clause (4) of Article 10 (Legislation to forbid discussion of sensitive issues) and any law passed under that provision and the entrenchment clause, Article 159(5) itself. The Federal Constitution may be amended by Federal law and the only requirement is that it must generally be supported on Second and Third Readings by the votes of not less than two-thirds of the total number of members of the House of Representatives and of the Senate. Certain amendments do not even require this two-thirds majority; they are –

a) any amendment to Part III of the Second Schedule (Supplementary Provisions relating to Citizenship) or to the Sixth Schedule (Forms of Oaths, and Affirmations) or Seventh Schedule (Election and appointment of Senators);
b) any amendment incidental to or consequential on the exercise of any power to make law conferred on Parliament by any provision of the Constitution other than Articles 74 and 76 (which relate to the general legislative powers of the Parliament and of the Legislatures of the States);
c) any amendment made for or in connection with the admission of any State to the Federation or its association with the States thereof or any modification made as to the application of the Constitution to a State previously so admitted or associated;
d) any amendment incidental to or consequential on the repeal of any transitional law made under the former Clause (2) of Article 159 or consequential on an amendment made to paragraph III of the Second or the Sixth or Seventh Schedule.

In the first two elections to the House of Representatives the Alliance party obtained such a clear majority that there has been no difficulty in

obtaining the two-thirds majority required for amendments. The States can reasonably look to the Senate to exercise a delaying influence in their interests. The Senate originally consisted of two elected members for each of the States (making a total of 22 for the States of Malaya and 26 for the States and Malaya and the Borneo States) and twenty members appointed by the Yang di Pertuan Agung. Thus the States did have a strong representation in the Senate but here again the State elections gave the Alliance party the majority in nearly all the States and here again it was not difficult for the Alliance Government to obtain the two-thirds majority it required. The influence of the Senate has nevertheless been further weakened by the Constitution (Amendment) Act, 1964, which increased the number of members of the Senate to be appointed by the Yang di Pertuan Agung to thirty-two, thus causing the nominated Senators to outnumber the elected Senators. The Constitution (Amendment) Act of 1962 reserved from the requirement of a two-thirds majority (with retrospective effect from 31st August, 1957, that is the date when the Constitution first began to operate) "any amendment made for or in connection with the admission of any State to the Federation or its association with the States or any modification made as to the application of the Constitution to a State previously so admitted or associated". This provision appears to give very wide powers of amendment by the ordinary process of a federal law to the Federal Government and the only limitation is that contained in Article 161E which relates to the safeguards for the constitutional position of the Borneo States. In regard to the States of Malaya, however, the amendment seems to give power to the Federal Parliament to amend the Constitution in its application to the States without the requirement of a two-thirds majority.

In regard to the application of the Constitution to the Borneo States it would appear that an amendment of the Constitution requires a two-thirds majority in both Houses of Parliament and also in a number of specified cases the concurrence of the Governor of the Borneo States or each of the Borneo States concerned.[23]

The Malaysia Act provided that as from the passing of that Act no amendment to the Constitution made in connection with the admission to the Federation of a Borneo State shall be excepted from the requirement of the two-thirds vote of both Houses of Parliament, nor shall any modification made as to the application of the Constitution to a Borneo State be so excepted unless the modification is such as to equate or assimilate the position of that State under the Constitution to the position of the States of Malaya.[24]

[23] *Ibid.* Article 161E.

[24] *Ibid.* Article 161E (1).

No amendment shall be made to the Constitution without the concurrence of the Governor of the Borneo State or each of the Borneo States concerned, if the amendment is such as to effect the operation of the Constitution as regards any of the following matters:

a) the right of persons born before Malaysia Day to citizenship by reason of a connection with the State, and (except to the extent that different provision is made by the Constitution as in force on Malaysia Day) the equal treatment, as regards their own citizenship and that of others, of persons born or resident in the State and of persons born or resident in the States of Malaya;
b) the constitution and jurisdiction of the High Court in Borneo and the appointment, removal and suspension of judges of that court;
c) the matters with respect to which the Legislature of the State may (or Parliament may not) make laws, and the executive authority of the State in those matters, and (so far as related thereto) the financial arrangements between the Federation and the State;
d) religion in the State, the use in the State or in Parliament of any language and the special treatment of natives of the State;
e) the allocation to the State, in any Parliament summoned to meet before the end of August, 1970, of a quota of members of the House of Representatives not less in proportion to the total allocated to the other states which are members of the Federation on Malaysia Day, than the quota allocated to the State on that day.[25]

Moreover, in relation to any rights and powers conferred by federal law on the government of a Borneo State as regards entry into the State and residence in the State and matters connected therewith (whether or not the law is passed before Malaysia Day), such a law, except in so far as it provides to the contrary, is treated as if it had been embodied in the Constitution for the purpose of requiring the concurrence of the Governor of an affected Borneo State for any subsequent change in that law.[26] The Immigration Act, 1963, which came into effect on Malaysia Day, has given to the Borneo States the control of immigration into those States, not only over aliens, but also over most categories of federal citizens from other States. By virtue of Article 161E these powers in the Borneo States have now become embedded in the Constitution and will require the concurrence of those States for amendment.

The Federal Parliament is given the power by law to admit other States to the Federation and to alter the boundaries of any State; but it is provided that a law altering the boundaries of a State shall not be passed without the consent of that State, expressed by a law made by the

[25] *Ibid.* Article 161E (2).

[26] *Ibid.* Article 161E (4)

Legislature of that State, and of the Conference of Rulers. There is no provision in the Constitution for the secession of any State but the example of Singapore shows that this can be done by agreement between the Federal Government and the State and by an Act of the Federal Parliament.[27]

There have not been many cases in Malaysia on the interpretation of the Constitution and fewer still dealing with the federal aspect of the Constitution, and the relationship between the Federation and the States. One of them is the case of the *Government of the State of Kelantan* v. *the Government of the Federation of Malaya and Tunku Abdul Rahman Putra al-Haj*[28] in which the Government of the State of Kelantan asked for declarations that the Malaysia Agreement and the subsequent Malaysia Act were null and void or alternatively not binding on the State of Kelantan. The grounds on which these declarations were asked were that the Agreement of 1957, to which the State of Kelantan was a party established a federation of eleven States and as the proposed changes in effect abolished that federation contrary to the 1957 Agreement, they required the consent of each of the Constituent States including Kelantan. It was maintained that the Sultan of Kelantan should have been a party to the 1963 Agreement, that the Rulers of the States should by Convention be consulted regarding any substantial changes in the Constitution and that the Federal Parliament had no power to legislate for Kelantan on a matter covered by State legislation. The question whether there could be interlocutory relief in a suit against the Federal Government was put aside and the application considered on its merits. Thomson C.J. (as he then was) held (a) that in enacting the Malaysia Act, so as to amend *inter alia* Article 1(1) and (2) of the Constitution Parliament had acted within the powers granted to it by Article 159 of the Federal Constitution and the exercise of such power did not require consultation with any State as a condition to be fulfilled; (b) that the Malaysia Agreement was validly signed by the Federal Government in exercise of its executive powers and the exercise of these powers did not require consultation with any State Government or the Ruler of any State. The learned Chief Justice said:-

"It has not even been suggested that the Malaysia Act was not passed strictly in accordance with the provisions of the Constitution relating to Acts amending the Constitution. It amended Article 1(1) which provides that 'the Federation shall be known by the name of Persekutuan Tanah Melayu (in English the Federation of Malaya)' by providing [section 4(1)] that 'the Federation shall be known, in Malay and in English, by the name 'Malaysia'". It amended Article 1(2) by adding [section 4(2)] the States

[27] *Ibid.*, Article 2.

[28] [1963] M.L.J. 355

of Sabah, Sarawak and Singapore to the States originally enumerated in Article 1(2). In doing these things I cannot see that Parliament went in any way beyond its powers or that it did anything so fundamentally revolutionary as to require fulfilment of a condition which the Constitution itself does not prescribe that is to say a condition to the effect that the State of Kelantan or any other State should be consulted. It is true in a sense that the new Federation is something different from the old one. It will contain more States. It will have a different name. But if that state of affairs be brought about by means contained in the Constitution itself and which were contained in it at the time of the 1957 Agreement, of which it is an integral part, I cannot see how it can possibly be made out that there has been any breach of any foundation pact among the original parties. In bringing about these changes Parliament has done no more than exercise the powers which were given to it in 1957 by the constituent States including the State of Kelantan.

"Turning now to the Malaysia Agreement, by Article 39 the executive authority of the Federation is vested in the Yang di Pertuan Agung and is exercisable, subject to the provisions of any federal law and with certain exceptions, by him or by the Cabinet or any Minister authorised by the Cabinet. By Article 80(1) the executive authority of the Federation extends to all matters with respect to which Parliament may make laws which, as has been seen, includes external affairs including treaties and agreements. The Malaysia Agreement is signed "for the Federation of Malaya" by the Prime Minister, the Deputy Prime Minister and four other members of the Cabinet. There is nothing whatsoever in the Constitution requiring consultation with any State Government or the Ruler of any State. Again a power has been lawfully exercised by the body to which that power was given by the States in 1957."[29]

In the case of *Stephen Kalong Ningkan* v. *Government of Malaysia*[30] the facts were as follows:- on July 22, 1963 the appellant was appointed Chief Minister of Sarawak and so acted as leader of the majority party in the Council Negeri. On June 16, 1966 the Governor acting on representations said to be made to him by the majority in the Council that they had lost confidence in their Chief Minister, requested the appellant to resign. Upon his non-compliance the Governor on June 17, 1966, purported to dismiss him together with other members of the Supreme Council, and appointed Penghulu Tawi Sli as Chief Minister. Action being brought in the High Court at Kuching, Harley Ag. C.J. on September 7, 1966, declared the dismissal of the appellant void. On September 14, 1966 the Yang di Pertuan Agung proclaimed a state of emergency in Sarawak. On September

[29] *Ibid.*, p. 359.

[30] [1968] 2 M.L.J. 238.

19, 1966, the Federal Parliament passed the Emergency (Federal Constitution and Constitution of Sarawak) Act 1966, amending Clauses (5) and (6) in Article 150 of the Federal Constitution by giving the Federal Government power to amend the Constitution of Sarawak and providing further that, notwithstanding anything in the State Constitution, the Governor may summon the Council Negeri, suspend standing orders and issue directions binding on the Speaker. Pursuant thereto, the Governor on September 23, 1966 summoned a meeting of the Council Negeri, which passed a vote of no confidence in the appellant. He was then dismissed the following day. In his second action in the High Court at Kuching, the appellant claimed (a) the proclamation of a state of emergency being made on the advice of the Federal Cabinet was null and void in that it was not made *bona fide* but in *fraudem legis* and (b) the Emergency (Federal Constitution and the Constitution of Sarawak) Act 1966 was on that account null and void. It was submitted on behalf on the appellant (a) that the proclamation of emergency was *ultra vires* and invalid, and that the Emergency (Federal Constitution and the Constitution of Sarawak) Act, 1966 which was based on it, accordingly fell with it in its entirety; (b) even if the Proclamation of Emergency was valid, sections 3, 4 and 5 of the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966 purported to amend the Constitution of Sarawak in a manner which had been committed by Article 41 of the Constitution of Sarawak to the Legislature of Sarawak and was therefore beyond the powers of the Federal Parliament to enact. The Federal Court dismissed the petition for the declarations and the appellant appealed to the Privy Council.

It was held by the Privy Council (1) the onus was on the appellant to show that the proclamation of emergency was in *fraudem legis* as alleged by him or otherwise unauthorized by the relevant legislation and in this case the appellant had failed to discharge the onus on him; (2) Article 150 of the Federal Constitution gave power to the Federal Parliament to amend or modify the Constitution of Sarawak temporarily if Parliament thought that such a step was required by reason of the Emergency. In the circumstances the Federal Parliament had power to enact the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966 and therefore the appeal must be dismissed. On the second submission made by the appellant, Lord MacDermott in giving the opinion of the Privy Council said;

"With the Proclamation valid and Article 150(5) of the Federal Constitution in consequence effectual, were sections 3, 4 and 5 of the impugned Act *ultra vires* the Federal Parliament as amending or providing for amendment of the Constitution of Sarawak? That these sections do seek to amend that Constitution may... be accepted and the question therefore turns on the extent of the Federal Parliament's powers. The Federal Constitution provides for the distribution of legislative power

between the Federation and the States and contains certain provisions enabling the Federal Parliament to legislate in certain events with respect to state affairs. These provisions however do not bear immediately on the question in hand which falls to be decided on the true meaning of two of the documents annexed to the Agreement relating to Malaysia made on the 9th July 1963 between the United Kingdom, North Borneo, Sarawak and Singapore. These documents are the draft. . . of the Malaysian Federal Constitution and the draft. . . of the 1963 Constitution of the State of Sarawak.

"By article 41(1) of that Constitution it was enacted that – 'Subject to the following provisions of this article, the provisions of this Constitution may be amended by an Ordinance enacted by the Legislature but may not be amended by any other means'. Taken by itself this enactment is in plain terms, but it has to be read in conjunction with the Federal Constitution, for it no less than the 1963 Constitution of Sarawak, was agreed to by the contracting parties and the Federation, and the question accordingly becomes whether the Legislative powers of the Federal Parliament, as enlarged by article 150(5) during the operation of an Emergency Proclamation, was intended to include a power to modify the Sarawak Constitution and thus to override Article 41(1) thereof. "The Federal Court held that the Sarawak Constitution could be modified in this way and their Lordships share that view. The Federal Constitution must have been accepted by the contracting parties as the supreme law of the Federation in view of article 4 thereof, but this in itself does not appear to their Lordships to be conclusive. More to the point are the terms of article 150 (as modified pursuant to clause 39 of the draft Bill) for they go to show that the parties to that agreement must have realised that the powers of the Federal Parliament conferred by that article during the currency of a Proclamation of emergency, might be used to amend, for the time being, the provisions of the Sarawak Constitution of 1963. On its face, Clause (1) of article 150 is capable of applying to a grave emergency threatening the security of economic life of any of the States of the Federation, and it could hardly have failed to be within the contemplation of the parties to the Malaysia Agreement that the powers needed to meet such a situation might include power to modify, at any rate, temporarily, the Constitution of the part of the Federation which was principally affected. Again clause (4) of article 150 states in plain terms that while a Proclamation of Emergency is in force the executive authority of the Federation is to extend to any matter within the legislative authority of a State and to the giving of directions to the Government of a State or any officer or authority thereof. This provision is plainly capable of conflict with the 1963 Constitution of Sarawak, particularly article 5 thereof, and in itself indicates that a Proclamation of Emergency under article 150 was intended to have

consequences which might be contrary to the provisions of a State Constitution. Clause (5) of article 150 points in the same direction. The legislative power which it confers on the Federal Parliament is expressed to be subject to clause (6A) and that clause provides that clause (5) is not to extend the powers of the Federal Parliament with respect to any matter of Muslim law or the custom of the Malays or with respect to any matter of native law or custom in a Borneo State. These subject-matters, however, are placed by the Federal Constitution in the State list, that is to say, in the list setting out the legislative powers of the States. The limiting provisions of Clause (6A), therefore, indicate that the legislative power conferred by article 150(5) was intended to extend to matters which normally were within the legislative competence of the States. But perhaps, most significant of all, is the width of the language of clause (5) of article 150. Subject to clause (6A), while a Proclamation of Emergency is in force, the power conferred upon the Federal Parliament is a power to make law "with respect to any matter" if it appears to Parliament that the law is required by reason of the emergency. These words could scarcely be more comprehensive. In the view of the Board they reflect the fact that a grave emergency can assume many forms and may make demands upon the Federal Government which could only be met if the widest powers were available.

"The terms of article 41(1) of the 1963 Constitution of Sarawak are sufficiently explicit to make it difficult as a matter of implication to construe the Federal Constitution as empowering the Federal Parliament to amend the Constitution of Sarawak permanently and at its pleasure. But a temporary amendment on exceptional grounds stands on a different footing and the considerations mentioned lead their Lordships to the conclusion that article 150(5) was intended to arm the Federal Parliament with power to amend or modify the 1963 Constitution of Sarawak temporarily if that Parliament thought such a step was required by reason of the Emergency, and further that such an intention must be imputed to the parties to the Malaysia Agreement of 9th July 1963. Their Lordships accordingly held against the appellant on his second submission and are of opinion that in so far as the impugned Act had the effect of modifying or amending the 1963 Constitution of Sarawak it was *intra vires* and valid."[31]

There has been only one reported case where a State law has been declared to be void because of inconsistency with a federal law. In the case of *City Council of George Town and another* v. *Government of the State of Penang and another*[32] the facts were that on July 1, 1966 the Chief Minister of Penang took over the functions of the Mayor of George Town,

[31] *Ibid.*, p. 242-244.

[32] [1967] 1 M.L.J. 169.

whereupon the State Government proceeded to administer the municipal affairs of the city. This was done pursuant to an order termed the City Council of George Town (Transfer of Functions) Order, 1966 made under subsection (1) of section 398B of the Municipal Ordinance, which section was inserted by the Municipal (Amendment) (Penang) Enactment, 1966, an enactment of the State Legislature. The petitioners applied to the Federal Court for a declaration that the said City Council of George Town (Transfer of Functions) Order, 1966 and the Municipal (Amendment) (Penang) Enactment, 1966 were void by virtue of article 75 of the Federal Constitution on the ground that they were inconsistent with the Local Government Elections Act, 1960 of the Federation. It was held that the State enactment and the order made thereunder were clearly inconsistent with the Federal legislation and were therefore invalid and the Federal Court had jurisdiction to make an order so declaring.

The case of *Government of Malaysia* v. *the Government of Kelantan*[33] was a case considered by the Federal Court on a reference by the Yang di Pertuan Agung under article 130 of the Federal Constitution. In that case the Kelantan Government on the 20th February 1964 granted a mining and forest concession to the Timbermine Industrial Corporation Ltd. The Corporation had to pay royalty for timber extracted and minerals won. It agreed however to make advance payments of royalty to the State Government. When the Corporation extracted timber and won minerals on which royalty was due, it had to pay only 50%, retaining the other 50% until the whole of the amount prepaid was refunded. In certain circumstances the amount advanced could be forfeited. The Federal Government argued that this transaction amounted to borrowing in violation of article 112(2) of the Federal Constitution, as it was not authorised by State Law. The Federal Court held that it did not amount to borrowing as there was no legal relationship of lender and borrower between the State Government and the Corporation and the State Government would not be obliged to repay if the advance payments were forfeited for breach of conditions. The law established by this decision has since been negatived by the Constitution (Amendment) (No. 2) Act, 1971 (Act 31). Section 8 of the Act now provides that "borrowing" includes the raising of money by entering into any arrangement requiring the payment before the due date of any taxes, rates, royalties, fees, or any other payments or by entering into any agreement whereby the Government has to repay or refund any benefits that it has enjoyed under the agreement.

The power of judicial review is dealt with in articles 4 and 128 of the Federal Constitution. Article 4(3) and (4) read as follows:-

[33] [1968] 1 M.L.J. 129.

"(3) The validity of any law made by Parliament or the legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or –

a) if the law was made by Parliament, in proceedings between the Federation and one or more States;

b) if the law was made by the Legislature of a State, in proceedings between the Federation and the State.

(4) Proceedings for a declaration that a law is invalid on the grounds mentioned in clause (3) (not being proceedings falling within paragraphs (a) or (b) of the clause) shall not be commenced without the leave of a Judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the clause.

Article 128 reads as follows:-

"(1) The Federal Court shall to the exclusion of any other court have jurisdiction to determine –

(a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and

(b) disputes on any question between States or between the Federation and any State.

(2) Without prejudice to any appellate jurisdiction of the Federal Court, where in any proceedings before another Court a question arises as to the effect of any provision of this Constitution, the Federal Court shall have jurisdiction (subject to any rules of court regulating the exercise of that jurisdiction) to determine the question and remit the case to the other court to be disposed of in accordance with that determination."

Section 48(1) of the Courts of Judicature Act, 1964, originally provided that where in any proceedings in any High Court a question arose as to the effect of any provision of the Constitution the judge, hearing such proceedings, shall stay the same on such terms as may be just to await the decision of such question by the Federal Court. This provision has been amended by the substitution of the word "may" for the word "shall" so that the Act no longer obliges the High Court to stay the proceedings and the High Court may itself dispose of the question.

In the case of *City Council of George Town and another* v. *Government*

[34] [1967] 1 M.L.J. 170.

of the State of Penang and another,[34] it was argued on behalf of the State Government that the Federal Court had no jurisdiction to make the declaration asked for. The argument was that article 128(1) (a) of the Federal Constitution gave the Federal Court jurisdiction only to determine on the ground that the State has no power to make laws; in other words the Federal Court only has jurisdiction to determine on the competency of the State or Parliament to make laws. Therefore since the State has the power to make the laws in question this was conclusive as far as the Federal Court was concerned. The Federal Court however held that it had jurisdiction to declare a State law to be inconsistent with the Federal Constitution and therefore void. It was admitted that a High Court has jurisdiction to do so and the Federal Court held that in view of section 49(1) of the Courts of Judicature Act, 1964, a Federal Court also could exercise jurisdiction. On this point the present Chief Justice, Malaya has expressed the extra-judicial view that probably the Federal Court might have come to a different conclusion if the case had been fully argued.[35]

In *Ghazali* v. *Public Prosecutor*[36] Ong J. (as he then was) held that under article 128 of the Federal Constitution he had no jurisdiction to pronounce any decision as to the effect of any provision of the Constitution. However in *Gerald Fernandez* v. *Attorney-General Malaysia*[37] where Ong C.J. had held that he was not competent to decide whether the Commonwealth Fugitive Criminals (Amendment) Act, 1969 was ultra-vires the provisions of article 7(1) of the Federal Constitution, Suffian F.J. in the Federal Court said, "With respect I think the learned Chief Justice was in error in thinking he had no jurisdiction. This is not a proceeding for a declaration that the Commonwealth Fugitive Criminals (Amendment) Act 1969 is invalid on the ground mentioned in clause (3) (of article 4 of the Constitution) namely because Parliament was not competent to enact but on the ground that it was inconsistent with article 7(1) of the Constitution – It was competent of the High Court to give a ruling on this question."[38] Suffian F.J. thought the learned Chief Justice was misled by being referred to an unamended copy of section 48(1) of the Courts of Judicature Act, 1948.

If we refer to the orthodox definition of federalism it may be difficult to regard Malaysia as a true federation. The powers of the Central Government in Malaysia are very great and as has been shown by recent events are

[35] Mohamed Suffian Hashim, *Introduction to the Constitution of Malaysia*, Kuala Lumpur, (1972) p. 96.

[36] [1964] M.L.J. 156.

[37] [1970] 1 M.L.J. 262. See also *Hasbim* v. *Yahaya* [1973] 2 M.L.J. 85 and *Yeoh Tat Thong* v. *Government of Malaysia* [1973] 2 M.L.J. 86.

[38] *Ibid.* p. 264.

all pervading in an emergency. The fundamental principle of federalism according to Wheare is that general and regional governments are co-ordinate. He says "What is necessary for the federal principle is not merely that the general government like the regional governments should operate directly from the people, but further that each government should be limited to its own sphere and, within that sphere, should be independent of the other".[39] Wheare's definition was based on the earlier experience of federalism in the United States, Canada and Australia. The newer federations do not easily fall within his definition and it may be the definition needs to be considered in the light of the experience of these new attempts at federation. Malaysia like India claims to be a federation and has a federal system of government in which there is a division of powers between one government and several regional authorities, each of which, in its own sphere, is coordinate with the others, and each of which acts directly on the people through its own administrative agencies.[40]

Ahmad Ibrahim*

[39] K.C. Wheare *Federal Government*, Oxford, 1963, p. 14.

[40] A.H. Birch, *Federalism, Finance and Social Legislature in Canada, Australia and the United States*, Oxford, 1955, p. 306.

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RIGHT TO COUNSEL BEFORE TRIBUNALS IN MALAYSIA

The expression "natural justice" has been uncomplimentarily tagged as "sadly lacking in precision"[1] "capricious", and "so vague as to be practically meaningless."[2] Authors of these dismal descriptions may well find added justification when the question of representation before administrative tribunals is raised. Not only has the scope of this right never been definitively described in England and many other jurisdictions, but the right itself awaits consistent judicial affirmation. The steady growth of tribunals in Malaysia and their growing impact on an ever-increasing portion of the populace highlights the need to focus greater attention on this area of the law. Fortunately, the recent decision of Raja Azlan Shah J. (as he then was) in *Doresamy* v. *P.S.C.*[3] affirming the right to representation before tribunals has breathed contemporary life into this otherwise entangled area of the law. It is proposed in the light of this decision to examine whether this right has been accorded a niche in our judicial system; and if so, to define its scope.

The facts of this case were as follows: the applicant, Doresamy, was an office-boy in the employ of the Registry of Societies. Because of his arrest and subsequent restriction under the Emergency (Public Order and Prevention of Crime) Ordinance,[4] he was deemed to have committed a breach of the Code of Conduct under Regulations governing conduct and discipline in that he had "conducted himself in such manner as to bring the Public Services into disrepute." His departmental head invited him to show cause why he should not be dismissed, which he did by letter through his solicitors. The appropriate disciplinary board, after consideration, recommended that disciplinary proceedings with a view to dismissal be instituted against Doresamy. He was given an opportunity to exculpate himself and his solicitors made due representations on his behalf. The Board after deliberation, however, dismissed him. He was then informed of his right of appeal to an Appeal Board which he did in writing through his solicitor. The appeal was dismissed on the ground that the applicant should have appealed "personally in writing" as required by regulation

[1] [1914] 1 K.B. at 199.

[2] S.A. de Smith: *Judicial Review of Administrative Action*, (1973) (3rd. Edition), p. 136. Hereinafter referred to as *de Smith*.

[3] [1971] 2 M.L.J. 127.

[4] No. 5 of 1969.

13(1) of the Public Services Disciplinary Board Regulations, 1967[5] and not through his solicitor. If the appeal had proceeded, a meeting would have had to be convened at which the appellant would have been entitled to be heard. At that stage, the Regulations empowered the Appeal Board in its discretion to permit the Government or the officer to be represented by an officer in the Public Service or, in exceptional cases by an advocate and solicitor. Such permission could be withdrawn if sufficient time was given; provided that where the Appeal Board permitted the Government to be represented, it had to permit the Officer to be similarly represented.

Whereas the issue was articulated in narrow terms: "whether the presentation of the appeal may be made by a solicitor on behalf of an aggrieved person. . . ."[6] the ensuing discussion was clearly directed towards the wider question of the right to representation before administrative tribunals. The narrow postulation was answered affirmatively by drawing substantially ". . . from the exposition of the law in the three authorities cited."[7] These were *Mundell* v. *Mellor*,[8] *Pett* v. *Greyhound Racing Association, Ltd.*[9] and *Enderby Town Football Club* v. *The Football Association, Ltd.*[9] *and Another.*[10] A closer examination of these authorities suggests that they adopted distinctly different approaches. In *Pett's* case, for example, the Court of Appeal talked not only in terms of the agency principle as the foundation for the right to counsel but also the *audi alteram partem* facet of natural justice. It is imperative to discover the true basis of Raja Azlan Shah J.'s decision because different consequences follow from each one. The agency principle, as an example, would deny the use of discretion to oust the right to representation whilst the adoption of the natural justice test would necessarily import discretion. Two possible bases are readily identifiable: (1) the agency principle and (2) the right-to-be-heard rule of natural justice.

(1) THE AGENCY PRINCIPLE

The case acknowledged as clearly establishing the right at common law for any person *sui juris* to appoint an agent to act for him is *R.* v. *Assessment Committee of St. Mary Abbot's, Kensington.*[11] Only that aspect of the Straits Settlements decision in *Mundell* and the English Court of Appeal

[5] Regulation 14, P.S. Disciplinary Board Regulations, 1967.

[6] per Raja Azlan Shah at p. 130.

[7] *Ibid.* at p. 130.

[8] [1929] S.S.L.R. 152.

[9] [1969] 1 Q.B. 125; [1968] 2 All E.R. 545.

[10] [1971] Ch. 591; [1971] 1 All E.R. 215.

[11] [1891] 1 Q.B. 378.

decision in *Pett* which placed reliance on *St. Mary Abbot's* was quoted by Raja Azlan Shah J. In particular he referred to Charles J.'s approval of the following passage in *Jackson & Co.* v. *Napper:*[12]

> "Subject to certain well-known exceptions, every person who is *sui juris* has a right to appoint an agent for any purpose whatsoever and . . . he can do so when he is exercising a statutory right no less than when he is exercising any other right."[13]

In *Mundell's* case, an accident resulting in loss of life occurred in connection with the operation of machinery at a soap factory in Singapore. An inquiry was scheduled by the Chief Inspector of Machinery. A partner in the firm, who were the consulting engineers in charge of the factory, was summoned to give evidence. He engaged the plaintiff, an advocate and solicitor, to attend the inquiry and represent him. His right of audience on behalf of the partner was, however, refused. The plaintiff brought a motion for mandamus to enforce his right of representation. Deane J., approving Charles J's dictum above-quoted, emphasised that "every man . . . who has a right to be heard has a right at common law to appear or be heard through an agent in the absence of any express provision restricting or taking away that right."[14] The conclusion then was that a person could appoint anyone — including an advocate and solicitor — as his agent. Raja Azlan Shah J. thus accepted that this common law right to be represented by an agent was accorded express recognition by our judicial system as early as 1929, and further that this right was not absolute; it could be restricted albeit only by an express provision or by necessary implication.[15] It is clear therefore that the agency principle formed a definite basis on which a right to counsel was inferred in the circumstances.

The matter does not rest here, for there have indeed been numerous judicial attempts directed at obviating the precedent established by *Mary Abbot's.* To what extent can these attempts gain currency in Malaysia? In this respect three points need to be emphasized. First, the agency principle necessarily presupposes a right in the principal party to be heard. This logical postulation was expressly referred to by Deane J.

> "But the whole point being as to the right of audience, the question comes back ultimately to the right of Mr. Ritchie [the principal party] to be heard himself. If he has a right to be heard then by common law he has the right to appoint an agent to speak for him. . .

[12](1886) 35 Ch. D. 162 at p. 172.

[13]*Ibid.*

[14]*Op. cit.* (note 8), p. 154.

[15]The last restriction was derived from the other two authorities cited viz., *Pett's* case and *Enderby's* case.

> Now such a position would of course, be logical, since if a man cannot be heard himself, he would have no common law right to appoint an agent to be heard for him. . . ."[16]

This point is important because cases which have attempted to avoid the applicability of *St. Mary Abbot's* have in reality encompassed factual situations in which the applicant himself had no right to audience.[17]

Secondly, attempts to distinguish *St. Mary Abbot's* have been based on classifying the hearing in that case as administrative, as distinct from judicial. Thus it has been suggested that tribunals exercising judicial functions are invested with a greater latitude of freedom to exclude representation. Aside from the real difficulty in comprehending how a judicial function can be said to involve the exercise of greater discretion than an administrative function, a number of other reasons militate against the use of this device for excluding the applicability of *St. Mary Abbot's* in Malaysia. First, the practice of classifying functions of a tribunal for purposes of determining the applicability of certain rules in administrative law (e.g. natural justice) has happily fallen out of favour with our courts. The most recent reinforcement of the rejection of such label-worship came in *Tan Hee Lock* v. *Commissioner for Federal Capital & Ors.*[18] In this case, an order of the Federal Capital Commissioner under s. 18A of the Control of Rent Act 1966 was challenged on the ground that, *inter alia*, it was made in contravention of the rules of natural justice. The lower court's holding that the Commissioner's functions were not amenable to *certiorari* as they were purely administrative, was expressly rejected. Gill F.J., delivering the unanimous Federal Court decision, stated:

> "It is submitted that assuming for the sake of argument that in deciding an application under s. 18A of the Act the Commissioner was performing a purely administrative act, even then, in view of the serious consequences arising therefrom, it was necessary for him to have followed the principles of natural justice."[19]

Secondly, even if it is argued that the rejection of label-worship is far from settled,[20] it is possible to reply that in *Mundell's* case the inquiry by the tribunal was thought of as being the performance of a judicial task. Deane J., in answering the question whether the tribunal was bound to hear the

[16] *Op. cit.* (note 8), p. 160.

[17] For example, see *Ex. p. Death* (1852) 18 Q.B. 645.

[18] [1973] 1 M.L.J. 241.

[19] *Ibid.* at p. 240.

[20] See *Gylnn* v. *Keele University* [1971] 1 W.L.R. 487, which appears to revert to the classification scheme. See also H.W.R.W., "Nudism and Natural Justice" [1971] 87 L.Q.R. 320 at p. 321.

plaintiff, went to inordinate lengths to demonstrate the close similarity between the functions of that tribunal and a court proper, delving in particular into the judicial trappings of the tribunal, such as "... the power to enforce the attendance of witnesses, and to take their evidence upon oath for the purpose of being able to arrive at findings. ..."[21] His telling conclusion in this respect was that "the truth is that the tribunal created by this Ordinance is really a court of inquiry held in order that certain facts may be investigated judicially in order that judicial findings may be arrived at on which the local authority may take measures affecting a certain class of persons."[22] It was thus clearly directed at proving that the cumulative effect of the trappings of the tribunal justified its being treated as performing a judicial task.[23] It is submitted therefore that this 'label-worship' formula to restrict the use of the agency principle has been denied currency in Malaysia. Besides mitigating the harsh injustices caused by an over-refined analysis of functions, this is encouraging because "often ... the method of characterisation can be seen as a contrivance to support a conclusion reached on non-conceptual grounds."[24] Thirdly, it is pertinent to inquire whether the Singapore High Court judgement of Wee Chong Jin C.J. in *Jacob* v. *A.G.*[25] can be used to persuade the court that authority exists, albeit merely persuasive, that the right to representation ought to be excluded. The approach of this case, it is submitted, was solely in terms of the natural justice rule and cannot possibly affect a right derived from another source.[25a] The agency principle as a basis for the right was therefore left open.

This common law right of every man to be heard, to appear or to be heard through an agent is by no means absolute. It can be excluded by "any express provision restricting or taking away that right" or by "necessary implication," Deane J., re-echoing Charles J. in *Mary Abbot's* stated emphatically that the right of Advocates and Solicitors to appear in court was not founded on statute; it was a right derived from the common law. The Courts Ordinance was in fact an example of the "... express provision restricting or taking away that right," inasmuch as it confined

[21] *Op. cit.* (note 8), at p. 160.

[22] *Ibid.*

[23] An attempt along similar lines to demonstrate that the assessment committee was discharging a judicial function is discernible on a closer examination of Lord Esher's judgement in *St. Mary Abbot's.* See J.E. Alder, "Representation before Tribunals" [1972] Public Law 278, at p. 289.

[24] de-Smith, *op. cit.* (note 2) p. 58.

[25] [1970] 2 M.L.J. 133. For a discussion of the facts and holding in this case see *infra,* p. 35.

[25a] This point is discussed further, see *infra,* p. 35 et.seq.

the choice of an agent to an Advocate or Solicitor of the Court ". . . by reserving to Advocates and Solicitors the exclusive right to appear before those Courts."[26] What one may inquire, is the position if the regulation or legislation is silent on the matter? Raja Azlan Shah J. in *Doresamy* stated categorically that in such a situation exclusion is unwarranted. This formulation, it is submitted, is correct in law and supports an interpretation that is least restrictive of important personal rights. It is unfortunate, however, that Raja Azlan Shah J. marred this otherwise sound conclusion, by preceding his views on this subject with a questionable interpretation of Lord Denning, M.R.'s judgement in *Enderby's* case. In this case, the Enderby Football Club was fined and censured by their county association, whereupon they appealed to the Football Association (FA). The FA rejected the Club's claim to be represented by a lawyer, placing reliance on rule 38(b) of the FA, which expressly excluded legal representation except where the chairman or secretary of the club in question happened to be a lawyer. The question of first importance in this case was whether a party who is charged before a domestic tribunal is entitled as of right to be legally represented? Lord Denning approached this issue by observing that "much depends on what the rules say about it. When the rules say nothing, then the party has no absolute right to be legally represented. It is a matter for the discretion of the tribunal."[27] In terms of the agency principle, this postulation, it is submitted, does not accurately represent the law. The agency principle cannot be excluded as a matter of discretion. Lord Denning's comment is itself a departure from his earlier judgement in *Pett No. 1*, and the only way to reconcile his last statement with the former is to suggest that as the agency principle had no application because it was expressly excluded by rule 38, Lord Denning was reasoning in terms of the natural justice poser. For this reason Raja Azlan Shah J.'s citation of this case to explain the "well-known exceptions" to the agency principle appears misplaced.

Nevertheless, Raja Azlan Shah J.'s acceptance of the agency principle assumes added significance for a final reason. The Court of Appeal's decision in the interlocutory application (*Pett No. 1*) was not followed by Lyell J. in *Pett No. 2*.[28] He rejected the applicability of the agency principle by stating that "(i)t seems to me that that right must be ousted when it is sought to be exercised in circumstances in which another rule of the common law does not permit it."[28] It is unfortunate that Lyell J. failed to identify what he termed "another rule of the common law," hence opening the issue to speculation. Could the rule be a reference to the rules

[26] *Op. cit.* (note 8), at p. 161. See s. 120 of Courts Ordinance XXX of 1907.

[27] *Op. cit.* (note 10), [1971] 1 All E.R. 215 at p. 218.

[28] *Pett v. Greyhound Racing Association Ltd.* (No. 2) [1970] 1 Q.B. 46.

of natural justice? This interpretation is open to serious objections. The right to representation could flow from two alternative sources viz., natural justice and the agency principle; "another rule of the common law" cannot possibly oust a right derived from an alternative source. It is thus submitted that *Doresamy's* case could have earned itself greater prestige as precedent if Raja Azlan Shah J. had consciously directed his mind to the contrasting decision in *Pett No. 2* in coming to this conclusion thereby foreclosing the verbal acrobatics which could ensue from the fact that his decision was made in *per incuriam* of subsequent persuasive authority.

2. THE NATURAL JUSTICE PRINCIPLE

The second unsatisfactory feature of the *Doresamy* case was its failure to make an express reference to the alternative line of reasoning – the right to be heard – by which the Court of Appeal in *Pett No. 1* inferred the existence of the right to representation. Two reasons render such reference important. First, representation vide the agency principle can be excluded by contract or by legislation. Not so when this right is founded upon natural justice. While it is true that in the context of statutory bodies, procedural requirements are stipulated and the rules of natural justice function merely in a residuary capacity, if the right to representation could be held to be a facet of natural justice, then only the most express or "clearly implied" stipulation could oust its application. More importantly, in the context of domestic bodies there is a growing index of cases supporting the proposition that the requirements of natural justice cannot be excluded by contrary contractual provisions.[29] Secondly, Wee C.J. in the Singapore High Court decision of *Jacob* v. *A.G.*,[29a] purporting to follow Lyell J. in *Pett No. 2* and the Privy Council decision of *University of Ceylon* v. *Fernando*,[30] rejected the argument that the right to legal representation constituted a facet of the *audi alteram partem* rule. It can of course be plausibly stated in defence of Raja Azlan Shah J.'s judgement that since representation was inferred from one source, it was unnecessary to contemplate the natural justice source to legal representation. It is

[29] See *Edward* v. *S.O.G.A.T.*, [1971] Ch. 354, 376, 381; *Enderby's* case, *op. cit.* (note 10), and *Faramus* v. *Film Artists Asson.* (1964) A.C. 925, 941.

[29a] *Op. cit.* (note 25) and discussion in the text.

[30] [1960] 1 All E.R. 631. In *Fernando's* case, which involved disciplinary charges, it was held that a fair hearing had been given although witnesses had been heard in Fernando's absence. He had been given a sufficient account of what they had said and he had not requested to confront or cross-examine them. It has been queried "whether it was reasonable in the circumstances to make Fernando's right to cross-examine contingent on his taking the initiative in making such a request; he was not legally represented." see *de Smith*, p. 188, note 75.

submitted, however, that a close perusal of Raja Azlan Shah J.'s decision clearly demonstrates its near-congruity to Lord Denning's reasoning based on natural justice. Thus Raja Azlan Shah J. concluded his judgement with the following remarks:

> "The considerations requiring assistance of counsel in the ordinary courts are just as persuasive in proceedings before administrative tribunals. This is especially so when a person's reputation and livelihood are in jeopardy. If the ideal of equality before the law is to be meaningful, every aggrieved person must be accorded the fullest opportunity to defend himself at the appellate review stage."[31]

It must be immediately pointed out that the agency principle operates independently of an assessment of "the considerations" requiring assistance of counsel. Nor is it necessary under the agency rationale, to give special weight to matters such as a person's reputation and livelihood being jeopardised. The irresistible inference to be drawn from this excerpt is that the question of representation was viewed from the natural justice perspective. "The considerations", in Raja Azlan Shah J.'s contemplation which required assistance of counsel in disciplinary proceedings in the circumstances, were hardly at variance with those articulated by Lord Denning in *Pett No. 1*, where he said that "it is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence."[32] In short, both Lord Denning and Raja Azlan Shah J. were illustrating how unfair it was, in the circumstances, to expect the parties themselves to state their case. It is submitted therefore that the right to representation was also based on the *audi alteram partem* rule of natural justice; mayhap unconsciously.

It remains to determine whether the logic implicit in the Singapore High Court decision in *Jacob* v. *A.G.*[33] renders this conclusion untenable. In that case the plaintiff challenged the committee of inquiry's finding against him on the ground, *inter alia*, that he was denied the right to be represented before the committee by an advocate and solicitor. After making extensive references to the Privy Council decision of *University of Ceylon* v. *Fernando*, Wee C.J. disposed of this ground by arguing:

> "This court is bound to follow a decision of the Privy Council and if the Privy Council has decided that a right to question the witnesses brought against a man is not required by natural justice and that the principles or rules or requirements of natural justice are, apart from impartiality, those elementary and essential principles of fair-

[31] *Op. cit.* (note 3), at p. 130.

[32] *Op. cit.* (note 9), (1968) 2 All E.R. 545 at p. 549.

[33] *Op. cit.* (note 25).

> ness as contained in the passages from *De Verteuil* v. *Knaggs*[34] and *Byrne* v. *Kinematograph Renters Society Ltd.*,[35] I am *bound* to decide that the committee of inquiry has not denied the plaintiff a reasonable opportunity of being heard merely because it has refused the plaintiff's request to be represented before it by an advocate and solicitor."[36]

The formulation of his conclusion is unfortunate in more than one respect. First, *Fernando's* case brought into sharp focus the highly variable content of the natural justice concept and demonstrated the need to evaluate each set of factual circumstances on its own merits. The factual situation of one case – no less *Fernando's* – is certainly no precedent for subsequent cases. Previous cases are at best guides that are illustrative of the application of an abstract principle of law to the reality as presented by the facts in the dispute. For the Chief Justice to hold himself "bound"[37] by the Privy Council decision without an appraisal of the circumstances surrounding the case at hand, displayed a lack of comprehension of the relative nature of natural justice precepts. Secondly, the "elementary and essential principles" of fairness referred to by Wee C.J. do not, it is submitted with respect, eschew the right to representation. One of the requirements of natural jsutice, so neatly put by Harman J. in *Byrne's* case is ". . . that [the petitioner] should be given an opportunity to state his case."[38]

The Privy Council stated explicitly in *S.S. Kanda* v. *the Government of the Federation of Malaya*[39] that courts should always examine whether the right to be heard is "a real right which is worth anything."[40] This is the broad principle of law to which Wee C.J. ought to have found himself bound. Admittedly this does not require that a person be allowed to 'state his case' in the most persuasive manner; it suffices if it is

[34] [1918] A.C. 179.

[35] [1958] 2 All E.R. 579.

[36] *Op. cit.* (note 25) at p. 136, emphasis added.

[37] It is also a moot point whether a decision of the Privy Council is necessarily binding in countries other than that from which the appeal arose. Courts in many jurisdictions have declared themselves unfettered by such decisions. See *Hare* v. *Trustee of Health* (1884) 3 Cape S.C.R. 33 [South Africa], *Pesona* v. *Babonchi Baas* (1948) 49 N.L.R. 442 [Ceylon], *Vishundas* v. *Gov.-General* A.I.R. 1947 Sind. 154 [India], *Will* v. *Bank of Montreal* [1931] 3 D.L.R. 526 [Canada], *Fenton* v. *Danville* [1932] 2 K.B. 333 [England]. See also Ahmad Ibrahim, "Privy Council decisions on Wakaf. Are they binding in Malaysia?" [1971] 2 M.L.J. vii.

[38] quoted in *Jacob* v. *A.G. op. cit.* (note 25), at p. 135.

[39] [1962] M.L.J. 169, P.C.

[40] Per Lord Denning, *ibid.* at p. 172.

presented in a fashion consistent with fairness. Given this test, it is surely possible to envisage factual situations where representation could be imported as a necessary ingredient of natural justice. To suggest that this could never be the case is to create a postulation not representative of judicial authority. It is generally agreed, for example, that a patent denial of natural justice is occassioned where only one party to a dispute is permitted legal representation.[41] Further, Lyell J's view in *Pett No. 2*, on which Wee C.J. placed heavy reliance, that legal representation could be regarded as elementary only in a society which has acquired ". . . some degree of sophistication in its affairs,"[42] misinterpreted the Privy Council decision in *Fernando*. As a commentator has stated, "it (the Privy Council in *Fernando's* case) was not contrasting primitive and sophisticated societies as the learned judge suggests but basic principles common to all courts and tribunals as opposed to the highly technical rules of evidence peculiar to common law courts."[43]

One final matter merits discussion. It is often articulated that insofar as legal representation causes the proceedings to be dilatory by introducing over formality as well as inflating expenses incurrable, it negates the *raison d'etre* for tribunal proceedings. Where the right is inferred by rules of natural justice however, this objection is not insurmountable. Natural justice, encompassing the concept of fairness, is a highly fluid notion necessarily varying with different factual situations. If legal representation can be seen to work obvious inequities, then fairness demands its denial. It may indeed be argued that speed and reasonable costs themselves are aspects of justice.[44] Perhaps; but it is submitted that natural justice refers to only one facet of justice, viz. procedural safeguards to ensure compliance with notions of fairness, and that it ought, in certain factual situations, to be accorded priority over other relatively lesser facets of justice.[45] As succintly stated by one researcher on administrative law, "I personally can never accept the idea that fair procedures and high quality judicial review inevitably result in inefficiency. Perhaps there is some delay; but this seems to be a cheap price to pay for fairness in administration."[46]

[41] See e.g. *de Smith*, p. 187.

[42] [1970] 1 Q.B. 46, at p. 65.

[43] Paul Jackson, *Natural Justice* (1973), p. 17.

[44] This is implicit in Cairns L.J.'s judgement in *Enderby* v. *The Football Association Ltd.*, *op. cit.* (note 10).

[45] "Convenience and justice generally have never been on speaking terms with each other. Justice ought not to be sacrificed at the altar of convenience," *Abd. Majid* v. *Disciplinary Committee of the Univ. of Punjab* P.L.D. 1970 Lahore 416.

[46] Mr. Harry Whitmore who, along with 3 others, was appointed a member of an Administrative Review Committee by the Australian Federal Government to

On the question of expenses he was equally emphatic: "The obstacle [high costs] is something of a sham – of course fair adjudication costs more than unfair adjudication. The price just has to be paid."[47] This is especially so where, as in *Doresamy's* case, the applicant was threatened with grave social and financial ruin; compounded by the fact that Doresamy was an office boy and, at best, semi-literate.

The variable content of the *audi alteram partem* rule as a contrivance for including or excluding representation was convincingly illustrated by Lord Denning in *Pett No. 1* and *Enderby's* case. In *Pett's* case, the potential consequences of the proceedings were the suspension or non-renewal of the licence. Lord Denning was clearly mindful of the fact that the livelihood of a trainer was dependent on the possession of this licence.[48] In disproving Maugham J.'s views in *Maclean v. Workers Union,*[48a] which denied the right of representation before domestic tribunals, Lord Denning opined that while this holding "... may be correct when confined to tribunals dealing with minor matters where the rules may properly exclude legal representation...," it certainly did not apply "... to tribunals dealing with matters which affect a man's reputation or livelihood or any matters of serious import."[49] In contrast *Enderby's* case did not involve a severe penalty and was most certainly not attendant upon any loss of livelihood. Hence the decision that natural justice rules were not breached although representation was excluded. The other consideration of importance was the appropriateness of a legally trained person to participate in the proceedings. In *Pett's* case the charge was one of drugging a dog. The hearing was to be oral. The methods of inquiry and the establishment of the facts were closely analagous to an ordinary criminal trial for which a legally trained person was specially suited. Not so in *Enderby's* case where, for example, Fenton Atkinson L.J. referred to the adjudicators as men "... with a great fund of common sense and experience of football and the rules in question."[50] Lord Denning pronouncing on the same theme, stated:

"... in many cases it may be a good thing for the proceedings of a

investigate and report on the subject of administrative justice and judicial review. His research led him to examine in some detail the role of the lawyer in administrative decision-making in England, the U.S.A., New Zealand and Australia. See Whitmore, "The Lawyer in Administrative Justice", (1970) 33 M.L.R. 481

[47] *Ibid.*, at p. 492.

[48] *Op. cit.* (note 32), at p. 549.

[48a] [1929] 1 Ch. 602 at p. 621; [1929] All E.R. Rep. 468 at p. 471.

[49] *Op. cit.* (note 32), at p. 549.

[50] *Op. cit.* (note 27), at p. 221.

> domestic tribunal to be conducted informally without legal representation. Justice can often be done in them better by a good layman than by a bad lawyer. This is especially so in activities like football and other sports, where no points of law are likely to arise, and it is all part of the proper regulation of the game."[51]

These in-built devices implicit in the flexible attributes of the natural justice rules, permit the exclusion of legal representation in situations when the parties to the proceedings are seriously disadvantaged thereby. This also permits the tribunal to regulate the kind of representation it will allow having regard to the nature of the hearing; for it is possible to envisage situations where a non-legal representative, e.g. a trade union leader in labour cases, would be considered more suitable to "state the case."

Can the agency principle be similarly regulated? A clue is provided by Lord Esher M.R.'s statement that "no doubt the assessment committee would have some discretion and might refuse to hear a manifestly *improper person* as agent" (emphasis added).[52] "Improper person" was nowhere defined in the judgement. It is submitted that it could be employed by the courts to exclude only those with a personal disability e.g. insanity, from acting as representatives. Its value therefore as a useful devise "... to meet the objection that a general absolute right to representation is an undesirable, a counter productive element of tribunal procedure having regard to the variety of kinds and procedures of administrative decision making bodies,"[53] is considerably minimised. Be that as it may, the current trend is clearly towards expressly permitting representation. In England, the *Franks Report*[54] paved the way for extension of legal representation before statutory tribunals. Steadily this idea has gained a pride of place in disciplinary procedures in universities and national sporting organisations. Indeed it is unlikely that any tribunal or domestic body would exclude this right altogether. Not, at least, without contemplating Lord Denning's premonitory note in *Enderby's* case that it may not be "... legitimate to make a rule which is so imperative in its terms as to exclude legal representation altogether."[55]

[51] *Ibid.* at p. 218.

[52] *Op. cit.* (note 11), at p. 383.

[53] Alder, *op. cit.* (note 23), p. 287.

[54] *Report of the Franks Committee on Administrative Tribunals and Enquiries*, Cmnd. 218 (1957).

[55] *Op. cit.* (note 27), at p. 219. *Contra*, s. 63 of the Singapore Industrial Relations Act, Chapter 124, which expressly excludes the right to be represented by an advocate and solicitor or paid agent in proceedings before the Industrial Arbitration Court, except in proceedings relating to contempt of that Court, or by leave of the Court in the very limited proceedings in which the Attorney General has intervened.

Finally, if representation is thought of in such imperative terms, and according to Raja Azlan Shah J. "if the idea of equality before the law is to be meaningful every aggrieved person must be accorded the fullest opportunity to defend himself at the appellate review stage,"[56] then what of the indigent who through lack of funds is unable to obtain the guiding hand of counsel in cases where the assistance of legal representation constitutes an essential requirement of justice. Indeed one rationale for keeping costs to the bare minimum in cases of tribunal proceedings is that it affects a high number of indigents. The injustice of appearing before a tribunal without a representative can be real as one investigation of the working of tribunals has demonstrated:

> "The commonest situation before tribunals — very common indeed — is that the claimant or party is completely inarticulate. Sometimes he or she is literally trembling before the tribunal. How justice can be accorded to someone who fails to say anything, or merely mumbles a few words, I fail to see. In many cases the applicant is confronted by an official, or an employer, or a landlord's solicitor who has the facts fully marshalled and is prepared to argue the point at issue. I have seen many cases in which the claimant quite obviously did not understand what the issue was and certainly, he was unable to present facts or arguments in any coherent way. In others the applicant did not know what documents were relevant. When evidence as to facts is given — perhaps by an official, or an investigator — the applicant is in no position to test veracity by cross examination."[57]

It may be possible to argue that the imperative formulation of representation before administrative tribunals, at least statutory bodies, when read together with Art. 8(1) of the Malaysian Constitution,[58] imposes a constitutional obligation upon the Government to extend legal aid or to create special arrangements to eliminate unequal treatment of people who are like-circumstanced.[59] This postulation however is not altogether free from difficulties, the nature of which will have to await elucidation in another comment. As one commentator remarked appre-

[56] *Doresamy* v. *P.S.C.*, *op. cit.* (note 8), at p. 130.

[57] H. Whitmore, *op. cit.* (note 46), at p. 485.

[58] Art 8(1): "All persons are equal before the law and entitled to the equal protection of the law."

[59] Sheridan and Groves think it "probable that these articles [Art 8(1) and Art 5(3) of the Malaysian Constitution] would be regarded as imposing a constitutional obligation on Malaysia to ensure that any person charged with a serious crime is provided with counsel at public expense if he cannot find the fee himself." *The Constitution of Malaysia*, (1967), p. 39. The position is analagous. See also Huang-Thio (1963) 12 *Int. & Comp. L.Q.* 113.

hensively: "Any attempt, through the extension of legal aid, to encourage professional representation as a norm in the tribunal sphere, may mark the beginning of a tendency perhaps unwelcome, towards uniformity in administrative procedures."[60]

In Malaysia, there may not yet be the overgrowth of tribunals seen in the United Kingdom and elsewhere, nor has our legal aid scheme travelled very far from the incubation stage, but nonetheless it is of urgent importance to realise that a genuine issue of equal justice exists and that the remedial approach, when it comes, must reflect more than a "mere grudging gesture to a ritualistic requirement."[61]

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[60] Alder, *op. cit.* (note 47), at p. 297. But see *contra* Abel Smith and Stevens, *In Search of Justice* (1968): "... even bearing in mind the dangers of excessive legalism, we think it dangerous that any form of legal aid is unknown before most tribunals."

[61] Per Mr. Justice Fortas in *Kent* v. *United States* 383 U.S. 541 (1966).

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RECEPTION OF ENGLISH LAW UNDER SECTIONS 3 AND 5 OF THE CIVIL LAW ACT 1956 (REVISED 1972)

An interesting question which has given rise to a certain amount of academic discussion[1] is the extent to which Malaysian courts can adopt English law. Sections 3 and 5 of the Civil Law Act (Revised 1972) allow the courts to apply English law in certain circumstances but the exact scope of the provisions is far from clear. It is regrettable that the Commissioner of Law Revision did not take the opportunity to express his intentions with a greater degree of certainty. Although the Act is subject to a number of ambiguities, the discussion in this note will be restricted to two issues: first, whether section 3(1)(a) of the Civil Law Act, 1956 envisages the importation of English statutes passed before the 7th April, 1956; and secondly, the related issue of whether there is any difference between section 3(1)(a) and section 5(1) of the Act.

Section 3(1)(a) provides that in the absence of any written provision in Malaysia the courts shall "in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April, 1956." Does this subsection purport to incorporate the whole of English law, including statutes which may have modified the common law, or does it have a more restricted application? Professor Bartholomew[2] writing on section 3(1) of the Civil Law Ordinance, 1956[3] which is in *pari materia* with section 3(1)(a) of the Revised Act, submits that English legislation is applicable under the Ordinance. He argues that the admissibility of English statutes is a matter of "sheer necessity" and that to interpret section 3(1) in such a way that

[1] See Sheridan, *Malaya and Singapore, The Borneo Territories. The Development of their Laws and Constitution* (1961) p. 19; G.W. Bartholomew, *The Commercial Law of Malaysia* (1965) p. 21-39.

[2] *Ibid.*

[3] "Save in so far as other provision has been made or may hereafter be made by any written law in force in the Federation or any part thereof the Court shall apply the common law of England and the rules of equity as administered in England at the date of the coming into force of this Ordinance [7 April 1956]: Provided always that the said common law and rules of equity shall be applied so far only as the circumstances of the States comprised in the Federation and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary."

only the unreformed version of English law can be received would be to assimilate common law rules which have been found to be inadequate in England. He concludes that the expression 'common law' simply means the law administered by the Courts of Common Law – whatever its nature.

The term "common law" is admittedly an expression that is susceptible of more than one meaning. The definition which Prof. Bartholomew adopted to suit his argument is unquestionably wide enough to cover statutes.[4] But it is submitted that this is not the meaning commonly adhered to. The term "common law" is more frequently used in contra-distinction to statute law and is in fact a body of principles built up from the decision of judges in Common Law Courts. Blackstone[5] describes the common law in his commentaries:

> "This unwritten or common law is properly distinguishable into three kinds: 1) General customs; which are the universal rule of the whole kingdom, and form the common law in its stricter and more usual signification. 2) Particular customs; which for the most part affect only the inhabitants of particular districts. 3) Certain particular laws; which by custom are adapted and used by some particular courts, of pretty general and extensive jurisdiction."

He goes on to say, "all these doctrines . . . are not set down in any written statute or ordinance, but depend morely upon immemorial usage, that is, upon common law, for their support." A contemporary definition, entirely consistent with Blackstone's, has been offered by Glanville Williams. He states:

> "Originally this meant the law that was not local, that is, the law that was common to the whole of England. This may still be its meaning in a particular context, but it is not the usual meaning. More usually the phrase will signify the law that is not the result of legislation, that is the law created by the custom of the people and the decisions of the Judges."[6]

The definition accepted by Professor Bartholomew on the other hand, is at best of historical interest and has never gained currency. Moreover it is a general rule of construction that words in a statute must be construed not only in their popular sense but also in the sense they bore when the statute was passed.[7] In 1956 when the Civil Law

[4] E. Jowitt, *The Dictionary of English Law* (1959), which defines common law as ". . . that part of the law of England which, before the Judicature Acts, 1873-75, was administered by the common law courts. . . as opposed to equity (q.v.) or that part of the law administered by the Court of Chancery."

[5] 1 Comm. 67.

[6] *Learning the Law* (7th Ed.) (1963) p. 25.

Ordinance came into force, the term 'common law' was universally employed to distinguish case law from statutes and this, it is submitted, on principle must be the meaning intended by the Civil Law Ordinance 1956.

The Malaysian Courts seem to confirm the view that sections 3(1) does not admit of statutes. In *Mokhtar* v. *Arumugam,*[8] Thompson C.J., Smith J. and Ong J. refused to entertain any arguments based on an English statute. Smith J., delivering the judgement of the court, said: "It is quite clear that in England the power of the court to award damages in the nature of interest for delay in returning specific goods is a remedy conferred by statute and not one available at common law. This relief, being a creature of English statute, is not available here. See section 3(1) of the Civil Law Ordinance, 1956."[9] In *Ong Guan Hua* v. *Chong,*[10] which raises the question of the validity of securities given in respect of gaming contracts, Thompson C.J. reiterated his views. It was implicit in his Lordship's judgement that unless the English Gaming Acts of 1710 and 1835, which provided that every security given in respect of games shall be deemed to have been given for an illegal consideration, were enacted locally, as the English Gaming Acts of 1845 and 1892 were in the Civil Law Ordinance, 1956, they will not be applicable here.

A recent Privy Council decision, *Leong Bee & Co.* v. *Ling Nam Rubber Works,*[11] makes some interesting observations on this point, but unfortunately the Board did not spell out its position exactly. Sir Frank Kitto agreed that counsel for the appellants was right in conceding that in Malaysia the common law presumption that,

> "a fire which began on a man's property arose from some act or default for which he was answerable has no application in Malaysia and has no application there at least since the coming into force of the Civil Law Ordinance 1956, s. 3. The reason is that having been displaced by statute, first by 6 Anne, C. 31, s. 6 and later by the Fires Prevention (Metropolis) Act 1774, 14 Geo. 3. C. 78, 2. 86, the presumption formed no part of the common law of England as administered in England at that date. Upon the appellants lay the burden of proof as to both negligence and nuisance. . . ."[12]

An immediate difficulty arises: if the common law has been repealed

[7] *Maxwell on Interpretation of Statutes* (11th Ed. by Wilson and Galpin) (1962), p. 54, 58.

[8] [1959] 2 M.L.J. 232.

[9] Prof. Bartholomew dismisses this case as untenable. See Bartholomew, *op. cit.* n. 1 at p. 32.

[10] [1963] 29 M.L.J. 6, 7.

[11] [1970] 2 M.L.J. 45.

[12] *Ibid.*, p. 46.

by a statute before 1956, then what law is applicable in Malaysia? It cannot be the pre-1774 common law for that law formed no part of the common law on the 7th day of April 1956. If the Privy Council did not apply the common law, then what law did it invoke to impose the burden of proof on the plaintiff as to both negligence and nuisance? By imposing the burden of proof on the plaintiff, it is submitted, all the court did was simply invoke the pervasive principle that a plaintiff must always prove his case. "[I]t is of the nature of things that the burden of proving negligence should be the plaintiff's."[13] But in the absence of such a general common law principle, what rule applies in Malaysia when the common law has been abrogated in England by a statute? If it does not fall within section 5(1) or any other sections,[14] then there appears to be a *lacuna* in the law. This is not a unique situation in the Malaysian context. It may be suggested that the Law Revision Commissioner, whose terms of reference are not limited to English models, form a committee to investigate ways of closing such gaps, possibly by drawing on examples from other legal systems.[15]

Under the terms of the Revised Act (1972), Professor Bartholomew's view becomes even more difficult to justify. Section 3(1)(a) deals with West Malaysia only and it refers to ". . . the common law of England and the rules of equity. . . " as being applicable there; whereas section 3(1)(b) and (c) which apply to Sabah and Sarawak respectively, refer to ". . ..the common law of England and the rules of equity, *together with statutes of general application*. . . ."[16] The conclusion appears inescapable that the legislature, by deliberately including the word "statutes" in sections 3(1)(b) and 3(1)(c) while retaining the words "common law . . . and rules of equity" in 3(1)(a), perceived a distinction between the two heads.

An alternative argument in support of this position is that to admit English statutes under section 3(1)(a) would be to render many of the provisions in the Civil Law Act 1956 redundant. The Act incorporates a number of English statutory provisions[17] which would have been unnecessary if s. 3(1)(a) had been intended to admit of statutes. Most importantly, section 5(1) of the Act would also be made redundant.

[13] Per Mackenna J. in *Mason* v. *Levy Auto Parts* [1967] 2 All E.R. 62, 67.

[14] See *infra*, p.46.

[15] See, for example, Ahmad Ibrahim, "The Civil Law Ordinance in Malaysia" [1971] 2 M.L.J. lviii.

[16] Emphasis added.

[17] For example: s. 26(2) and s. 26(4) of the Civil Law Act, 1956 enacts s. 18 of the English Gaming Act 1845 and s. 1 of the English Gaming Act 1892, respectively; ss. 15 and 16 enact the English Law Reform (Frustrated Contracts) Act 1943; s. 12 enacts the English Law Reform (Contributory Negligence) Act 1945.

Section 5(1) provides:

> "In all questions or issues which arise or which have to be decided in the States of West Malaysia other than Malacca and Penang with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea marine insurance, average, life insurance, and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case at the date of the coming into force of this Act, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law."

Professor Bartholomew, having submitted that section 3(1) of the Ordinance should admit of statutes was then obliged to stretch his view to its inevitable conclusion, that section 5(1) is redundant. He concluded "... that in the Malay States section 5(1) of the Civil Law Ordinance is redundant on the ground that the law applicable under that section is the same as would be applicable under section 3(1), namely, the law of England as it stood on 7th April 1956 subject to local legislation and a local circumstances proviso."[18] It is submitted that this contention is untenable. Surely, a more reasonable construction of the statute would be to read it as a whole and to avoid redundancy as far as possible. As Lord Greene remarked,[19]

> "I need not cite authority for the proposition that prima facie every word in an Act of Parliament must be given an effective meaning of its own. Whether or not the legislature in any given case has condescended to tautology is a question the answer to which depends on the language used, but, in the absence of an appropriate context, one statutory provision which is expressed in entirely different language from another, whether in the same or a different section, is not to be interpreted as repetitive or unnecessary."

The wordings of section 3(1)(a) and section 5(1) are quite distinct. In section 3(1)(a) the law applicable is "... the common law of England and the rules of equity...". Section 5(1) maintains "... the law to be administered shall be the same as would be administered in England in the like case...". The fact that the legislature employed different terminology in each section clearly indicates that the meaning of each one is different. It is apparent that section 5(1) allows the importation of statutes,[20] and equally apparent that section 3(1)(a) was not intended to have such an effect.

[18] *Op. cit.* n. 1, p. 32.

[19] *Hill* v. *William (Park Lane) Ltd.* [1949] 2 All E.R. 452, 464-5;

[20] *Re Low Nai Brothers* [1969] 1 M.L.J. 171. Gill J. (as he then was) held that s.

Finally, under the Civil Law Ordinance, 1956 section 5(1) allows the reception of English statutes passed at the date of coming into force of the Ordinance, i.e. the 6th of April, 1956. When the Ordinance was revised and became the Civil Law Act 1972, the date appointed for coming in force was 1st April 1972. Section 10(2) of the Revision of Laws Act, 1968 provides:

> "On and after the date from which a revised law comes into force, such revised law shall be deemed to be and shall be without any question whatsoever in all courts and for all purposes whatsoever the sole and only proper law in respect of matters included therein and in force on that date."

Whereas section 3(1) of the Revised Act specifically mentions the "... 7th day of April, 1956", section 5(1) continues to provide that "... the law to be administered shall be the same as would be administered in England in the like case *at the date of the coming into force of this Act*, if such question or issue had arisen or had to be decided in England..."[21] Could it be taken to mean that the new dateline under sections 5(1) of the Revised Act is 1st April 1972, with the result that English statutes passed after 7th April 1956 are now law in West Malaysia? The answer is uncertain for immediately following the preamble to the Act two dates are mentioned in square brackets: "[West Malaysia – 7th April 1956; East Malaysia – 1st April 1972]" The preferable view is that the new date applies only to East Malaysia and the position in West Malaysia remains unchanged.[22]

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115(2) of the English Companies Act 1947 was applicable in West Malaysia as being part of the mercantile law. See also *Ngo Bee Chan* v. *Chia Teck Kim* [1912] 2 M.C. 25, which subsequently has been criticised on another ground.

[21] Emphasis added.

[22] Section 5(1) specifically excludes Malacca and Penang from its ambit.

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OCCUPIER'S LIABILITY, LAW REFORM AND *DONOGHUE V. STEVENSON* – A MALAYAN TRILOGY?

In the recent case of *Yeap Cheng Hock* v. *Kajima-Taisei Joint Venture*[1], the High Court in Malaysia found itself entangled in the web of common law rules governing the liability of an occupier to those on his premises. Although the specialisation, technicality and rigid nature of those rules led to their downfall in the jurisdiction in which they were conceived,[2] the courts in Malaysia are bound by statute to apply those rules because they formed part of "the common law of England on the 7th day of April, 1956".[3]

The purpose of this comment is to note the decision in *Yeap* v. *Kajima*, to consider how accurately it reflects the rules it purports to apply, to assess critically the continuing utility of those rules and to propose an alternative basis of occupier's liability grounded in current notions of public policy in the law of tort. Such assessment and reform is now required in Malaysia. It is only the law of tort, of all the common law subjects, that remains largely unreconstructed. The courts still rely almost exclusively on English precedents, many of which are no longer good law in England as a result of the increasingly active role Parliament has played in law reform, particularly since the formation of the English Law Commission in 1965[4]

There is, moreover, a rising litigation consciousness in Malaysia which has paralled the rise in urban living, mobility, availability of motor cars and other dangerous instrumentalities, industrialisation and the institution of legal aid schemes. It is in respect to these considerations that the following observations are directed.

[1] [1973]2 M.L.J. 230.

[2] See the Occupier's Liability Act (1957), 23 *Halsbury's Statutes of England* 793 (3rd Ed.).

[3] Sec. 3(1)(a) of the Civil Law Act, 1956 (Act 67). Sec. 3(1)(b) and 3(1)(c) provide that the relevant dates for Sabah and Sarawak respectively are 1st December, 1951 and 12 December, 1949. For the effect of English statutes in Sabah and Sarawak see *infra* this Journal, p. 42.

[4] See for example: The Animals Act 1971; The Employers' Liability Acts 1969; The Factories Act 1969; the Housing Act 1961; Industrial Relations Act 1971. See also the Reports of the Law Commission on Civil Liability for Vendors and Lessors of Defective Premises 1970 (Law Comm. No. 40) and Civil Liability for Dangerous Things and Activities 1970 (Law Common No. 32).

The facts and holding in *Yeap* v. *Kajima* can be stated simply. The plaintiff was one of a group of geologists from the Geological Society of Malaysia visiting an irrigation tunnel being constructed by the defendant engineers in a mine in Kedah. Their purpose was to examine rocks and conduct a survey. The defendant's servants conducted the tour of the mine. Having descended to the tunnel floor, the group were taken by locomotive to a spot near the rock face, which is the inner most portion of the tunnel. From there they walked to the floor itself, passing a train loader which practically filled the tunnel. The train loader is a huge machine running on two rails used to load debris left behind by the blasting of the rock face. After examining the rock structure for a few minutes the party became concerned as the result of the sudden operation of machinery only a short distance from them. They began to retreat toward the tunnel entrance walking along the narrow passage between the train loader and the tunnel wall. After having proceeded a short way, the train loader suddenly started to move towards them. As they groped forward, one of the train loader's wheels jammed the legs of the plaintiff against a rock projection on the tunnel wall. In consequence he suffered a severe injury of the left leg just below the knee and his leg had to be amputated.

Syed Agil Barakbah J. in the High Court held: (1) the plaintiff was a licensee because he was visiting the tunnel for his own purposes; (2) the rock projection was a concealed danger which was known or ought to be known to the defendant and he was therefore liable for breach of his occupancy duty; (3) the performance of dangerous work imposed an alternative duty of care on the defendent under *Donoghue* v. *Stevenson*,[5] and the sudden operation of the train loader was a breach of this "activity" duty; (4) the sum of $40,470 was fair and reasonable damages for pain and suffering, loss of amenities and loss of future earnings.

I. THE ISSUES

A. *The knowledge requirement – objective or subjective?*

The first step in the convoluted process of establishing an occupier's liability at common law is to categorise the entrant to the premises as an invitee, licensee or trespasser. It is on the basis of this distinction that all other consequences flow. The Court made quick work of this determination, holding that the group of geologists who entered the tunnel site were licensees because their presence did not benefit the defendants in a pecuniary or material way. "The law," Barakbah J. rightly pointed out, "does not take account of the wordly advantage which the host remotely has in view".[6]

[5] [1932] A.C. 562; [1932] All E.R. Rep. 1.

[6] *Op. cit.* n. 1, p. 232, and see *Latham* v. *Johnson* [1913] 1 KB 398, 410.

Having accepted this distinction[7] the court embarked on a consideration of its ramifications. The first one was that because the defendant *ought to have known* that the rock projection on the tunnel wall constituted a concealed danger to the plaintiff, he breached his duty as a licensor. The Court relied on an unsorted mixture of authority, some of which directly contradicted this proposition, in coming to this conclusion. For example, Barakbah J. quotes a passage from *Charlesworth on Negligence* to the effect that whilst the duty of an invitor is to warn his invitee of "dangers of which he ought to have known as well as those of which he actually knew"[8], the licensor is "only bound to warn of traps of which he knew"[9]. He relies on this excerpt and a statement by Lord Sumner in *Mersey Docks and Harbour Board* v. *Proctor*[10], which is directed to the issue of what constitutes a trap as opposed to an obvious danger, to conclude that "in other words, the occupier is bound not to create a trap or to allow a concealed danger to exist upon the said premises, which is not apparent to the visitor, *but which is known or ought to be known, to the occupier*" (italics added).

The chief distinction between the duty owed to licensees and invitees traditionally was that in the former case the licensor had to have a subjective or actual knowledge of the danger, whereas in the latter case the invitor need only have objective or constructive knowledge of the hazard. Willes J. considered this to be settled law by 1866. He held in *Indermaur* v. *Dames* that, in respect to invitees, "the occupier shall on his part use reasonable care to prevent damage from unusual dangers, which he knows or ought to know about";[11] but in considering the duty owed to licensees, Willes J. commented "there is considerable resemblance though not a strict analogy, between this class of cases and those founded upon the rule as to voluntary loans and gifts, that there is no remedy against the lender or giver, for damage sustained from the loan or gift, except in case of unusual danger known to or concealed by the lender or giver"[12]. Again in *Gautret* v. *Egerton*, where the injured party was a licensee, Willes J. said that there "must be something like fraud" in order to ground the liability of a licensor.[13]

The rationale of the foregoing distinction lay in the nature and found-

[7] See *infra*, p. 63.

[8] *Charlesworth on Negligence*, 4th Ed. p. 202.

[9] *Ibid.*

[10] [1923] A.C. 253, 274.

[11] [1866] LR 1 CP 274, 288.

[12] *Ibid*, p. 287.

[13] [1867] LR 2 CP 371, 375.

ation of the two relationships. Whereas the invitee conferred some economic benefit on his invitor and was therefore entitled to expect that reasonable care would be taken to provide a safe premises for him, the bare licensee gratuitously received a benefit from his licensor so that any complaint by him "may be said to wear the colour of ingratitude as long as there [was] no design to injure him".[14] It was only when the licensor became aware of a hidden danger of which the licensee was unaware that he was obligated to take reasonable precautions.

As long as the law continued to distinguish the two categories it appeared unlikely that the courts would proceed to assimilate the duties owed to each one. To do so might appear to obviate the need for such a distinction. Yet this is precisely what the courts in England proceeded to do. In *Ellis* v. *Fulham Borough Council*[15], a quantity of sand had been placed at one side of a public road maintained by the defendant. The plaintiff, a child, stepped upon a piece of glass hidden in the sand and cut his toe. After describing the relationship between the parties as that of licensor-licensee, Greer L.J. stated the knowledge requirement of the licensors' conventionally: "any liability of the council could only arise if there was a danger known to them and not known to the plaintiff which he could not be expected to avoid"[16]. In applying the law to the facts however, he widened its ambit by holding: "it does not seem to me to matter that the council officials did not know that the actual piece of glass was there; the question is, did not the council know that there was a danger to children that it ought to provide against?"[17] The court then found a breach of duty because the defendant knew of the risk that glass from broken bottles could find its way into the sand even if he was not actually aware of the presence of glass on the particular occasion in question. This formulation is wider than the formulation in *Gautret* v. *Egerton*[18] because in that case only actual knowledge of the facts giving rise to the risk was required. There was nothing in the conduct of the defendant in *Ellis* v. *Fulham* that could be characterised as "something like fraud"[19] in the words of Willes J.

Almost imperceptibly the duty owed to licensees had been modified from a requirement of subjective knowledge of facts to one of objective knowledge of facts and subjective knowledge of danger. The nature of this departure was clarified and adopted by the Court of Appeal in *Pearson* v.

[14] *Indermaur* v. *Dames*, *op. cit.* n. 11, p. 285.

[15] [1938] 1 K.B. 212; [1937] 3 All E.R. 454.

[16] *Ibid.* [1937] 3 All E.R. 454, 457.

[17] *Ibid.*

[18] *Op. cit.*, n. 13.

[19] *Ibid.*, p. 375.

Lambreth B.C.[20] The plaintiff in that case entered a public convenience provided by the defendant. On leaving the convenience he bumped his head against an overhead grille which had been lowered by some children while the plaintiff was inside. The defendant's servant knew that children were in the habit of swinging on the grille, although he was not aware that they were doing so on this particular occasion. After classifying the plaintiff as a licensee the court held that the defendant was liable because his servant had actual knowledge of the danger that children might pull down the grille. The fact that the defendant had no actual knowledge of the position of the grille did not defeat the plaintiff's claim. Asquith L.J. commented that "it is sufficient if the defendant knows – (a) that there is present a physical object capable of being put in a dangerous condition; (b) by the action of third persons; (c) who are quite likely to act in such a way as to put it in a dangerous condition, having regard to their past behaviour or inherent qualities."[21]

Although the chief distinction between invitees and licensees had so far been narrowed, it had not yet been obliterated. It remained for *Hawkins* v. *Coulsdon Purley Urban District Council*[22] to accomplish that task. The plaintiff in that case was a visitor to a house that the defendant had requisitioned some years earlier. He fell and broke his leg while descending the steps from the front door after dark. One of the steps was broken and it was found that the defendant had actual knowledge of that fact, but that he did not appreciate that the broken step constituted a danger to the plaintiff. Nevertheless the Court of Appeal unanimously decided that the licensor was liable, holding that where he had actual knowledge of the facts giving rise to the danger and a reasonable man would have realised that it was a danger, a duty arises. If one puts the decision in *Pearson* v. *Lambreth*, that subjective knowledge of facts giving rise to danger is not required, together with the decision in *Hawkins* v. *Coulsdon*, the conclusion that there is no longer any difference between the duty owed to invitees and licensees in relation to the knowledge requirement is an inescapable one. Lord Denning, M.R., recognised this development when he commented in *Hawkins* v. *Coulsdon* that "counsel for the defendant's said that if we affirm the judge's view of the law – as we do – there will be little difference left between an invitee and a licensee. I think there is some truth in this, but it is not a matter for regret . . . it can fairly be said that the occupier owes a duty to every person lawfully on the premises to take reasonable care to prevent damage."[23]

[20] [1950] 2 K.B. 353; [1950] 1 All E.R. 682.

[21] [1950] 1 All E.R. 682, 686. See also *Coates* v. *Rawtenstall Corp.* [1937] 3 All E.R. 682.

[22] [1954] 1 Q.B. 319; [1954] 1 All E.R. 97.

[23] *Ibid.*, p. 106.

It is on this basis that the result in *Yeap* v. *Kajima* can be justified. A reasonable man in the position of the defendant contractor would have known that the rock projected into the tunnel and that this constituted a danger to the plaintiff geologist. This same result, it should be noted could have been achieved by reference to the ordinary principles of negligence instead of the tortuous reasoning the court felt obligated to employ. It is no exaggeration to say that the correct result was achieved in spite of the law and not because of it.

B. *Unusual* v. *concealed dangers*

Barakbah J. took barely two sentences to conclude that the rock projection in the tunnel constituted a concealed danger and therefore this requirement presented no stumbling block to the plaintiff's claim that the defendant owed him a duty. To a court whose sensibilities have been conditioned by the ordinary principles of negligence embodying the "reasonable man" concept, it is understandable that the almost imperceptible and seemingly arbitrary distinction between a "concealed" danger, giving rise to a duty to licensees and an "unusual" danger, which suffices for invitees, is not a substantive one. In applying the law to the facts Barakbah J. seized on the fact that a visitor in the position of the plaintiff would not notice the rock edge, concluding that he had "no hesitation in holding that the rock was hidden or concealed from the plaintiff."[24]

With respect it is submitted that a survey of judicial authority supports a narrower interpretation of what constitutes a concealed danger than the Court indicated. In *Gautret* v. *Egerton*[25] the defendants were possessed of land with a canal and of bridges across the canal. The plaintiff, a licensee who fell into the canal, was held not entitled to recover, Willes J. stating that "it is quite consistent with the declaration in these cases that this land was in the same state at the time of the accident that it was in at the time the permission to use it was originally given. To create a cause of action something like fraud must be shown."[26] This comment applies with equal accuracy to the rock projection in *Yeap* v. *Kajima*. Thus it has been held that a licensee who walks across a piece of wasteland in the dark and falls into an unfenced quarry,[27] a licensee who falls into a trench dug in an unfinished road not yet dedicated to the public,[28] or who

[24] *Op. cit.*, n. 1, p. 233.

[25] [1867] L.R. 2 C.P. 371.

[26] *Ibid.*, p. 375.

[27] *Houndsell* v. *Smyth* [1860] 7 C.B. (NS) 731

[28] *Coleshill* v. *Manchester Corp.* [1928] 1 K.B. 776.

catches his foot in a depression in a flight of steps,[29] cannot recover. The rock projection in *Yeap* v. *Kajima* would have more easily fit within the broader classification of "unusual dangers", a term reserved to describe the duty owed to an invitee at common law. A danger is unusual if it is unknown to the invitee and could not reasonably be expected to give rise to the danger. Accordingly, in *Indermaur* v. *Dames*[30] a gasoline fitter servant who fell through an unfenced opening in one of the upper floors of a factory was held entitled to recover. Similarly, a visitor to a patient in a hospital who slipped on a mat put on a highly polished floor was entitled to recover.[31]

Once again, a survey of the authorities reveals the ambiguity of the common law position. Unlike the knowledge issue however, there has been no serious attempt to reconcile those ambiguities. Only by glossing over the issue was Barakbah J. able to achieve a result that did not do violence to generally accepted notions of the basis of responsibility in tort.

C. *Liability for current operations*

In addition to holding the defendant liable for breach of his occupancy duty by maintaining a concealed danger which he ought to have known about, Barakbah J. formulated an alternative basis of liability based on the defendant's "performance of dangerous work and possession and use of dangerous things"[32] to impose a duty of care according to the general principles of negligence. This so called "activity" duty or liability for "current operations" mitigated the rigidity of the common law rules relating to occupier's liability when the entrant was injured as a result of negligently carrying out operations on the premises. In *Yeap* v. *Kajima* the operation was the sudden movement of the train loader and the High Court rightly distinguished the basis of liability for that movement from the duty owed for the static condition of the tunnel.

Although this distinction can be traced back to pre-*Donoghue* v. *Stevenson*[33] cases, its modern rationale was first enunciated fully by Lord Denning, MR., in *Dunster* v. *Abbott*[34]. The defendant was the owner and occupier of premises bordered by an unlighted country road. The plaintiff entered the premises after dark with a view to selling advertising space to

[29] *Fairman* v. *Perpetual Investment Bldg. Soc.* [1923] A.C. 74.

[30] [1886] L.R. 1 C.P. 274.

[31] *Weigall* v. *Westminster Hospital* [1936] T.L.R. 301.

[32] *Op. cit.*, n. 1, p. 233.

[33] [1932] A.C. 562; [1932] All ER Rep. 1; see *Tolhousen v. Davies* [1888] 57 LJ QB 392, and *Tebbutt v. Bristol & Exeter Ry* [1870] L.R. 6 QB 73.

[34] [1953] 2 All E.R. 1572.

the defendent. The defendant refused to do business with the plaintiff and as he left the premises he tripped and fell into a ditch allegedly because the defendant had turned off a light too soon. In holding the defendant not liable, Denning L.J., as he then was, said it was irrelevant to the determination of the case whether the plaintiff was an invitee, a licensee or a trespasser or even whether the danger was unusual or concealed. He explained, "that distinction is only material in regard to the static condition of the premises. It is concerned with dangers which have been present for some time in the physical structure of the premises. It has no relevance in regard to current operations, that is, to things being done on the premises, to dangers which are brought about by the contemporaneous activities of the occupier or his servants or of anyone else."[35] He went on to hold that the duty of the defendant was simply to use reasonable care in all the circumstances, and on the present facts the defendant was clearly in no breach of duty by turning off the lights. The Court of Appeal relied on this same rationale to achieve an opposite result in *Slater* v. *Clay Cross Ltd.*[36] In that case the plaintiff, a local resident, had habitually used a railway tunnel as a pathway providing a shortcut to the village. While walking through the tunnel he was struck by the defendant's train. The court found it unnecessary to determine the plaintiff's status as entrant holding that the defendant's duty was to take reasonable case to see that the premises were reasonably safe for people lawfully coming onto them and the defendant in this case breached that duty. The scope of the current operations doctrine and its relationship to occupier's liability was enunciated by the House of Lords in *Perkowski* v. *Wellington Corp.*[37] The plaintiff in that case died as a result of injuries suffered when he dived into shallow water from a spring board at low tide. The defendant had erected the spring board some years ago. Lord Somervell held that the current operations duty did not apply to the defendant distinguishing *Slater* v. *Clay Cross Ltd.* on the ground that the danger in that case arose from the negligent driving of the defendant's train and not out of the condition of the tunnel. In *Perkowski*, on the other hand, the spring board had been erected years ago and the complaint was based on its present condition and not its use. As the spring board did not constitute a concealed danger the defendant was held not liable for breach of his duty as licensor.

In the present case the danger resulted from a combination of a positive act, i.e. the negligent operation of machinery, and the static condition of the premises, i.e. the rock projection. The High Court took the view that this situation required an analysis of the facts in terms of both duties.

[35] *Ibid.*, p. 1574.

[36] [1956] 2 Q.B. 264; [1956] 2 All E.R. 625.

[37] [1959] A.C. 53; [1958] 3 All E.R. 368.

Presumably the decision of the Court would have been for the plaintiff if there was a breach of either duty. The Privy Council in *Commissioner for Railways* v. *Mc Dermott*[38], a decision that the High Court was apparently not referred to, lends its support to an alternative approach. In *McDermott*, the plaintiff was injured when she tripped on the defendant's railway line owing to the defective state of the sleepers. Before she could escape, the defendant's train, approaching the crossing at 40 mph and unable to stop in time, amputated her foot. The plaintiff alleged that the defendant was negligent in operating trains over a defective unlit crossing. The defendants argued that the plaintiff was a mere licensee on the tracks and the limited duty owed to her was not breached. The view of Lord Gardiner, L.C., speaking for the Privy Council, is particularly apposite: "whenever there is a relationship of occupier and licensee, the special duty of care which arises from that relationship exists. If there is no other relevant relationship, there is no further or other duty of care. But there is no exemption from any other duty of care which may arise from other elements creating an additional relationship between the two persons concerned."[39] Having decided that the two duties can exist concurrently, he went on to characterise the facts in *McDermott* as giving rise to a breach of the activity duty only. Although the danger resulted from a combination of positive acts and dangerous condition, in the same way it did in *Yeap* v. *Kajima* the Privy Council placed prime importance on the positive acts. Lord Gardiner, L.C., said, "it can be contended that the general duty of care applies only in respect of such positive operations, whereas the limited duty applies to the static condition of the crossing. This contention however is, on the facts of the present case, too artificial and unrealistic to be acceptable. The positive operations and the static condition interact, and the grave danger is due to the combination of both."[40]

Perhaps the key to understanding why the Privy Council adopted this approach is that the facts in *McDermott* did not give rise to a breach of the licensor's duty. The Privy Council was anxious to avoid holding that there was a breach of one duty but not the other without any rational basis for the distinction so it lumped the two duties together. The need to adopt such a fiction is a direct result of the rigid categorisation of entrants and arbitrary gradation of duties promulgated by the courts for so many years.

D. *Duty to trespassers*

In seeking to buttress its conclusion on the activity duty issue further the

[38] [1967] 1 A.C. 169; [1966] 2 All E.R. 162.

[39] *Ibid.*, p. 186, 197.

[40] *Ibid.*, p. 189.

High Court referred to the controversial and now effectively overruled House of Lords decision in *Robt. Addie Sons Ltd.* v. *Dumbreck*[41] Barakbah J. understood that case to hold that "even in the case of a trespasser there is a duty to abstain from doing an act which if done carelessly must be reasonably contemplated as likely to injure [a trespasser] when he is known to be present".[42] It is respectfully submitted that the occupier's duty laid down in *Addie's* case had nothing whatever to do with the ordinary principles of negligence that comprise the activity duty. In *Addie's* case a boy aged four years was killed while playing on a wheel, part of a haulage system, in a field occupied by the defendant. The field was surrounded by a hedge which was quite inadequate to keep out the public and was habitually used by young children as a playground to the knowledge of the defendant's officials. The wheel was not visible from the electric motor which set it in motion and the accident occurred owing to the wheel being set in motion by the defendant's servants without taking special precautions to avoid accidents to persons frequenting the wheel. The court found that the defendant was an occupier of the land and the plaintiff was a trespasser. It held that the occupier owed no duty to a trespasser other than that of not inflicting damage intentionally or recklessly on a trespasser known to be present. The plaintiff was therefore not entitled to recover. Any idea that there might be an alternative basis of liability when injury resulted from current operations as opposed to the static conditions of the premises can be rebutted by reference to the facts of the case, which disclose that the plaintiff's complaint related to the current operation of the machinery and not its static condition. Furthermore, the distinction was specifically denied by Lord Hailsham, L.C., who said that "towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes onto the premises at his own risk".[43]

The thrust of Barakbah J.'s analogy appears to be that under the rule in *Addie's* case an occupier owes an activity duty to trespassers but that the standard of liability for breach of that duty is reckless conduct. It is difficult to find judicial support for this view. In *Videan* v. *British Transport Commission*[44], Lord Denning, M.R., argued that after *Donoghue* v. *Stevenson* the rule in *Addie's* case should be limited to cases concerning the static condition of premises. In relation to activities on the land the true test is forseeability and reasonable care. In *Commissioner*

[41] [1929] A.C. 358; [1929] All E.R. Rep. 1.

[42] *Op. cit.* n. 1, p. 233.

[43] *Op. cit.* n. 41, [1929] A.C. 358, 395.

[44] [1963] 2 Q.B. 665; [1963] 2 All E.R. 860.

of Railways v. *Quinlan*[45], however, the Privy Council rejected this distinction holding that the formula in *Addie's* case cannot legitimately be regarded as confined to the situation where injury arises from the static condition of the land. The purpose of the rule, Viscount Radcliffe argued, was "to prescribe not merely that a trespasser must take the land as he finds it, but also that he must take the occupier's activities as he finds them, subject to the restriction that the occupier must not wilfully or recklessly conduct them to his harm."[46]

It is a symptom of the confused state of the law relating to occupier's liability that in regard to invitees and licensees the law recognises the existence of an alternative basis of liability for current operations, but not in the case of trespassers. This anomolous situation has been perpetuated by the recent decision of the House of Lords in *B.R.B.* v. *Herrington*[47], which overhauled the law in this area. The defendant in that case owned an electrified railway line which was fenced off from a meadow where children lawfully played. The defendant's station master, who was responsible for that stretch of line, knew that the fence was in a dilapidated condition and had been notified that children had been seen playing on it. The plaintiff then aged six, was injured by a live wire while trespassing on the line. The House of Lords took this opportunity to review the law relating to trespassers and then formulated a new basis of liability called the "common humanity" standard, for both activity and occupancy duties. It appears to represent a half way house between the two rejected alternatives of the narrow "reckless disregard" test in *Addie* v. *Dumbreck* and the *Donoghue* v. *Stevenson* requirement of acting with reasonable care. Lord Morris emphasized that the occupier is not required "to make surveys of his land in order to decide whether dangers exist of which he is unaware",[48] but that once he is aware of the danger he is under a duty to "take such steps as common sense and common humanity would dictate . . to exclude or to warn or otherwise within reasonable and practical limits reduce or avert [it]".[49] In this way the new standard narrowed the gap between the various bases of liability relevant to occupiers without closing it. It seems to have ruled out for the forseeable future any chance that the activity/occupancy duties distinction will be extended to this area of the law.

[45] [1964] A.C. 1054; [1965] 1 All E.R. 897.

[46] *Ibid.*, [1964] 1 All E.R. 897, 906.

[47] [1972] A.C. 877; [1972] 1 All E.R. 749.

[48] *Ibid.*, [1972] 1 All E.R. 749, 767.

[49] *Ibid.*

II. THE OCCUPIER'S LIABILITY ACT, 1957[50]

Before proceeding in the final section of this comment to canvass a proposal for reform of the law relating to occupier's liability in Malaysia, it may be instructive to outline the solution to the issues raised in *Yeap* v. *Kajima* under the Occupier's Liability Act now in force in England.

The specialisation and technicality of the common law rules as well as their perpetuation of rigid distinctions between the categories of entrants led to a general feeling of unrest. As one writer put it, "the facts are made to fit the conception instead of having the conception fit the facts. By this procrustean method, the three categories are preserved intact even though reason and experience be sacrificed in the process."[52] In 1952 the Lord Chancellor, Viscount Simonds, invited the Law Reform Committee to consider the improvement, elucidation and simplification of the law relating to the liability of occupiers of land or other property. The Committee reported in 1954[53]. The defects they pointed out were noted and their suggested remedies were virtually all implemented by the Occupier's Liability Act, 1957.[54]

The effect of the legislation, *inter alia*, is to abrogate the distinction between invitees and licensees and the differing duties owed to each class. In their place the Act provides for one uniform duty of care owed to all lawful visitors – the "common duty of care". Section 2(2) of the Act explains the nature of the duty: "the common duty of care is a duty to take such care as in all the circumstances is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there." Paragraphs 3 and 4 of Section 2 stipulate the circumstances relevant for determining if the common duty of care has been breached. They include the age of the visitor, his expertise in guarding against special risks incidental to his calling, the effect of a prior warning by the occupier and the fact that the injury was caused by the occupier's independent contractor. The rest of the Act relates to specialised areas of concern over occupiers bound by contract, third parties, the obligation of non-occupiers, landlords and subtenants. Its scope did not extend to the reform of the law relating to trespassers.

It is submitted that the result in *Yeap* v. *Kajima* would have been the same under the Act as it was at common law. The most striking statement in support of this conclusion was that of Lord Denning, M.R., in *Slater* v.

[50] See further North, *Occupiers' Liability* (1971).

[51] For further discussion of this issue in the context of a new proposal, see *infra* p.70.

[52] Mac Donald, [1927] 7 Can. Bar Rev. 665, 668.

[53] Cmnd. 9305 (1954): For comment see Odgers [1955] C.L.J. 1; Heuston (1955) 18 M.L.R. 271 (1955).

[54] See Odgers [1957] C.L.J. 39; Newark [1958] 12 N.I.L.Q. 203; Payne [1958] 21 M.L.R. 359 (1958).

Clay Cross Ltd.[55] He said:

> "The Law Reform Committee has recently recommended that the distinction between invitee and licensee should be abolished; but this result has already been virtually attained by the decision of the courts . . . this distinction has now been reduced to the vanishing point. The duty of the occupier nowadays is simply to take reasonable care to see that the premises are reasonably safe for people lawfully coming on to them, and it makes no difference whether they are invitees or licensees."

An analysis of the issues raised in *Yeap* v. *Kajima* in relation to the Act confirm this process. The defendant contractor in *Yeap* is undoubtedly an occupier within the meaning put on those words by the House of Lords in *Wheat* v. *Lacon.*[56] He had "a sufficient degree of control over the premises to put him under a duty of care towards those who lawfully come on the land. The word occupier in the Act therefore is used in the same sense as it was used at common law."[57] Lord Denning in *Wheat* v. *Lacon* singled out independent contractors as being sufficiently in control of the place where they worked to give rise to the common duty of care. Assuming that the geologists in *Yeap* v. *Kajima* were lawful visitors, the next question is to determine whether the contractors fulfilled their duty to the plaintiff. The most relevant circumstance on these facts was that the plaintiff was unfamiliar with the tunnel. There was no evidence to suggest that he was able to appreciate or guard against the special risks to which he was exposed. It is submitted therefore that the defendant in *Yeap* v. *Kajima* breached the common duty of care in that both the rock projection and the unexpected operation of machinery were not consistent with the defendant's obligation "to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited . . ."[58] Thus a relatively simple analysis, based on criteria not unlike those relevant to a solution under the ordinary principles of duty and breach of duty, leads to a conclusion identical to the one reached by the court after an elaborate, intricate and in some places inaccurate exposition of the common law principles of occupier's liability.

With respect to the controversy surrounding the distinction between activity and occupancy duties, the Act unfortunately provides no clear cut answer. It still remains an open question whether the Act applies to

[55] [1956] 2 Q.B. 264, 269; [1956] 2 All E.R. 625.

[56] [1966] A.C. 552, 557; [1965] 2 All E.R. 700.

[57] *Ibid.*

[58] Sec. 2(2).

cases of breaches of both types of duties, or only to the latter. There is a division of opinion among the commentators on this issue[59], but the better view, it is submitted, is that Section 1(2) of the Act limits its scope to regulating "the nature of the duty imposed by law in consequence of a person's *occupation or control* of premises" (emphasis added). On any view, however, the question no longer retains its former importance because the difference between the two duties of care is not substantive.[60] If the High Court in *Yeap* v. *Kajima* had applied either standard to the defendant's operation of the train loader the result would undoubtedly have been the same.

III. A REFORM PROPOSAL BASED ON DONOGHUE v. STEVENSON

It is the conclusion of this observer that there exist no functional reasons for foreclosing the application of the ordinary principles of negligence to cases of occupier's liability. The classic formulation of these principles, of course, is found in the famous dictum of Lord Atkin in *Donoghue* v. *Stevenson*[61]. Its central notion is the identification of duty with foresight by reliance on the "neighbor" analogy. This pronouncement, as developed in *Bourhill* v. *Young*[62], *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock and Engineering Co. Ltd. (The Wagon Mound)*[63], *Hedley Byrne and Co. Ltd.* v. *Heller and Partners Ltd.*[64] *and Dorset Yacht Co. Ltd.* v. *Home Office*[65], is now the unchallanged model for moudling the shape of the law of negligence. It provides a yardstick for appraising novel claims,[66] and has been utilised on more than one occasion to overrule other and inconsistent precedents.[67] Implementing a change of this magnitude in Malaysia presents no insurmountable difficulties. A short statute would be

[59] See *Salmond on Torts* 15th Ed., by R.F.V. Heuston (1969), p. 337 (fn. 4), who supports the view that the distinction has been abolished by reference to the long title of the Act, which extends its scope to "occupiers and others". Jolowiez, on the other hand, argues that the Act does not affect the activity duty for its principal purpose was to rid the law of the distinction between invitees and licensees, and the activity duty is not relevant to that determination. *Winfield and Joloweiz on Tort* (9th Ed.) (1971).

[60] For the common duty of care, see Clerk & Lindsell, *Torts*, 13th Ed., (1969), p. 596.

[61] [1932] A.C. 562, 580; [1932] All E.R. Rep. 1.

[62] [1943] A.C. 92; [1942] 2 All E.R. 396.

[63] [1961] A.C. 388; [1961] 1 All E.R. 404.

[64] [1964] A.C. 465; [1963] 2 All E.R. 375.

[65] [1970] A.C. 1004; [1970] 2 All E.R. 294.

[66] See [1967] 2 Q.B. 1: and [1945] 1 All E.R. 280

[67] *Hedley Byrne* v. *Heller*, *op. cit.*, n. 64; *Dorset Yacht* v. *Home Office*, *op. cit.*, n. 45.

required to abolish all the common law rules relating to an occupier's liability for the condition of his land and structures as far as they deviate from the ordinary principles of negligence at common law as currently interpreted and applied by the civil courts in Malaysia.

It is submitted that the recent decision of the House of Lords in *Dorest Yacht*, which of course the Law Reform Committee on Occupiers Liability in England did not have the benefit of considering, lends strong support to this proposal. In *Dorset Yacht* the duty issue was clearly framed: could the Home Office, acting through its borstal officers, under any circumstances owe a duty to any member of the public to take care to prevent trainees under its control or supervision from causing injury to person or property? The arguments for the Home Office were first that there was virtually no authority for imposing a duty of this kind, and second that reasons of public policy, especially the freedom of the Home Office to continue its progressive reform programs, required that these officers should be immune from liability. With the exception of Viscount Dilhorne, all the judges on both the Court of Appeal and in the House of Lords rejected these arguments. Lord Reid said:

> "About the beginning of this century most eminent lawyers thought that there were a number of separate torts involving negligence each with its own rules and they were most unwilling to add more. They were of course aware from a number of leading cases that in the past the courts had from time to time recognised new duties and new grounds of action. But the heroic age was over, it was time to cultivate certainty and security in the law; the categories of negligence were virtually closed. The learned attorney general invited us to return to those halcyon days, but attractive though it may be, I cannot accede to this invitation.
>
> "... *Donoghue* v. *Stevenson* may be regarded as a milestone, and the well known passage in Lord Atkin's speech should I think be regarded as a statement of principle. It is not to be treated as if it was a statutory definition. It will require qualification in new circumstances. *But I think that the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion.*"[68]

The effect of this decision is to shift the burden of persuasion to those who argue for exemption from *Donoghue* v. *Stevenson* based liability unless there is a sound policy rationale to base such an exemption. In *S.C.M. (United Kingdom), Ltd.* v. *W.J. Whittall E Sons Ltd*[69] and *Spartan Steel Ltd.* v. *Martin*[70], the Court of Appeal concluded that in the case of

[68] [1970] 2 All E.R. 294, 297; emphasis added.

[69] [1971] 1 Q.B. 337; [1970] 3 All E.R. 325 (C.A.).

economic loss not consequential on physical injury, such a policy basis did exist based on the nature of the loss, the unlimited number of claims it would give rise to and legislative policy[71]. In *Hedley Byrne*, the House of Lords was confronted with a situation that is closely analogous to the present one. A long line of cases dating back to *Derry v. Peek* in 1889[72] had held that no cause of action lies for damage resulting from negligent misstatements. In deciding that the courts should henceforth impose a limited duty of care for words as well as acts, the House of Lords make it plain that apart from questions of precedent, which now no longer bind the House, the only valid reason for not applying *Donoghue v. Stevenson*. was one of public policy. Quite careful people often express definite opinions on social and or informal occasions without taking that care which they would exercise if asked for their professional opinions[73]. Another difference was that a negligent act or negligently made article will normally cause damage only once whereas words are more volatile. How far they are relied on must in many cases be a matter of doubt. If statements were held to create the necessary proximity to give rise to a "neighbour" relationship, there might be no limit to the persons to whom the speaker or write would be liable.[74] In these circumstances the House formulated a duty of care for negligent misstatements that departs from *Donoghue v. Stevenson* only where those policy reasons compelled it to do so.

It now falls to determine whether there exist any policy reasons for excluding the principle of proximity to cases of occupier's liability. The policy considerations underlying the common law in this area can be separated into two categories. The first one involves the traditional concept that the landowner was sovereign within his own boundaries and as such might do what he pleased on or with his own domain.[75] In the middle of the nineteenth century, not coincidentally at the same time Willes J. decided *Indermaur v. Dames*,[76] the privileged position of the land owner and members of his class generally, was taken for granted. Taken together with the fact that juries played an important role in civil cases, this meant that judges had to formulate precise rules and establish rigid categories of

[70] [1972] 3 All E.R. 561 (C.A.).

[71] But see the powerful dissenting judgement of Davies.L.J. in *Spartan Steel*; he argues that the policy basis is largely fictional, *ibid.*,p. 566-567.

[72] 14 App. Cas. 337; 61 L.T. 265.

[73] Per Lord Reid, p. 580.

[74] Per Lord Pearce, p. 614-615.

[75] Bohlen, *Studies in the Law of Tort* (1929), p. 156, 181.

[76] *Op. cit.*, n. 11.

entrants in order to narrow questions of fact and thereby keep the law in their own hands.[77] The alternative was to leave the landowner's interests to the discretion of the jury who belonged as a general rule to the class of potential entrants rather than landowners.[78] Nor did Willes J. and his colleagues on the bench perceive that there was a conflict between the sanctity of landed property and the yet to be formulated general principle that members of the community should be protected from physical injury caused by another's negligence. The result of this process was that the freedom of the landowner was given greater legal recognition than the physical welfare of the community. It is submitted that the advent of the competing and now universally accepted principle that one should be responsible for the damage which he ought reasonably to forsee, together with the revolutionary changes in social and economic attitudes in this century reveal that this policy objection to the imposition of *Donoghue* v. *Stevenson* standards to questions of occupiers' liability is an anachronism.

The second policy consideration underlying the divergence was the distinction between wrongs of commission and wrongs of omission. In *Southcote* v. *Stanley*[79], decided in 1856, the plaintiff was a visitor to, but not a guest at a hotel. When he opened a door on the premises on his way out, a piece of glass fell on him. Bramwell B. said:

> "In this case my difficulty is to see that the declaration charges any act of commission. If a person asked another to walk in his garden, in which he had placed spring guns or man traps, and the latter not being aware of it, was thereby injured that would be an act of commission. But if a person asked a visitor to sleep at his house and the former omitted to see that the sheet's were properly aired, whereby the visitor caught cold, he could maintain no action for there was no act of commission, but simply an act of omission . . .and under these circumstances the action is not maintainable"[80]

The early common law was too preoccupied with suppressing flagrant violations of the peace to worry about complaints that harm had ensued from what someone had failed to do rather than what he had actually done. The line of demarcation between active misconduct and passive inaction was never easy to draw. In *Dunster* v. *Abbott*[81] for example, was it an omission not to leave the light on for the plaintiff as he was leaving

[77] Marsh, "The History and Comparative Law of Invitees, Licensees and Trespassers", [1953] 69 L.Q.R. 182, 185.

[78] *Ibid.*

[79] 1 H & N, 247.

[80] *Ibid.* p. 250.

[81] [1953] 2 All E.R. 1572.

the premises, or an act of commission to turn it off too soon? Critical to this assessment of where the line should be drawn is the fact that in the case of commission the defendant is charged with having worsened the plaintiff's position or having created the risk, whereas in the case of a true omission the worst that can be said of the defendant is that he failed to confer a benefit on the plaintiff by saving him from a detriment[82]. On this analysis virtually all occupier's liability cases would fall outside the scope of acts of omissions because the position of the plaintiff has been materially worsened by the occupier's conduct. This was certainly the case in both *Southcote* v. *Stanley* and *Dunster* v. *Abbott* as well as in *Yeap* v. *Kajima*.

The historical reasons for the mistaken inclusion of these cases under the rubric of acts of omission were reviewed by Lord Denning in *Hawkins v. Coulsdon & Purley U.D.C.*[83], the facts of which have already been stated[84]. He explained that when the issue was first raised, nearly 100 years ago, the courts said the licensee was in the same position as a servant and could not sue at all. Later, the courts abandoned that analogy and instead adopted the analogy of a gift. Willes J. held in *Gautret* v. *Egerton*[85] that the occupier of premises was liable to a licensee only if he actually knew of the danger. He commented that "the principle of law as to gifts is, that the giver is not responsible for damages resulting from the insecurity of the thing, unless he knew its evil character at the time and omitted to caution the donor"[86]. Lord Denning proceeded to point out that the law relating to gifts has changed in the last 100 years and the analogy is therefore no longer apt. He concluded:

> "I propose therefore to put the law of gifts on one side and to consider the law about licensees, and as to them I would suggest that there is no longer any valid distinction to be drawn between acts of commission and acts of omission. It always was an illogical distinction. Many acts of commission can be regarded as acts of omission and vice versa. It all depends on how you look at them.
>
> "... when we come to consider the matter on principle it is clear that there should be no difference between an act of commission and an act of omission. If an occupier actually knows of a state of affairs on his land which a reasonable man would realise was a danger, he should not be allowed to escape from his responsibilities on the plea

[82] See Fleming, *An Introduction to the Law of Torts* (1967), p. 61; and *East Suffolk River Catchment Board* v. *Kent* [1941] A.C.74; [1940] 4 All E.R. 527.

[83] [1954] 1 Q.B. 319; [1954] 1 All E.R. 97, 103 – 105.

[84] See *supra*, p. 52.

[85] [1867] 2 L.R. 2 C.P. 375.

[86] *Ibid.*

that he was not a reasonable man and did not realise it. I ought to add that when I speak of the 'actual knowledge' of the occupier of the existing state of affairs, I include also his presumed knowledge of it"[87].

Thus, on close scrutiny, neither the special position of landowners nor the distinction between acts of omission and commission present a barrier to the incorporation of this branch of the law into the general principles of negligence. The conclusion appears inescapable to this observer that after the decision of the House of Lords in *Dorset Yacht*, there remains no sound bases in public policy for excluding occupier's liability from the principles of proximity enunciated by Lord Atkin.

It may be inquired how much impact such a radical departure from traditional conceptions would have on the law. The answer is this: not much in terms of the holding in a case like *Yeap* v. *Kajima* because, as the first part of this comment demonstrated, the common law distinctions between invitees and licensees on the one hand and between both categories and the ordinary principles of negligence on the other have been all but eliminated. The most significant change would be in the *ratio* of the cases. It would no longer be necessary to rationalise outmoded decisions and make arbitrary distinctions in order to achieve a just result. The law would be vastly simplified and brought into line with developing notions of duty and function in the law of tort. There would be only one basis of liability in negligence unless reasons of policy demanded that it be curtailed in specific instances.

It should be noted in this regard that the concept of reasonable forseeability and the reasonable man are flexible. The introduction of a uniform basis of liability does not mean that the occupier's duty will be the same in each case. The status of the entrant and the likelihood of his visit would be relevant factors in determining what dangers were forseeable. In deciding whether the occupier satisfied the duty owed it would be necessary to balance a number of other factors including, *inter alia*, the magnitude of the risk, the gravity of the injury, the feasibility of warning, the practicability of taking precautions, the obviousness of the danger, the generally accepted standard of maintenance for the type of premises in question and the social utility in keeping the premises open. Applying the formula to the facts in *Yeap* v. *Kajima*, it is clear that the presence of the plaintiff in the tunnel was reasonably forseeable because he was one of a party from the Geological Society of Malaysia being shown around the mine by the defendant for the purpose of making a survey and examining rocks. It is equally clear that the defendant breached his duty of care. The rock projection, and more especially the moving train loader created a grave risk of danger that was in no way obvious. Although

[87] *Op. cit.*, n. 83, p. 106.

there is probably no practicable way to eliminate rock projections in a mine, it is reasonable to ensure that dangerous machinery will remain stationary and a warning about both hazards was in order.

Although it is beyond the scope of this comment to consider the ramifications of this proposal on all the rules of occupier's liability in detail, a brief survey of its impact in these other areas will be attempted. First, the question of whether the defendant is an occupier[88] subject to the rules of occupiers' liability, a non-occupier in the position for example of a landlord[89], or an independent contractor[90], would become a moot point. On any assumption the basis of liability would be the same – to take reasonable care in the circumstances. Second, the vexing question of whether the occupier is liable for all the acts of his independent contractor[91] or only when it can be shown that he was negligent in entrusting the work to an independent contractor[92], would also be eliminated. The cases would henceforth be analysed in terms of the employer's vicarious liability for acts of his independent contractor; the general rule being that the employer is not liable unless the nature of the work gives rise to a non-delegable duty on his part to see that reasonable care is taken[93]. Third, that cumbersome class of persons called "visitors entering as of right" which includes police officers, firemen, inspectors and persons using public premises provided by a public authority, and whose status at common law has never been made entirely clear,[94] would be assimilated into the category of visitors to whom the occupier owes a duty to take that amount of care that a reasonable man in his circumstances would take. Fourth, it is submitted that the now discredited decision of the House of Lords in *London Graving Dock Co.* v. *Horton*[95] would no longer be good law. That case decided that it was a complete defence for an occupier to show, without more, that his invitee knew or had been warned of the dangerous condition which subsequently injured him. As the Court of Appeal pointed out in *Roles* v. *Nathan*[96], a decision inter-

[88] See generally Hwang (1968) 10 *Malaya L.R. 68.*

[89] See *Cavalier* v. *Pope* [1906] A.C. 428; *Bottomly* v. *Bannister* [1932] 1 K.B. 116; [1939] 4 All E.R. 4.

[90] *Billings (A.C.) Ltd.* v. *Riden* [1958] A.C. 240; [1957] 3 All E.R. 1.

[93] See generally G. Williams, "Liability for Independent Contractors" [1956] CLJ 180 and *Honeywill Stein Ltd.* v. *Larkin Bros. Ltd.* [1943] 1 K.B. 191; [1933] All E.R. Rep. 77.

[94] In *Pearson* v. *Lambreth B.C.* [1950] 2 K.B. 353, the user of a public lavatory was classified as a licensee, but in *Hartley* v. *Mayoh & Co.*, [1954] 1 Q.B. 383, [1954] 1 All E.R. 375, a fireman was treated as an invitee. Compare Sec. 2(2) of the Occupier's Liability Act.

[95] [1951] A.C. 737; [1951] 2 All E.R. 1.

[96] [1963] 2 All E.R. 908.

preting the Occupier's Liability Act, the effect of *Horton* was that "the occupier could escape liability to any visitor by putting up a notice: 'This bridge is dangerous', even though there was no other way by which the visitor could get in or out and he had no option but to go over the bridge"[97]. This result is clearly unsatisfactory. Section 2(4)(a) of the Occupier's Liability Act in England was drafted specifically to clear up this situation and bring the law into line with what would constitute a reasonable warning under the general principles of negligence. The Court of Appeal in *Roles v. Nathan* agreed that it succeeded in its purpose. Subsection 4(a) states that "where damage is caused to a visitor by a danger of which he had been warned by the occupier the warning is not to be treated without more as absolving the occupier from liability unless in all the circumstances it was enough to enable the visitor to be reasonably safe."

Fifth, the common law recognises the right of the occupier to escape liability by excluding his duty altogether[98]. This right was codified in section 2(1) of the Occupier's Liability Act and is consistent with the general principle that it is competent for a defendant in a negligence action to exclude his liability by disclaimer[99]. It is difficult to refute the argument on which this competence is based. If the occupier can exclude the visitor from his property altogether why should he not be able to set the terms on which the visitor enters?[100] It is suggested, however, that this rationale limits the scope of visitors to whom the occupier can exclude his duty. He cannot do so, under this rationale, to a person entering as of right, and the application of the doctrine to a current operation, like the negligent operation of a train loader, is not justifiable on this ground.[101]

Sixth, and perhaps most importantly, it is necessary to consider the impact of this proposal on the rules relating to trespassers as laid down by the House of Lords in *Herrington v. B.R.B.*[102] At the time of writing it remains unclear whether the "common humanity" basis of liability enunciated by the House is different in kind than the reasonable forseeability test enunciated by the same Tribunal in *Donoghue v. Stevenson*. If there is a difference in substance between the two, it is this: first, the

[97] *Ibid.*, per Lord Denning at p. 913.

[98] *Ashdown v. Samuel Williams & Sons* [1957] 1 Q.B. 409; [1957] 1 All E.R. 35.

[99] See for example, the wide effect given to the disclaimer in *Hedley Byrne v. Heller, op. cit.*, n. 64.

[100] See *Winfield & Jolowicz on Tort* 9th Ed., (1971), p. 185. Cf. Gower, "A Tortfeasors Charter?" [1956] 19 M.L.R. 582.

[101] But see *Benner v. Tugwell* [1971] 1 W.L.R. 847.

[102] See discussion *supra*, p. 58.

approach permits of a greater degree of control by the courts. Lord Morris emphasized that the occupier was not required to "make surveys of his land in order to decide whether dangers exist of which he is unaware."[103] Only once he is aware of such danger does he come under an obligation to take "such steps as common sense and common humanity dictate. . . to exclude or to warn or to otherwise within reasonable and practicable limits to reduce or avert it."[104] The occupier cannot, as a matter of law, be said to have acted in a culpable or inhumane manner unless ke knew both of the existence of facts rendering it likely that a trespasser would be present and of facts constituting a serious danger to him[105]. The second possible difference in substance is that in determining whether or not a duty of humanity arises, the resources of the occupier is a relevant consideration. Lord Reid said "an impecunious occupier with a little assistance at hand would often be excused from doing something which a large organisation with ample staff would be expected to do."[106] The inclusion of these two criteria,which are subjective in nature, may appear to deviate from the objective formulation of the duty principle in *Donoghue* v. *Stevenson.* In practice, however, the difference between the two will probably be negligible. Simply because, under the terms of the present proposal, the duties owed to invitees, licensees and trespassers would be expressed in terms of the familiar requirement of acting with reasonable care does not necessarily mean that the three categories of entrants are being equated. The standard is a flexible one. In *McGlone* v. *B.R.B.*,[107] an appeal to the House of Lords from Scotland, where the Occupier's Liability Act, 1960 provides that the "common duty of care" is owed to trespassers as well as lawful entrants, Lord Reid observed that it may "often be reasonable to hold that an occupier must do more to protect a person whom he permits to be on his property than he need do to protect a person who enters his property without his permission."[108] It is helpful in this regard to refer to Lord Denning's judgement in the recent case of *Pannett* v. *P. McGuiness & Co. Ltd.*,[109] a post-*Herrington* decision of the Court of Appeal. The issue in *Pannett* was whether an independent contractor, who was assumed to be an occupier, breached his duty of care to trespassing children injured by fire on the premises. To aid

[103] [1972] 2 All E.R. 749, 767.

[104] *Ibid.*

[105] (1972) 35 M.L.R. 409, 414.

[106] [1972] 2 All E.R. 749, 758.

[107] [1966] S.C. (H.L.) 1.

[108] *Ibid.*, p. 11.

[109] [1972] 2 Q.B. 600; [1972] 3 All E.R. 137.

in applying the new standard, Lord Denning formulated a number of criteria.[110] Their similarity to the criteria usually associated with the "reasonable man" standard for determining a breach of a *Donoghue* v. *Stevenson* duty is striking. They include (1) the occupier's knowledge of the likelihood of a trespasser being present, (2) the character of the intrusion, (3) the gravity and likelihood of the probable injury, and (4) the nature of the premises. Lord Denning then proceeded to run the two tests together by characterising the attitude of the House of Lords in *Herrington* in these terms: "there was nothing subjective about [the railway's] fault. It was all objective... In short they did not take such reasonable care as the circumstances of the case demanded."[111]

IV. CONCLUSIONS

Finally, it is pertinent to inquire why a satisfactory result could not be achieved by reproducing the Occupier's Liability Act in Malaysia. First, the 1957 Act was based on the Report of the Law Reform Committee who carried out their research in 1953 without the benefit of having seen the decision of a number of important cases since that date including *Ashdown* v. *Samuel William's & Sons*,[112] *A.C. Billings & Sons Ltd.* v. *Riden*,[113] *Hedley Byrne* v. *Heller*,[114] and *Dorset Yacht* v. *Home Office*.[115] The first two cases brought important sections of occupier's liability into line with the general principles of negligence,[116] and the last three established the compelling logic of adhering to those principles in the absence of sound policy reasons for not doing so. This process has been facilitated by the Lord Chancellor's decision in 1966 to free the House of Lords from the shackles of the doctrine of binding precedent. Furthermore, in 1953 the duty concept had not yet attained the position of prominence or reached the state of development it now has. It is of course a matter for speculation, but it is arguable that if the committee had met today, its recommendations would have incorporated or have been closely modelled on the precepts of the common law principles of duty and breach of duty. Second, in so far as the "common duty of care" standard is relevant, there can be little difference between the statute and the principles of negligence at common law.[117] In *Simms* v. *Leigh Rugby*

[110] *Ibid.* [1972] 2 All E.R. 137, 141.

[111] *Ibid.* p. 140.

[112] [1957] 1 Q.B. 409; [1957] 1 All E.R. 35.

[113] [1958] A.C. 240; [1957] 3 All E.R. 1.

[114] [1964] A.C. 465; [1963] 3 All E.R. 575.

[115] [1970] A.C. 1004; [1970] 2 All E.R. 294.

[116] See *supra*, p. 67-68.

[117] *Winfield & Jolowicz on Tort*, *op. cit.* n. 100, p. 173; and Clerk and Lindsell,

Football Club,[118] Wrangham J. used the case of *Bolton* v. *Stone*[119] as the touchstone in deciding whether the common duty of care had been breached by the occupier of a rugby football ground. This relationship supports the view that the cases in this area ought to be analysed by reference to familiar principles and not that occupier's liability should be made the subject of an independent action for breach of statute.

Third, in so far as the Act departs from the principles of negligence as currently interpreted, it does so primarily to set out its scope by either defining who is an occupier[120] and what are premises[121], or to modify binding precedent.[122] Fourth, the Act did not deal with the important area of duty to trespassers. It seems anomalous to promulgate a statutory scheme which purports to detail the obligations of the occupier in both tort and contract, but which is not comprehensive and therefore requires the courts to decide a substantial number of cases by reference to common law principles. In the final analysis, the real thrust of Lord Atkin's exhortation is that "there must be and is some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are instances."[123]

H.L. Dickstein*

Torts 13th Ed., (1969); p. 595-596; *Wheat* v. *Lacon & Co.* [1966] A.C. 552; (1966) 1 All E.R. 582.

[118] [1969] 2 All E.R. 923.

[119] [1951] A.C. 850; [1951] 1 All E.R. 1078.

[120] Sec. 1(2).

[121] Sec. 1(3).

[122] Sec. 4 of the Act modifies the law relating to a landlord's duty to third parties, which had previously been governed by the decision of the House of Lords in *Cavalier* v. *Pope*, [1906] A.C. 428.

[123] *Donoghue* v. *Stevenson* [1932] A.C. 562, 580.

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INCOME TAX LIABILITY OF TERMINAL PAYMENTS

This article has been prompted by the recent decision of the Federal Court in *H.* v. *Comptroller-General of Inland Revenue*[1] on the application of S.13 of the Income Tax Act, 1967 (Revised 1971) to redundancy payments. However, in view of the importance and scope of this subject the opportunity is taken to examine the assessability of terminal payments not only in relation to employments but also in relation to the cancellation of agency contracts.

Income tax was first introduced in Malaya on 1st January, 1948 by the Income Tax Ordinance, 1947; and in Sabah and Sarawak by the Income Tax Ordinance, 1956, and the Inland Revenue Ordinance, 1960, respectively. After the formation of Malaysia it was found convenient to formulate a uniform income tax system for the Federation. Accordingly, the Income Tax Act, 1967[2] was enacted. Income Tax, under the 1967 Act is assessed on a residential basis and is a tax purely on income, capital receipts being excluded from assessability except where expressly provided for by the 1967 Act, as for example in the case of compensation for loss of employment under S.13(1)(e).

The form of the income tax system in Malaysia is fundamentally different from that in the United Kingdom. The United Kingdom uses the Schedular System, under which income is only assessable if it falls within the provisions of one of the Schedules and the tax on that income is then computed under the provisions of that Schedule. Each schedule is mutually exclusive. In Malaysia, on the other hand, income tax is imposed on the net assessable income from all sources, there being no special provisions to compute the tax liability on income from any particular source. Australia uses a similar system of income tax in which all assessable income is charged to tax without rigid separations between different sources of income. Inspite of the difference in the machinery of income tax imposition between the United Kingdom and Malaysia there is a close similarity in their substance in a number of areas, including income tax on terminal payments, as the remainder of this article will clearly demonstrate. Hence reliance on United Kingdom precedents is appropriate to assist in the

[1] [1973] 2 M.L.J. 40.

[2] All references to "the 1967 Act" hereinafter shall be to the Income Tax Act, 1967 (Revised 1971) and references to "the 1947 Ordinance" shall be to the Income Tax Ordinance, 1947, unless otherwise stated.

interpretation of substantive provisions in the 1967 Act.

I. COMPENSATION FOR LOSS OF OFFICE

(A) *Before 1967*

Before discussing the relevant provisions of the 1967 Act it may be useful to summarise the position as it existed under the 1947 Ordinance in order to compare and examine the changes made by the 1967 Act in the same area. Under S.10(1)(b) of the 1947 Ordinance income tax was chargeable on "gains or profits from any employment." And S.10(2)(a) went on to explain "gains or profits from employment" as meaning: "any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite or allowance . . . paid or granted in respect of the employment whether in money or otherwise." S.13(1)(i) then proceeded to exempt from tax "sums received by way of retiring or death gratuities or as consolidated compensation for death or injuries."

Hence, under the 1947 Ordinance, compensations paid for the loss of office escaped income tax altogether unless the payment could be shown to have been made "in respect of the employment."

Lord Wilberforce commented:

> "Two propositions are accepted as common ground in the present case. First, where a sum of money is paid under a contract of employment, it is taxable, even though it is received at or after the termination of the employment (see for example *Henry* v. *Foster* (1932) 16 T.C. 605). Secondly, where a sum of money is paid as consideration for the abrogation of a contract of employment, or as damages for the breach of it, that sum is not taxable (see for example *Henry* v. *Murray*, [1950] 1 All E.R. 908)."[3]

The type of situation falling within the first proposition above would be, for example, where the contract of employment itself makes provision for the payment of a sum of money in the event of termination of employment before the expiration of the period of service under the contract.[4] The sum paid in such a case is treated as deferred remuneration and hence can be said to be "in respect of the employment." "The taxpayer surrendered no rights. He got exactly what he was entitled to get under the contract of employment. Accordingly, the payment . . .falls within the taxable class."[5] The type of situation falling within the second proposition is where the contract of service itself makes no provision for the payment

[3] *Comptroller General of Inland Revenue* v. *T.* [1972] 2 M.L.J. 74, 74.

[4] See *Dale* v. *De Soissons* (1950) 32 T.C. 118; *Hofman* v. *Wadman* (1946) 27 T.C. 192.

[5] Roxburgh J., cited with approval by Lord Evershed, M.R. in *Dale* v. *De Soissons*, *ibid.*, p. 128.

of compensation upon premature termination of contract. The payment here is regarded as a capital sum being damages arising upon the abrogation of the contract.[6] The sum here does not arise under the contract; it is received for the surrender of a capital asset viz. the right to earn remuneration under the contract.

(B) *After 1967*

Under the 1967 Act the second of the two propositions no longer applies. S.4(b) charges tax on income in respect of "gains or profits from an employment." S.13(1) provides that "gross income of an employee in respect of gains or profits from an employment includes –

(a) any wages, salary, remuneration, leave pay, fee, commission, bonus, gratuity, perquisite or allowance (whether in money or otherwise) in respect of having or exercising the employment.

(b) any amount received by the employee, whether before or after his employment ceases, by way of compensation for loss of employment. . . "

A measure of relief from S.13(1) is provided by Schedule 6 of the 1967 Act. Sch. 6, para. 15 provides that where a sum is paid as compensation for loss of office by an employer to an employee, that sum is exempted from tax to the extent of two thousand dollars multiplied by the number of completed years of service with that employer; Sch. 6, para, 25 exempts from tax sums received by way of gratuity on retirement from an employment when the employee is more than fifty-five years old if male, or fifty years old if female, at the time of retirement, provided that the employee has been with the same employer for at least ten years. The relief granted by S.13(1)(i) of the 1947 Ordinance, i.e. the exemption from tax on death gratuities or consolidated compensation for death or injuries, is retained by Sch. 6, para. 14 of the 1967 Act.

Generally speaking, although there is some difference in the wording of the 1967 Act, S.13(1)(a) of the 1967 Act covers the same ground as S.10(2)(a) of the 1947 Ordinance. Accordingly, any sums paid *under* a contractual obligation whether upon premature termination of contract or otherwise, will be charged under S.13(1)(a) as being sums received "in respect of having or exercising the employment".[7] Hence the first

[6] *I.R.C.* v. *Brander and Cruishshank* [1971] 1 All E.R. 36; *Duff* v. *Barlow* (1941) 23 T.C. 633, *Du Cross* v. *Ryall* (1935) 19 T.C. 444; *Cowan* v. *Seymouv* [1920] 1 K.B. 500.

[7] This general statement is subject to qualification. A contractual right to the sum is "a strong ground for holding that, from the standpoint of the recipient, it does accrue to him by virtue of his employment, or in other words by way of remuneration for his services" per Jenkins L.J. in *Moorhouse* v. *Dooland* [1955] Ch. 284.; 1 All E.R. 93,104.

proposition stated by Lord Wilberforce in *Comptroller-General of Inland Revenue* v. *T*[8] still holds good under the 1967 Act. However, the second proposition is abrogated by S.13(1)(e) of the 1967 Act, so that any sum paid *as compensation for loss of employment* would be assessable under this provision. Furthermore, it is submitted that any sum paid under a contractual obligation *in respect of loss of employment* would be assessable under S.13(1)(e) and not under S.13(1)(a) even though the sum *prima facie* also falls within the terms of S.13(1)(a). Since there is an express provision dealing with the tax liability on sums paid as compensation for loss of employment, there is no reason why the sum should be charged under S.13(1)(a). This interpretation is obviously more favourable for the taxpayer because where the sum is found to fall within S.13(1)(e) relief is available under Sch. 6, Para. 15; no such relief is available under S.13(1)(a).

"Compensation for loss of employment" is not defined in the 1967 Act but it is envisaged that any sum paid by an employer to an employee upon a termination of employment which is in breach of contract would fall within S.13(1)(e). Thus, for example, salary or wages in lieu of notice, *ex-gratia* or contractual redundancy payments, or payments for breach of contract would fall within S.13(1)(e). However, there are situations in which the employer may make a payment on the expiration of a contract or for variation of the contract of employment which will not constitute compensation for loss of employment. This is the very sort of problem that arose in *H. v. Comptroller-General of Inland Revenue.*[9]

> The appellant was employed by Sime Darby Malaysia Bhd. under five separate contracts of employment. The first, for four years, was dated April 24, 1951, at the end of which he was entitled to eight months leave. The following three contracts were for three years each followed by six months leave at the end of each period. The respective dates of commencement of each of these contracts were February 16, 1956, August 21, 1959 and March 27, 1963. His fifth and final contract was for 2 years, commencing October 26, 1966. A further written agreement between the parties dated March 27, 1962 provided that upon the expiration of the contract commencing on the last date of return to Malaysia for service, all future engagements were to be deemed to be from year to year determinable at any time by three months notice on either side. On July 31, 1968, the appellant received a letter giving him three months notice of termination of employment (his contract was due to terminate on October 26, 1968 at any event). The letter also stated that "as

[8] *Op. cit.* n. 3.

[9] *Op. cit.* n. 1.

compensation for loss of employment you have been accorded a sum of $32,000 *ex gratia.*" This sum had been paid to him under a scheme of "Proposed Compensation in Cases of Possible Amalgamation", which scheme had been voluntarily drawn up by the employers.

The question before the court was whether the sum was a gratuity in respect of having or exercising an employment, and hence assessable under S.13(1)(a), or whether it was compensation for loss of employment falling within S.13(1)(e). If it was the latter, Sch. 6, Para. 15 would be applicable and the whole sum would be exempt from tax.

The Federal Court, affirming Gill F.J. at first instance, held that the sum was not compensation for loss of employment, but was in fact a gratuity in respect of having or exercising the employment and accordingly chargeable as a gain or profit from employment by virtue of S.13(1)(a).

Suffian F.J. delivering the judgement of the Federal Court, applied the test of compensation enunciated by Romer L.J. in *Henry* v. *Foster.*[10]

> " 'Compensation for loss of office' is a well-known term, and, as I understand it, it means a payment to the holder of an office as compensation for being *deprived* of profits to which as between himself and his employer he would, but for an act of deprivation by his employer or some third party, such as the Legislature, have been entitled."[11]

Applying this test Suffian F.J. said:

> "The taxpayer here was under contract to serve until 26th October 1968. He was given due notice under which his service was to end not earlier than, but exactly on 26th October 1968. In the circumstances we do not think that he has been deprived of anything to which he was entitled, for which deprivation the $32,000 represented compensation. We would therefore hold that that money was not compensation for loss of employment."[12]

In arriving at this conclusion Suffian F.J. rejected the taxpayers contention based on a dictum by Rowlatt J. in *Chibett* v. *Joseph Robinson and Sons* that "... compensation for loss of an employment *which need not continue but which was likely to continue,* is not an annual profit within the scope of the Income Tax at all."[13] The taxpayer contended

[10](1932) 6 T.C. 605, p. 634.

[11] Emphasis by Suffian F.J.

[12] *Op. cit.* n. 1, p. 46.

that since he had already been in the employment of the company for seventeen and one half years it was likely that his employment would have continued up to the retiring age of fifty five years. The Special Commissioners found as facts that the taxpayer had been employed under five separate contracts of employment, that there was no obligation by the employer to renew the contract each time it expired, and that he should not have relied on his contract being renewed each time it expired. Therefore the taxpayer merely got what he bargained for under the contract when it was not renewed upon its expiry on October 26, 1968.

It is respectfully submitted that the above reasoning is correct and hence the $32,000 could not possibly be regarded as compensation for loss of employment. In *Chibett* v. *Robinson*[14] itself Rowlatt J. explained the circumstances in which a sum paid upon termination of employment could be regarded as compensation for loss of office.

> "If it was a payment in respect of the termination of their employment I do not think that is taxable. It seems to me that a payment to make up for the cessation of future annual taxable profits is not itself an annual profit at all. . . I should not have thought that either damages for wrongful dismissal or. . . a voluntary payment in respect of breaking an agreement which had some time to run. . . would be taxable profits. . . "[15]

It may be noted that the above passage shows the sort of payments not taxable under Schedule E of the U.K. legislation because they are compensations for loss of office.[16] In *Henley* v. *Murray*[17] Lord Evershed M.R. said that where a bargain between employer and employee brings about an end to the contract of employment and some sum is paid as consideration for the total abandonment of all contractual rights under the contract that sum would be damages not assessable under Schedule E.[18] Such a sum would however be assessable under S.13(1)(e) of the 1967 Act as compensation for loss of employment.

[13] (1924) 9 T.C. 48, p. 61. Emphasis by Suffian F.J.

[14] *Op. cit.* n. 13.

[15] *Ibid.*, p. 61.

[16] Sch. E., S.181 of the Income and Corporation Taxes Act 1970, in the U.K., charges to tax all emoluments derived from an office or employment. Compensation for loss of employment is not assessable under Sch. E. but is brought into charge by the "golden handshake" provisions, of SS.187-188. These provisions were first introduced in SS.37-38 of the Finance Act 1960, and are only applicable when the sum in question would not otherwise be assessable under Sch. E.

[17] [1950] 1 All E.R. 908.

[18] *Ibid.*, p. 909.

It can therefore be said that any sum paid to an employee for the breach of any contractual term which results in the premature termination of the employment would amount to compensation for loss of employment assessable under S.13(1)(e). S.13(1)(e) would apply even though the payment of compensation or damages in the event of premature termination was provided for in the contract itself. Hence cases such as *Dale* v. *De Soissons*[19], and *Hofman* v. *Wadman*[20] would now come under S.13(1)(e) and not under S.13(1)(a). This would also mean that the sum would be exempted from income tax to the extent provided for by Sch. 6 para. 15 of the 1967 Act.

The second ground of the decision in *H.* v. *Comptroller-General of Inland Revenue*[21] is best discussed under the next heading.

III. GRATUITY OR PERQUISITE IN RESPECT OF HAVING OR EXERCISING THE EMPLOYMENT

It will be recalled that the Federal Court held that the $32,000 was assessable even though it did not constitute compensation for loss of employment because it was a *gratuity* received in respect of having or exercising the employment. In arriving at this conclusion Suffian F.J. dismissed the taxpayer's contentions that (a) the payment was made to him without the employer being under any legal obligation to do so and (b) the payment was not being made to the *holder* of an office but to a *former* employee.

His Lordship said:

> ". . . There is clear evidence that the payment, though not of a contractual nature to which the taxpayer was entitled, was made *in reference to and by* virtue of his employment, especially when it is remembered that the quantum was related to the total period of his service.
>
> "It is clear as stated by Gill F.J. that in the present case the payment to the taxpayer was made in reference to the services rendered by the taxpayer by virtue of his office, and that it was something in the nature of a reward for his services, that the scheme of compensation drawn up by the company was in reality a scheme for the payment of a gratuity to its staff on the basis of age and years of service and that therefore it is liable to tax as a gratuity in

[19] *Op. cit.* n. 4.

[20] *Op. cit.* n. 4.

[21] *Op. cit.* n. 1.

respect of having or exercising his employment within the meaning of paragraph (a) of subsection (1) of section 13."[22]

It is obvious that Suffian F.J. reached this conclusion on the evidence and facts of the case. Regrettably however His Lordhip did not point out what the specific evidence was or the exact facts were on which he based his conclusion. Accordingly, before it is possible to determine the correctness of the decision in law, it will be necessary to examine the true meaning of the phrase "in respect of having or exercising the employment," for it is on the true interpretation of this phrase that the outcome of any case based on S.13(1)(a) of the 1967 Act will turn.

A case decided by the Privy Council under the Income Tax Ordinance 1947, with facts very similar to *H.'s Case*, is *T. v. Comptroller-General of Inland Revenue.*[23]

> The taxpayer was employed as a staff surveyor by the Malaya Borneo Society Ltd. from 23 August, 1954. The contract of service was terminable by three calendar months' notice by either party. In February, 1960, the management of the Company wrote a letter to its staff surveyors including the taxpayer, informing them of a redundancy pay scheme. Under the scheme any staff surveyor becoming redundant was to be entitled to one month's pay for each completed year of service subject to a maximum of 12 months' pay and a minimum of 3 months' pay. In 1965 the taxpayer was made the chief staff surveyor. On 2nd November 1965 the board of directors of the company passed a resolution declaring the taxpayer redundant and granting him the maximum benefit under the redundancy pay scheme.
>
> The question before the Privy Council was whether the $28,050 given to the taxpayer under the scheme was a gratuity paid or granted in respect of the employment.
>
> The Privy Council held that the sum did not arise in respect of the employment and hence was not taxable under S.10(2)(a) of the Income Tax Ordinance 1947.

In arriving at this conclusion the Privy Council rejected the contention that the letter containing the redundancy pay scheme became part of the contract of employment between the company and the taxpayer. Lord Wilberforce, delivering the judgement of the Privy Council, said that the latter was nothing more than an expression of the company's intent. The terminology of the letter was inappropraite to constitute

[22] *Ibid.*, p. 46; emphasis by Suffian F.J

[23] [1972] 2 M.L.J. 73.

a variation of the contract, and silence by the taxpayer could not be taken as assent to a contractual change.[24]

In considering the words "in respect of the employment" Lord Wilberforce said that "[i]f the fact is that it was paid in respect of *loss* of the employment, it does not come within the taxing words."[25] His Lordship continued:

> ". . . in order to be taxable, a gratuity must be paid in respect of the employment – many gratuities are so paid such as 'tips' and these are no doubt taxable. If the gratuity is not so paid, but is paid in respect of the termination of his employment, it is not taxable."[26]

Suffian F.J. in *H.'s Case* distinguished *T.'s Case* on the basis that in *T's Case* the company was under a legal obligation to give the tax-payer three months' notice before it could terminate his services and this had not been done. The sum paid in *T.'s Case* would therefore amount to compensation for loss of employment and would be assessable under S.13(1)(e) of the 1967 Act. In *H's Case*, on the other hand, adequate notice had been given, and the $32,000 was an additional voluntary payment.[27] In *T.'s Case* the Privy Council refused to draw a distinction between that type of case and cases where the payment is made expressly as consideration for abrogating a service agreement, which sum is not taxable as it falls outside the words "in respect of his employment" in S.10(2)(a) of the Income Tax Ordinance, 1947.[28]

Although the distinction drawn by Suffian F.J. between the *H. Case* and the *T. Case* is valid on the facts, it is respectfully submitted that essentially there is no difference between the two cases and that the decision in *H's Case* should have been the same as in *T.'s Case*. The Privy Council in *T's Case* approved *Chibbett* v *Robinson*,[29] in which the compensation paid to a firm of ship managers for loss of office was held to be not taxable even though there was no express agreement that the sum was paid as compensation for abrogating the employment. The same conclusion was reached by the House of Lords in *I.R.C.* v. *Brander and Cruickshank*.[30] After finding that the profits from registrarships and

[24] *Ibid.*, p. 74.

[25] *Ibid.*

[26] *Ibid.*

[27] *Op. cit.* n. 1, p. 46.

[28] *Op. cit.* n. 23, p. 75.

[29] *Op. cit.* n. 13.

[30] [1971] 1 All E.R. 36.

secretaryships held by a firm of solicitors were assessable under Schedule E as profits from an employment, the House of Lords held that voluntary compensation paid by two companies upon the termination of the taxpayer's services were not assessable under Schedule E, but came within the "golden handshake" provisions of the U.K. legislation.[31] In this case too there was no express agreement that the sum was paid in consideration of the abrogation of the contract of service. In fact there was no express contract between the companies and the taxpayers, the appointment being made from year to year. Furthermore, the taxpayers did not expect any compensation, the sum paid by the company being only due to the personal friendship between the directors of the company and one of the partners of the taxpayer firm. In the same way, in *H's* Case there was no legal obligation on the part of the employer to make the payment. Yet in those cases the sum was held not assessable whereas in *H's* Case it was held to be assessable. Although it is accepted that in *H's* Case there was no loss of employment for which compensation was paid as the contract expired in the normal course of events, yet, it is respectfully submitted that the payment was not paid in respect of *having or exercising* an employment but in respect of the *termination* of employment. It is submitted that there was indeed a *termination* of employment. Applying the "likely" test in *Chibbett* v. *Robinson*,[32], there was a likelihood that the taxpayer's contract would be renewed, as it had been over the past seventeen and one half years. Although the taxpayer had no *right* to a further contract of service due to past practice he could reasonably expect to be continued to be employed by the same employer. It is appreciated that this submission is made in the face of an adverse finding of fact by the Special Commissioners, but that finding can be restricted to deciding that the sum paid could not be regarded as compensation for loss of employment; that does not mean that there was no termination of employment.

As will be recalled, Lord Wilberforce in *T's Case* stated that a sum paid *in respect of termination of employment* was not assessable as being paid *in respect of employment*. Furthermore, in an Australian case, *Barncastle* v. *Commissioner of Taxes* (N.S.W.),[33] it was said that words "in respect of or in relation to the employment" referred to an existing employment

[31] S.187 of the Income and Corporation Taxes Act, 1970. In fact the whole sum paid was exempted in this case as it was below £5,000. See Schedule 8 paragaph 3. See *op. cit.* n. 16.

[32] *Op. cit.* n. 13.

[33] (1936) 36 N.S.W. State Reports, 338.

and did not extend to a former employment. In *Hochstrasser* v. *Mayes*;[34] in the Court of Appeal, Jenkins L.J. said:

> "... the profits of an office or employment include every sum in money or money's worth paid by an employer to an employee *during his employment* in his capacity as employee and for no consideration moving from the employee other than the services which he renders..."[35]

It is respectfully submitted that there is yet another basis on which the outcome of *H's Case* can be impugned. The sum can be regarded as having been paid on personal grounds, as a gesture of appreciation by the former employers. An examination of the case-law elucidating what constitutes a payment made on personal grounds demonstrates that in *H.'s Case* there are ample grounds to make the payment personal and not one "in respect of having or exercising the employment." This necessitates an exploration of the English authorities on the subject. Schedule E of the U.K. Income Tax Act, 1952 was substantially similar to the present S.13(1)(a) of the 1967 Act until its amendment in 1956 by the repeal of the Rules under Schedule E. The ninth Schedule, Rule 1, so far as material stated that "tax under Schedule E shall be annually charged on every person *having or exercising* an office or employment of profit... in respect of all salaries, fees, wages, perquisites or profits whatsoever *therefrom*..." Despite the difference in wording between the 1967 Act and Rule 1 above, it will be seen that under both enactments the source of the profit must be the employment. The difference between the two enactments is that under the U.K. formula the taxpayer must be *having or exercising* an employment and the profit must be *therefrom*, whereas under the Malaysian formula the profit must be *in respect of having or exercising* the employment. It is submitted that in view of the word "therefrom" in the U.K. Act and "in respect of" in the corresponding section in the Malaysian Act, there is no material difference in the essence of the two formulae. In passing it may be noted that after the repeal of the Rules to Schedule E by the Finance Act 1956 in the United Kingdom, the taxing formula of gains or profits from employment is that the emoluments must be "in respect of any office or employment." This is similar to the formula used in S.10(2)(a) of the 1947 Ordinance which charged to tax gains or profits "in respect of the employment." The English cases have interpreted the pre-1956 and post-1956 formulae as being the same in their operation, and it is accordingly submitted that the difference in wording between the 1947 and 1967 Malaysian legislation does not alter the essential meaning of the formula.[36]

[34] [1958] 3 All E.R. 285.

[35] *Ibid.*, p. 290; emphasis added.

[36] In *H.* v. *Comptroller-General of Inland Revenue* [1973] 2 M.L.J. 40 43 At first

In view of the substantial similarity between the legislation in both countries it is felt that U.K. cases can be used to trace the true scope of the Malaysian legislation.[37]

The courts, in interpreting the U.K. legislation have used diverse terminology to explain the meaning of Rule 1. For example, it has been said that to be assessable a sum must arise by *virtue* of the office, or it must be in consideration for *services rendered or to be rendered*, or that the sum must *arise from* the employment. However, in looking at these interpretations it must be remembered that they do not displace the words of the statute itself. In *Hochstrasser v. Mayes*[38] Lord Radcliffe said:

> ". . . it is not easy in any of these cases in which the holder of an office or employment receives a benefit which he would not have received but for his holding of that office or employment to say precisely why one considers that the money paid in one instance is, in another instance is not, a 'perquisite or profit. . . therefrom'
>
> "The test to be applied is the same for all. It is contained in the statutory requirement that the payment, if it is to be the subject of assessment, must arise "from" the office or employment. In the past several explanations have been offered by judges of eminence as to the significance of the word 'from' in this context. It has been said that the payment must have been made to the employee 'as such'. It has been said that it must have been made to him 'in the capacity of employee'. It has been said that it is assessable if paid 'by way of remuneration for his services' and said further that this is what is meant by payment to him 'as such'. These are all glosses and they are all of value as illustrating the idea which is expressed by the words of the statute. But it is, perhaps worth observing that they do not displace those words. For my part I think that their meaning is adequately conveyed by saying that, *while it is not sufficient to render a payment assessable that an employee would not have received it unless he had been an employee, it is assessable if it is paid to him in return for acting as or being an employee.*"[39]

The final sentence above, it is submitted, places a restriction on the

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instance, Gill F.J. said that there was no difference between a "gratuity in respect of employment" and a "gratuity in respect of having or exercising an employment."

[37] Although this article is concerned only with the tax liability of terminal payments, in interpreting S.13(1)(a) of the 1967 Act it will be necessary to refer to U.K. cases on voluntary payments made to an employee during the subsistence of his employment.

[38] [1960] AC 376; [1959] 3 All E.R. 817, p. 823.

[39] Emphasis added.

scope of the word "having" in S.13(1)(a) of the 1967 Act. If the word is given its literal meaning, then every sum paid to an employee would fall within the tax net where the sum is paid to the employee because he holds that employment and not because he has done something in that employment. The sum paid to the employee is only assessable if he has "acted" in that employment; that is he has performed services for which he is being remunerated by a sum to which he is not necessarily entitled under his contract of service. The word "being" does not derogate from the principle above. It would cover such voluntary payments as are made to all the employees or to a particular class of employees on a certain occassion regardless of any services rendered by them. Thus, for example, Easter offerings to an incumbent benefice,[40] discretionary bonuses to employees,[41] gift vouchers to all employees of the firm at Christmas[42] a gift of a suit to all employees at Christmas.[43] In short, all benefits given to an employee outside his entitlement under the contract of employment have been held to be assessable on employees. In these cases the benefits are given to an employee by reason of his *being* an employee as there is no selection as to which employee or which employees within a given class is to receive the gift.

All the various glosses used by the courts in interpreting Rule 1 to Sch. E of the U.K. Income Tax Act, 1952 boil down to one thing; the payment, to be assessable, must be referable to services. The most comprehensive statement to this effect was made by Upjohn J. at first instance in *Hochstrasser* v. *Mayes*[44] which was subsequently approved by Viscount Simonds in the House of Lords.

> "In my judgement, the authorities show this, that it is a question to be answered in the light of the particular facts of every case whether or not a particular payment is or is not a profit arising from the employment. Disregarding entirely contracts for full consideration in money or money's worth and personal presents, in my judgement not every payment made to an employee is necessarily made to him as a profit arising from his employment. Indeed, in my judgement, the authorities show that, to be a profit arising from the employment, *the payment must be made in reference to the service the employee renders by virtue of his office, and it must be something in the nature of a reward for services past, present or future.*"[45]

[40] *Blakiston* v. *Cooper* [1909] A.C. 104.

[41] *Denny* v. *Reed* (1935) 18 T.C. 254.

[42] *Laidler* v. *Perry* [1965] A.C. 16.

[43] *Wilkins* v. *Rogerson* [1961] Ch. 133.

[44] [1959] Ch. 22 33.

[45] Emphasis added.

Viscount Simonds, in accepting the above statement only doubted the word "past".[46]

Sums paid to an employee by way of gift due to the personal relationship between the employee and the employer are not assessable. The leading statement enunciating the test to be applied in deciding whether a particular voluntary payment is not assessable as being a gift is contained in *Seymour* v. *Reed*. Viscount Cave L.C. said:[47]

> "... it must now (I think) be taken as settled that they include all payments made to the holder of an office or employment as such, that is to say, by way of remuneration for his services, even though such payments may be voluntary, but that they do not include a mere gift or present (such as a testimonial) which is made to him on personal grounds and not by way of payment for his services. The question to be answered is, as Rowlatt J. put it: 'Is it in the end a personal gift or is it remuneration?' If the latter, it is subject to the tax; if the former, it is not."

To decide in each case whether a particular payment is made on personal grounds or not the facts and evidence of each case will have to be carefully scrutinised. In *Seymour* v. *Reed*[48] itself it was held that a benefit granted to a cricketer was a testimonial and not assessable. The factors taken into consideration in arriving at this conclusion were: (a) a benefit was only granted towards the close of a cricketer's career as an endowment for his retirement; (b) it was not granted more than once; (c) it was an expression of the gratitude of his employers and the cricket loving public for his *past performances* and it was not meant to spur him to greater exertions in the future; (d) the employee under his contract of employment did not have a right to a benefit.[49]

The doubt cast by Viscount Simonds in *Hochstrasser* v. *Mayes*[50] on the word "past" is borne out by *Seymour* v. *Reed*.[51] This is particularly so where the past services have already been adequately remunerated. Furthermore, a sum given as a personal gift is not deprived of that quality because the donor makes himself liable under contract to pay the sum. In *Bridges* v. *Hewitt*,[52] shares were transferred to directors of a company by the company's shareholders because of the work done by the

[46] *Op. cit.* n. 38, [1959] 3 All E.R. 817, 84.

[47] [1927] A.C. 554 559.

[48] *Ibid.*

[49] *Ibid.*, pp. 559-560.

[50] *Op. cit.* n. 46.

[51] *Op. cit.* n. 49.

[52] [1957] 2 All E.R. 281.

directors in making the company successful. The shareholders bound themselves contractually to make the transfer and the directors undertook to continue to serve the company for at least four years from the date of the deed. The Court of Appeal held that the value of the shares was not assessable on the directors as the shares were a personal gift and not remuneration. Morris L.J. said:[53]

> ". . . it seems to me that a payment which has the attributes of being a personal gift does not necessarily lose those attributes merely because the donor agrees to bind himself so as to be compellable at law to make the payment. . . "

An illustration of the point that a sum paid as remuneration for future services will be assessable is *Cameron* v. *Prendergast*.[54] The taxpayer, a director of a company, wished to resign as director but he was persuaded to stay on the understanding that henceforth he would only act in an advisory capacity. In consideration thereof he was given £45,000 but his salary was reduced from £1,500 p.a. to £400 p.a. The Houses of Lords held that the £45,000 was assessable as it constituted an inducement to remain in office; money paid as consideration for continuation of employment is a profit from employment.

Jenkins L.J. in *Moorhouse* v. *Dooland*,[55] having reviewed all the earlier authorities, summarised the principles under which a sum would be assessed under Schedule E as follows:

> "(i) The test of liability to tax on a voluntary payment made to the holder of an office or employment is whether from the standpoint of the person who receives it, it accrues to him by virtue of his office or employment, or in other words by way of remuneration for his services. (ii) If the receipient's contract of employment entitles him to receive voluntary payment, whatever it may amount to, that is a ground, and I should say a strong ground, for holding that, from the standpoint of the receipient, it does accrue to him by virtue of his employment, or in other words by way of remuneration for his services. (iii) The fact that the voluntary payment is of a periodic or recurrent character affords a further, but I should say a less cogent ground for the same conclusion. (iv) On the other hand, a voluntary payment made in circumstances which show that it is given by way of present or testimonial on grounds personal to the recipient, as for example a collection made for the particular individual who is at the time vicar of a given parish because he is in straitened circumstances, or a benefit held for a professional

[53] *Ibid.* p. 298.

[54] [1940] A.C. 549; see also *Tilley* v. *Wales* [1943] 1 All E.R. 386.

[55] [1955] Ch. 284; [1955] 1 All E.R. 93, 204.

cricketer in recognition of his long and successful career in first-class cricket. In such cases the proper conclusion is likely to be that the voluntary payment is not a profit accruing to the recipient by virtue of his office or employment but a gift to him as an individual paid and received by reason of his personal needs in the former example and by reason of his personal qualities or attainments in the latter example."

Having reviewed the principles of law applicable in deciding the taxability of a "gratuity" under S.13(1)(a) it is now possible to apply those principles to *H.* v. *Comptroller-General of Inland Revenue*.[56] The relevant circumstances of that case are as follows: (a) The taxpayer had no entitlement under contract to receive the sum. It was found as a fact that the letter setting out the proposal did not form part of the contract of service. This shows therefore that the sum received was not in fact received *under* any contract[57]. (b) Upon receipt of the sum the taxpayer's employment was terminated. Therefore the sum could not in any way be referable to services to be rendered.[58] (c) Although the sum may have been paid in recognition of past services, this does not *ipso facto* make the sum assessable. He was adequately remunerated during the currency of his employment, and the fact that the sum is referable to past services can be regarded as demonstrating that the sum was a token of appreciation for services already rendered.[59] (d) The fact that the *ex gratia* payment is calculated by reference to the number of years of service rendered by the taxpayer ought not to be taken as a cogent factor in determining the essential nature of the payment.[60] In the light of the above factors it is respectfully submitted that the sum paid to the taxpayer in *H's Case* was not a gratuity paid "in respect of having or exercising the employment." The sum was merely a personal gift, a token of appreciation from the employers. There was nothing about the circumstances of the sum that makes it referable to the services of the employment.

By way of conclusion on the application of S.13(1)(a) and S.13(1)(e) to a terminal payment from employment, it may instructive to analyse a U.K. case, *Hunter* v. *Dewhurst*,[61] in the light of the Malaysian legislation.

[56] *Op. cit.*, n. 1.

[57] *Seymour* v. *Reed*, *op. cit.* n. 47.

[58] *Cameron* v. *Prendergast*, *op. cit.* n. 54.

[59] *Seymour* v. *Reed*, *op. cit.* n. 47, *Bridges* v. *Hewitt*, *op. cit.* n. 52.

[60] *Hunter* v. *Dewhurst* (1930) 16 T.C. 605; *Gelnboig Union Firclay Co.* v. *I.R.C.* (1922) 12 T.C. 427, in which the House of Lords said that the manner of calculating the sum payable as compensation for sterilising an asset should not affect the question as to whether such sum was a capital or an income receipt.

[61] *Ibid.*

The facts of the case are as follows:

> The taxpayer was the Chairman of a company. He wished to retire from active management of the company but since he had been instrumental in attaining the prosperity of the company the board of directors wished to be able to consult him from time to time. Under the Articles of the Company, Article 109 provided that in the event of the death, resignation, cessation of office for any reason other than misconduct, bankruptcy, lunacy, or incompetence, of a director who had held office for more than 5 years, the company would pay by way of compensation a sum equal to the total remuneration received by him in the preceeding 5 years. The taxpayer agreed to resign as Chairman and became an ordinary director at a much reduced salary. In consideration for giving up his rights under Article 109 the company granted him £10,000 as compensation. The House of Lords held that in the circumstances of the case the £10,000 was not taxable.

It will be noted that if the taxpayer resigned while he was an ordinary director, the sum receivable by him under Article 109 would be drastically less than the amount he would be entitled to by resigning altogether from the company while Chairman. The £10,000 was paid to him to cover the loss he would have thereby suffered. Lord Warrington of Clyffe said that the sum was not referable to services already performed or services to be performed; the sum was to enable the taxpayer to give occasional attendance at the board, and to enable the company to retain the benefit of his help.[62] Lord Atkin said:[63]

> "... The £10,000 was not paid for past remuneration for the condition of its becoming payable, for instance, loss of office, never was performed. It was not paid for future remuneration, for that was expressed to be £250, p.a. which was the sole remuneration. It seems to me that a sum paid to obtain a release from a contingent liability under a contract of employment cannot be said to be received 'under' the contract of employment, it is not remuneration for services rendered or to be rendered under the contract of employment, and is not received 'from' the contract of employment."

The references to "past services" in the judgement of their Lordships relate to the situation where the right of compensation upon termination of employment is contained in the contract of employment itself. This situation has already been dealt with.[64]

[62] *Ibid.*, pp. 643-644.

[63] *Ibid.*, p. 645.

[64] *Supra*, p. 73 *et seq.*

Considering the assessability of the above case under S.13(1)(e) of the 1967 Act, it is submitted that the sum would not be assessable under that provision for there has in fact been no loss of employment. In the present case the taxpayer has surrendered one office and taken up another office with the same employer. Since a promotion from an ordinary directorship to an executive directorship in the same company has been held to be a continuation of the same employment,[65] what in effect amounts to a demotion should also be regarded as a continuation of the same employment. It should be borne in mind that a Chairman or any other executive director can only be appointed from the board of directors and hence there is no reason why a shift from chairman to director should be regarded as the termination of one employment and commencement of another. The only way a sum can be brought within the provisions of S.13(1)(a) is by showing that the sum was paid in consideration of services. The one factor against the taxpayer for purposes of S.13(1)(a) is that the sum is payable under a contract, but this contract, however, is not the contract of employment. It is a new contract entered into between the parties, and accordingly, applying the principle laid down by Morris L.J. in *Bridges* v. *Hewitt*,[66] the fact that the donor has bound himself by contract to make the payment does not *ipso facto* make the sum assessable. Two questions should be asked in this connection. First, was the sum referable to past services? Lord Atkin answered this in the negative, because the condition for its becoming payable under the Article was never performed; and besides, the past services had been adequately remunerated. Secondly, was the sum referable to future services? Probably not, because the taxpayer was to receive a fixed salary as an ordinary director. This case is distinguishable from *Cameron* v. *Prendergast*[67] because in that case the office of the taxpayer remained the same; he continued to serve the company as a director. In the present case however, the taxpayer stepped down from his position as Chairman to become an ordinary director, and as ordinary director he received a proper salary.

III. TERMINAL PAYMENTS UPON CANCELLATION OF AGENCY CONTRACTS

The problem to be considered here is whether S.13(1)(a) or S.13(1)(e) of the 1967 Act are applicable to sums paid by a principle upon the cancellation of an agency contract held by an agent under which the agent pertorms services for the principal or sells the principal's goods It will be

[65] *May* v. *Falk* 17 T.C. 218.

[66] *Op. cit.* n. 52.

[67] *Op. cit.* n. 54.

remembered that S.13(1) covers only "gross income of an *employee* in respect of gains or profits from an *employment*." Therefore the primary question is whether the agency contract creates an employment. S.2 of the 1967 Act defines "employment" as meaning:

"(a) Employment in which the relationship of master and servant subsists;

(b) Any appointment or office, whether public or not any whether or not that relationship subsists for which remuneration is payable."

Definition (a) above gives rise to no difficulty. Generally speaking it is relatively easy to recognise a situation where a master-servant relationship exists. However, it is often difficult to distinguish an appointment or office which is an employment from one which is a profession. Rowlatt J. in *Great Western Railway* v. *Bater*[68] defined an office or employment of profit as ". . . a subsisting, permanent, substantive position, which had an existence independent of the person who filled it, and which went on and was filled in succession by successive holders. . ." The difficulty in distinguishing between employment and profession or vocation is accentuated when the taxpayer holds a multiplicity of posts. It is possible for a person, while carrying on a profession, to be employed at the same time. Thus a solicitor having a large general practice will be carrying on a profession, and if he also acts as a secretary or registrar for a company, he will also be engaged in an employment at the same time.[69] Similarly, a consultant radiologist who has private patients of his own and who is also a part-time consultant to a hospital, will be carrying on a profession and an employment respectivelv.[70]

The basic test for distinguishing between profession and employment is whether the taxpayer is subject to a *contract of service* or *a contract for services*, the former being an employment and the latter a profession. A taxpayer carrying on a profession ordinarily does work for a number of different persons in the course of the year, and the nature of the work is such that one particular person would not require the exclusive services of the taxpayer throughout the year. It makes no difference that only a restricted number of persons may engage the services of the taxpayer. Furthermore, the degree of skill of the taxpayer is not a relevant consideration. Whereas a professional would be remunerated in accordance with the amount of work done by him, an employee would normally be remunerated by a fixed sum even though this sum may be augmented by

[68] [1920] 3 K.B. 266, 274.

[69] *I.R.C.* v. *Brander and Cruickshank* [1971] 1 All E.R. 36.

[70] *Mitchell & Edon* v. *Ross* [1962] A.C. 814.

commissions and the like.[71]

When a sum is paid as compensation upon termination of a professional contract then that compensation cannot come within S.13(1). In *Walker* v. *Carnaby, Harrower Barham and Pykett*,[72] a firm of chartered accountants had been engaged as auditors to a group of companies for a period ranging from 27 years to 59 years. The group installed centralised machine accounting and accordingly terminated the firm's engagement. The company paid the equivalent of one year's fees as auditors to the firm as *solatium* for loss of office. Pennycuick J. held that the firm was carrying on a profession and accordingly the sum was not assessable under Schedule E. It was also held that the sum could not be treated as a business receipt assessable as a gain or profit from a profession as it was paid by way of recognition for services rendered or as consolation for the termination of a contract.

Although it is clear that a voluntary payment upon termination of a professional contract is not assessable under S.13(1), the sum will nevertheless be assessable if it can be shown to be a normal business receipt. In *Walker* v. *Carnaby*, Pennycuick J. said:[73]

> " "There is, as is well known, a great volume of authority on voluntary payments made to the holder of an office. There is no doubt that in many circumstances a payment, although voluntary, may yet when looked at from the point of view of the recipient be regarded as a payment arising from that office. There is curiously little authority on voluntary payments made to someone who is carrying on a trade or profession. . . It may be that traders do not frequently receive voluntary payments from their clients or customers or from former clients or former customers. The test must be whether a voluntary payment made to someone carrying on a trade or profession is properly to be regarded as a receipt to be taken into account in computing the profit of that trade or business. ... "

The 1967 Act, S.22(2)(b), provides that the gross income of a person from any source includes any sums receivable in the basis period for the year of assessment as "compensation for loss of income from that source." Hence, a receipt will have to be taken into account as a profit of the business where it is received as compensation for loss of income from that source. So, although *Walker* v. *Carnaby* will still escape assessment as the sum was not paid as compensation for loss of income, it may well be that sums paid upon the termination of other contracts of service or agency

[71] See *Davies* v. *Braithwaite* [1931] 2 K.B. 628, in which Rowlatt J. discusses the distinction between profession and employment.

[72] [1970] 1 All E.R. 502.

[73] *Ibid.*, p. 507.

contracts will be assessable when the sum is paid to compensate the taxpayer for the profit he would have earned if the contract had continued. In order to decide whether a sum paid upon the termination of an agency contract is covered by S.22(2)(b) of the 1967 Act the basic test to be applied is whether the sum is in fact a capital receipt or an income receipt. If it is a capital receipt then it cannot be regarded as compensation for loss of income from that source.

In the case of a receipt received upon the cancellation of an agency contract, the receipt will be regarded as a capital receipt if it affects the whole *profit-earning structure of the business.* If the receipt is received as a mere incident to the carrying on of that particular type of business then it will be regarded as compensation for loss of income. This test was enunciated by the House of Lords in *Van den Berghs Ltd.* v. *Clark.*[74] Lord Macmillan said that if a sum is received as an aggregate of the profits which would otherwise have been earned over the years then the lump sum too would be regarded as profit. But simply because a sum is measured in terms of profits, it does not thereby itself become a profit.

His Lordship continued:

> "... the cancelled agreements related to the whole structure of the Appellents' profit-making apparatus. They regulated the Appellants' activities, defined what they might and what they might not do and affected the whole conduct of their business. I have difficulty in seeing how money laid out to secure, or money received for the cancellation of so fundamental an organisation of a trader's activities can be regarded as an income disbursement or an income receipt."[75]

The operation of this test can be seen in two contrasting cases. In *Kelsall Parsons and Co.* v. *I.R.C.*[76] the taxpayers were commission agents for the sale of the products of various manufacturers in Scotland. One of the agency agreements, which was to last for three years, was terminated after the second year in consideration for which the taxpayers received £1,500 as compensation. It was held that the sum constituted a business receipt of the taxpayers. It was a normal incident of the business that its contracts might be altered or cancelled from time to time, and the business of the taxpayers was designed to absorb such shocks. The contract was also not an enduring asset or the business. In Malaysia, apart from being regarded as an ordinary business receipt the sum in the above case would also fall within S.22(2)(b). On the other hand, in *Barr, Crombie, and Co. Ltd.* v. *I.R.C.*[77] the taxpayers carried on the business of ship

[74] [1932] AC 431.

[75] *Ibid.*, pp. 442-443.

[76] (1938) 21 T.C. 608.

[77] (1945) 26 T.C. 406.

managers. The taxpayers had a contract with a shipping company to manage their ships for 15 years. This contract constituted well over 90 per cent of the taxpayers source of income. The shipping company went into liquidation when the contract still had 9 years to run. In consideration for the cancellation of the contract the taxpayers received £16,000. It was held that this was a capital sum and not assessable. The contract was practically the only asset of the taxpayer and the compensation received was regarded as being received for the surrender of a capital asset.

A payment such as in the second case, it is submitted, cannot be regarded as compensation for loss of income from a source. S.22(2)(b) is restricted to such sums as are received in the normal course of business, either as damages for loss of anticipated profits or in lieu of the right to earn profits under a contract which is thereby terminated. When the contract forms an integral part of the business and in fact amounts to a fixed capital asset of the business, then any sum received for the termination of that contract is itself a capital sum and not compensation for loss of gross income from that source. Such contracts stand on the same footing as a sum received upon the sale of a fixed capital asset of a business. The profit obtained from such a sale is a capital profit and not subject to income tax.

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UNDANG-UNDANG BARAT DAN HUKUM ADAT DALAM UNDANG-UNDANG NEGARA

I. FALSAFAH HUKUM

Jika kita perbandingkan sistem Undang-Undang dengan sistem Hukum Adat maka terdapat perbezaan yang jelas. Ini disebabkan kerana berbezanya falsafah Hukum, cara berfikir orang-orang Barat dan cara berfikir orang-orang Timur seperti orang-orang Malaysia dan Indonesia.

Falsafah Undang-undang Barat didasarkan pada falsafah ahli fikir Inggeris Hobbes dengan teorinya yang terkenal dengan istilah *"Social Contract"* (kontrek Masyarakat) yang diperjelaskan lagi oleh ahli fikir Swiss Jean Jacques *Rousseau* dalam karyanya *Du Contract Social.*[1]

Falsafah asal dari teori ini timbul dari adanya perjuangan kekuasaan antara seseorang dengan yang lain sebagai digambarkan dengan tepatnya oleh HOBBES dalam kata-kata Latin: 'omnium bellum contra omnes'.

Punca bertolak dari teori ini ialah falsafah undang-udang alam atau undang-undang semula jadi (Natural Law) yang memberi hak kepada perseorangan ('individual') dalam masyarakat, iaitu *kebebasan* and *kesamaan* sesama manusia. Tiap-tiap manusia mempunyai kepentingan sendiri dan bebas memperjuangkannya. Jika dibiarkan hidup masyarakat sedemikian maka terjadilah kacau bilau dalam masyarakat yang timbul dari perkelahian dan peperangan. Demi untuk terjaminnya satu masyarakat pemerintahan yang menjaga keamanan umum. Dalam perjanjian itu dinyatakan:

1. rakyat menyerahkan kuasa penuh kepada pemerintah untuk menjaga kerukunan masyarakat.
2. rakyat wajib menaati segala hukum yang dibuat oleh pemerintah tanpa syarat.

Dengan berfikir secara abstrak itu maka perseorangan dan masyarakat akan terpisah. Dalam perkembangan masyarakat Undang-undang Barat selanjutnya, teori ini berpendapat bahwa kehendak rakyat ditentukan dengan tercapainya suara terbanyak dalam Badan Perwakilan Rakyat. Golungan yang sedikit suara dipaksa menerima keputusan suara terbanyak. Akibat dari cara berfikir yang abstrak serta murni itu, maka Hukum atau

[1] lihat, G. Jellinek, *Allgemeine Staatslehre*, Berlin 1922, hal: 87 dan R. Kranenburg, *Algemeine Staatsleer*, Haarlem 1955, hal: 137-8.

undang-undang ditentukan dari atas dan berlaku bagi seluruh rakyat dalam masyarakat atas dasar kekuasaan yang mendapat kemenangan. Falsafah Hukum Adat didasarkan pada berfikir secara konkret (kenyataan). Manusia sejak mula ia diciptakan tidak bebas; ia selalu bergantung kepada keadaan di sekitarnya, samaada alam yang zahir maupun alam yang ghaib.

Dengan berfikir secara konkret ini maka perseorangan dan masyarakat tidaklah terpisah, tetapi merupakan satu *kesatuan* yang harmoni, kerana manusia perseorangan (individual) adalah juga manusia anggota masyarakat ('social being').

Kesatuan itu diibaratkan kepada jasad manusia dengan bahagian-bahagiannya dalam keseluruhan. Jika sebahagian dari jasad itu sakit (terganggu) maka seluruh jasad turut sakit (terganggu).

Begitu juga halnya dengan hidup bermasyarakat; mereka merupakan satu kesatuan hidup di mana suka dan duka menjadi beban bersama. 'Berat sama dipikul, rengan sama dijinjing', kata adat.

Sebagai anggota masyarakat ('social being') manusia menurut nalurinya menghendaki kerjasama antara mereka dalam menjadi kerukunan dalam masyarkat. Jika tidak, yang rugi itu ialah manusia perseorangan. Dan ini ternyata dari pengalaman-pengalaman pahit yang di alami oleh setiap orang, jika manusia perseorangan hanya menjalankan kepentingan peribadinya. Masyarakat menjadi kacau dan berlakulah "hukum rimba". Oleh kerana itu timbullah satu kesedaran dalam jiwa mereka bahwa yang patut diutamakan ialah *kepentingan bersama*, bukan kepentingan perseorangan.

Dengan berfikir secara konkret ini maka Kepala Masyarakat Hukum Adat tidak merupakan seorang Raja yang berdiri sendiri di atas rakyat, tetapi sebagai satu kesatuan dengan rakyatnyat yang bertugas memelihara hidup rukun dan damai masyarakat atas dasar *musyawarah*: 'Buruk dibaiki, kusut diselesaikan', kata adat.

Jadi tidak ada terdapat dalam masyarakat Hukum Adat perjuangan kekuasaan antara sesama manusia. Semua cita-cita dan kehendak dari perseorangan dapat dimajukan (prinsip kebebasan) dan di musyawarahkan bersama oleh masyarakat apakah cita-cita dan kehendak itu tidak akan merosak atau merugikan keharmonian masyarakat pada waktu itu.

Jika dianggap tidak merugikan maka menjadilah cita-cita atau kehendak perseorangan itu kehendak masyarakat sebagai suatu *kebulatan* kehendak.

Kebulatan kehendak ini tercapai sesudah dibahas dengan teliti akan masaalah tersebut didalam musyawarah sehingga keputusan musyawarah merupakan satu keinsafan masyarakat bahwa itulah sebaik-baik keputusan.

Jadi tidak merupakan satu keputusan yang didasarkan atas kehendak dari suara yang terbanyak yang kemudian memaksakan gulongan yang kalah suara menerimanya.

Falsafah Hukum Adat tidak mengenal istilah kalah menang dalam

musyawarah, kerana tidak adanya 'omnium bellum omnes'. Yang ada ialah kepentingan bersama, sehingga hukum timbul dari *bawah* iaitu dari keinsafan rakyat dalam masyarakat.

Oleh kerana itu Hukum Adat umumnya adalah Hukum yang *tidak* tertulis. Ia merupakan penyataan rasa keadilan yang hidup disanubari rakyat sendiri. Keinsafan keadilan inilah yang membawa tiap-tiap anggota masyarakat taat kepada Hukum Adat, kerana alangkah aib dan malunya seseorang jika ia tidak mematuhi Hukum Adat.

II. SISTEM HUKUM

Berlainan cara berfikir mengenai Hukum (falsafah Hukum) membawa perbezaan sistem Undang-undang Barat dan sistem Hukum Adat:

a. dalam Hukum Barat terdapat perbezaan yang tegas antara kepentingan perseorangan dengan kepentingan umum yang membawa akibat adanya pembahagian Undang-undang privet (private law) dan Undang-undang pablik (public law). Atas dasar pembahagian kedua hukum ini maka timbullah sistem pembahagian Undang-undang Sibil (Civil law) dan Undang-undang Jenayah (Criminal law); dalam Hukum Adat sistem sedemikian tidak ada. Kepentingan-kepentingan perseorangan pada hakikatnya adalah kepentingan-kepentingan bersama. Privet dan pablik atau sibil dan jenayah berjalin satu sama lain. Tidak ada perbezaan tegas antara kepentingan peribadi dengan kepentingan bersama, sehingga didalam Hukum Adat tidak adanya pembahagian Undang-undang sibil dan Undang-Undang Jenayah. Setiap pelanggaran Hukum Adat merupakan satu gangguan keseimbangan masyarakat. Oleh kerana itu maka adalah kewajipan yang melanggar dan kewajipan masyarakat untuk sedaya upaya memulihkan kembali keseimbangan yang terganggu itu dengan cara penyelesaian bermusyawarah. Untuk lebih jelas lagi kita ambil contoh perbuatan jenayah: *rogol* atau *perkosa.*

Rogol menurut Undang-undang Barat adalah suatu perbuatan jenayah dan sipelanggar haruslah dihukum penjara. Dengan jatuhnya hukuman penjara atas sepelanggar maka selesailah peristiwa itu. Tidak demikian halnya dengan Hukum Adat. Hukum Adat memandang peristiwa rogol sebagai satu gangguan keseimbangan maysarakat. Jadi tugas utama bagi masyarakat ialah memulihkan kembali keseimbangan yang terganggu berlandaskan kata-kata adat: buruk dibaiki, kusut diselesaikan. Peristiwa rogol dianggap oleh masyarakat adat sebagai satu noda bagi dusun siperogol. Oleh kerana itu kesucian dusun harus dipulih kembali. Untuk menyucikan dusun tersebut dari noda yang ditimbulkan oleh siperogol, maka perlu diadakan satu upacara membasuh dusun dengan suatu kenduri. Didalam kenduri ini siperogol meminta maaf kepada masyarakat atas kelakuannya yang tidak baik itu. Oleh masyarakat kejadian yang buruk ini dibaiki dengan mewajipkan siperogol berkahwin dengan perempuan yang bersang-

kutan. Permohonan maaf dari siperogol diterima, kerana perbuatan rogol yang buruk itu telah dibaiki dengan kenduri. Dengan dilangsungkan antara siperogol dan gadis atau perempuan yang dirogol, kekusutan yang timbul itu telah diselesaikan. Dengan cara-cara yang sedemikian keharmonian masyarakat pulih kembali dan peristiwa rogol selesai.

b. dalam Undang-Undang Barat, *Kontrek* adalah satu perjanjian 'consensual' yang didasarkan kepada *kata sepakat* (consensus). Perjanjian jual ('verkoop oversenkomst' dalam bahasa Belanda atau 'contract of sale' dalam bahasa Inggeris) umpamanya didasarkan kepada kata sepakat antara sipenjual dengan sipembeli. Kata sepakat ini merupakan tindakan Undang-undang ('legal action') dan adalah tindakan yang menuntukan dan yang mewajibkan *penyerahan* atau pindah milik. Dalam Hukum Adat kata sepakat bukanlah suatu tindakan Undang-undang, ia hanya merupakan satu persiapan sahaja ('preparation') yang belum mengikat sama sekali. Malahan, walaupun kata sepakat itu dikuatkan dengan pemberian *penjar* ('advance') oleh bakal sepembeli, ia masih belum mengikat, masih belum merupakan tindakan muktamat yang mewajipkan penyerahan. Akhir-akhir ini tercipta suatu perjanjian berjual beli antara kedua pehak. Terbutkit apabila pehak sipenjual mungkir, tidak jadi menjual tanahnya, maka ia tidak diwajibkan menyerah tanah yang hendak dijualnya kepada sipembeli atas dasar perjanjian yang telah dibuatnya. Hukum Adat sebenarnya tidak mengenal pengertian panjar; ia adalah ciptaan dari pedagang-pedagang bangsa asing (cina dan India) yang hendak memaksakan berlakunya sesuatu perjanjian ('contract'). Kata sepakat ('consensus') jika mahu dianggap sebagai perbuatan Undang-undang dalam sistem Undang-undang Barat, maka pengertiannya dalam Hukum Adat: kata sepakat itu jatuhnya *bersamaan* dengan penyerahan, jadi *tidak* terpisah. *Jual* menurut Hukum Adat: *melepaskan* barang kerana pembayaran tunai atau dengan perkataan lain penyerahan barang kerana menerima pembayaran tunai.

Ditinjau dari segi Undang-undang penjualan dalam Hukum Adat adalah perjanjian yang konkret (nyata), iaitu melepaskan barang setelah menerima sejumlah wang yang tertentu.

Tegasnya pembayaran tunai itu merupakan unsur utama dalam penjualan. Terbukti dalam jual beli *tanah*, dimana harus dilakukan dihadapan Kepala Masyarakat Hukum Adat yang bersangkut, kerana Kepala tersebut dianggap mengetahui benar-benar keadaan didalam masyarakatnya, disamping keperluan menjaga ketertipan Hukum dan jangan sampai hak orang lain terganggu. Dengan cara sedemikian maka *turut sertanya* Kepala Masyarakat Hukum Adat adalah syarat *mutlak* bagi penjualan, bukan sahaja untuk pengesahan tetapi juga terutama untuk kejelasannya.

c. Didalam Barat barang dibahagi kepada dua jenis:

1. barang *takalib* ('onroerend goed' dalam bahasa Belanda atau 'Immovable property' dalam bahasa Inggeris).

II. barang *bergerak* '(roerend goed' dalam bahasa Belanda atau 'movable property' dalam bahasa Inggeris).

Pembahagian ini membawa kepada perbezaan *cara* penyerahan. Jika barang itu barang bergerak, penyerahan jatuh bersama dengan pembayaran kerana mudah dilakukan. Tidak demikian halnya dengan barang tetap seperti tanah. Dalam hal tanah ini diperlukan penyerahan dengan suatu cara yang tertentu. Di Indonesia jual beli berlaku sebagai berikut:

Mula-mula kedua pehak, pembeli dengan penjual mengadakan perembukan mengenai harga tanah yang akan diperjual-belikan. Jika terdapat kata sepakat, maka terjadilah perjanjian antara mereka yang mengikat.

Menurut sistem Hukum Barat bagi jual beli tanah perjanjian yang sedemikian masih belum cukup. Masih diperlukan satu *surat pindah milik* ('acte van oversehrijving' dalam bahasa Belanda) dari seorang *notaris* ('notary') yang dilantik oleh Kementerian Kehakiman sebagai bukti yang lengkap dan yang sah (resmi) dari perjanjian penjualan itu. Dari tindakan notaris inilah timbul hak dan kewajipan penjual dan pembeli. Kewajipan penjual menyerahkan tanah yang dijualnya kepada pembeli dan haknya menerima pembayaran harga. Kewajipan pembeli membayar harga dan berhak atas pemindahan milik tanah atas namanya. Pemindahan hak milik tanah tersebut harus dilakukan di pejabat Pendaftaran Tanah (kantor 'KADASTER' dalam bahasa Belanda atau 'LAND OFFICE' dalam bahasa Inggeris), dimana terdapat buku pendaftarkan hak milik tanah. Dipejabat Kadaster inilah diselesaikan pemindahan kedalam buku pendaftarkan tanah. Perbuatan inilah yang disebut dengan istilah: *tukar nama.*

Kalau di Malaysia ini dapatlah kita perbandingkan sistem Undang-undang Barat di Indonesia mengenai tanah itu dengan sistem *Torren.* Hanya perlaksanaannya agak berbeza sedikit tetapi ujudnya sama.

Sebagaimana telah dikatakan tadi pembahagian dua jenis barang di-dalam Hukum Barat membawa akibat kepada perbezaan cara penyerahan-nya. Kalau barang bergerak penyerahan dan perjanjian jatuh *bersamaan;* kalau barang takalih penyerahan dan perjanjian *terpisah;* didalam sistem Hukum Adat kerana tidak mengenal pembahagian jenis barang kepada barang takalih dan barang bergerak, maka tidaklah terdapat perpisahan antara perjanjian dan penyerahan barang yang dijual belikan.

Jual beli menurut sistem Hukum Adat dalam hal tanah:

1. bukan perjanjian dan juga bukan akibat perjanjian.
2. ia harus dilakukan dengan *terang* iaitu dihadapan Kepala Masyarakat Hukum Adat yang bersangkutan untuk sahnya dan dengan pembayaran *tunai.*
3. jual beli yang berlangsung dihadapan Kepala itulah yang merupakan perbuatan pemindahan milik tanah yang dijual dari penjual kepada pembeli.
4. Selanjutnya kita dapati juga perbezaan sistem Undang-undang di-dalam undang-undang Barat dan didalam Hukum Adat selain dari pada perbezaan

sistem penyerahan yang tersebut di atas. Undang-undang Barat memakai sistem *fertikel* ('vertical') iaitu tanah tidak dapat dilepaskan dari seuma yang ada ditanah itu. Sistem Undang-undang tanah Barat ini berasal dari sistem Undang-undang Roman. Jadi menurut Undang-undang Barat yang dimaksud dengan tanah bukan sahaja apa yang terletak di atas tanah tetapi juga apa yang terkait-kuat dengan tanah seperti bangunan-bangunan, pohon-pohon dan lain-lain. Sedangkan sistem Undang-undang tanah menurut Hukum Adat ditinjau dari segi Undang-undang Barat adalah sistem *horizontel* ('horizontal'), iaitu suatu bentuk hak milik dimana tanah dengan segala apa yang ada diatasnya dipisahkan. Tanah kepunyaan si Ali, sedangkan bangunan diatasnya kepunyaan si Daud adalah biasa sahaja. Jadi menurut sistem Hukum Adat *perpisahan* antara tanah dengan segala apa yang terletak di atas tanah, baik ia terikat-kuat dengan tanah itu atau tidak seperti rumah, bangunan-bangunan lain, pohon dan sebagainya tetap ujud.
e. Fungsi sosial dari pada hak perseorangan ('individual') menerut sistem Undang-Undang Barat adalah bebas. Ini disebabkan kerana adanya perpisahan yang nyata antara hak perseorangan dan hak masyarakat.

Didalam sistem Hukum Adat perseorangan dan masyarakat merupakan satu *kesatuan* yang tidak terpisah. Setiap hak perseorangan merupakan perlaksanaan daripada hak bersama, kerana didalam Hukum Adat masyarakat memainkan peranan yang utama dalam kehidupan perseorangan.

Sebagai contoh yang tepat dan sederhana yang dapat dilihat dengan nyata didalam Masyarakat Hukum Adat ialah adat *gotong royong* (tolong menolong) dari anggota masyarakat dalam *segala hal.* Fungsi ini adalah fungsi sosial daripada hak perseorangan yang timbul dari kesedaran rasa *senasib sepenanggungan.*

Sedangkan sarjana Undang-undang Barat menganggap adat gotong royong ini sebagai satu *balas jasa* ('reciprocity'), satu fungsi sosial daripada hak perseorangan ditinjau dari segi perseorangan semata-mata.

Tegasnya disistem Hukum Adat kita jumpai perpaduan dari prinsip kebebasan yang memperhatikan sepenuhnya norma-norma susila dengan prinsip taat (hormat) kepada kebulatan kehendak dari masyarakat.

Gabungan dari kedua prinsip inilah yang menjadi tiang-tiang dari hidup rukun dan damai didalam Masyarakat Hukum Adat.

III. "HUKUM NASIONAL INDONESIA"

Setelah kita mengetahui secara selayang pandang perbezaan falsafah Hukum, cara berfikir orang-orang Barat dan orang-orang Timur dengan membawa perbezaan sistem Undang-undang Barat dan sistem Hukum Adat, maka pertanyaan yang timbul sekarang ialah bagaimana kedudukan Hukum Adat dan Undang-undang Barat didalam "Hukum Nasional Indonesia?"

Dalam hal ini *tiga* pendapat yang telah dikemukakan oleh beberapa orang pakar undang-undang di INDONESIA:

1. pendapat pakar Undang-undang Prof. Dr. Supomo yang dikemukakan-

nya dalam Syarahan ulang tahun Universitas Gajah Mada, di Jogjakarta 1947 yang berjudul: "Kedudukan Hukum Adat dikemudian hari", iaitu Hukum Adat *tidak* dapat dipakai dalam sistem Hukum Nasional Indonesia. Sebagai alasan yang utama dikemukakan beliau bahwa Hukum Adat tidak mempunyai kepastian Hukum.

2. pendapat pakar Undang-undang Prof. Sudiman Kartohadiprodjo yang dikemukakannya dalam karyanya yang berjudul: "Hukum Nasional, Bandung 1968" dihalaman 38-41, iaitu Hukum Adat dapat dipakai dalam sistem Hukum Nasional Indonesia tetapi terbatas yakni hanya dalam beberapa bidang persoalan Undang-undang sahaja seperti Undang-undang Keluarga dan Undang-undang Waris. Dalam bidang lain dapat diambil Undang-undang Barat.

3. pendapat pakar-pakar Undang-undang yang terbanyak, iaitu Hukum Adat dapat menjadi dasar Hukum Nasional Indonesia dengan tidak mengabaikan unsur-unsur yang datang dari luar yang telah diterima oleh Masyarakat Indonesia. Kalau kita bahas ketiga pendapat tersebut, maka kita lihat pendapat Supomo merupakan pendapat yang ekstrim; pendapat Sudiman merupakan satu penggabungan ('combination') antara pendapat Supomo dan pendapat dari pakar hukum yang terbanyak.

Diantara para pakar Undang-undang yang terbanyak ini termasuklah pakar Undang-undang Prof. Dr. Hazairin, Mahaguru Hukum Adat di Universitas Indonesia Jakarta dan Prof. Dr. Moh Koesnoe, Mahaguru Hukum Adat di Universitas Airlangga di Surabaya.

Hazairin berpendapat bahawa Hukum Adat dapat dijadikan landasan atau dasar dari Hukum Nasional Indonesia dengan alasan kepada fakta (kenyataan), iaitu perkembangan Hukum Adat dipengaruhi oleh faktor-faktor dari luar dan dari dalam. Sebagai contoh ia kemukakan perkembangan masyarakat adat yang berbagai jenis sistem kekeluargaannya seperti *unilateral-partilineal, matrilineal, bilateral, parental,* semuanya dipengaruhi oleh faktor-faktor dari luar dan dalam yang bertujuan menyalurkan masyarakat yang bukan bilateral kearah yang bilateral.[2]

Mohd. Koesnoe berpendapat bahwa Hukum Adat dapat diterima sebagai landasan daripada Hukum Nasional Indonesia dengan alasan kepada pengalaman perkembangan Hukum Adat dimasa yang lalu, iaitu Hukum Adat dapat memenuhi keperluan-keperluan nasional yang moden. Ini adalah disebabkan oleh satu kenyataan bahwa Hukum Adat itu dengan sifat dinamisnya tidak menolak hukum yang baru dari luar jika telah diperlukan. Sebagai contoh ia kemukakan perkembangan ilmu pengetahuan Hukum Antara gulongan ('intergentilrecht' dalam bahasa Belanda atau 'interracial law' dalam bahasa Inggeris) di Indonesia, dimana dapat disaksikan bagaimana Hukum Adat berlaku untuk mereka yang tidak hidup dibawah kekuasaan Hukum Adat dan bagaimana mereka yang hidup di

[2]lihat *Hukum Kewarisan Bilateral,* karya Hazairin, Djakarta, 1967.

bawah kekuasaan Hukum Adat menerima lembaga-lembaga hukum asing yang tidak dikenal atau tidak terdapat didalam Hukum Adat.[3]

Dalam pertikaian pendapat mengenai persoalan (masaalah) Landasan dari Hukum Nasional Indonesia yang dilancarkan secara bebas dan terbuka itu, Majlis Permusyawaratan Rakyat Sementara ('Indonesia People's Congress') sependapat dengan pendapat dari ahli hukum yang terbanyak.

Dan ini ternyata dari keputusan-keputusan Majlis Permusyawaratan Rakyat Sementara didalam tahun-tahun 1960 sampai 1967.

Dalam keputusan M.P.R.S. No. 11, 1960 Pemerintah Indonesia telah menetapkan bahwa Hukum Adat adalah landasan daripada tata Hukum Nasional.

Kemudian disusul segera pelaksanaannya, iaitu dengan mengeluarkan satu undang-undang tanah yang terkenal dengan sebutan: Undang-undang Pokok Agraria 1960 ('Basic Agrarian Act') dimana diresmikan Hukum Adat sebagai hukum yang berlaku bagi soal tanah dan lembaga-lembaga Hukum Adat ditetapkan sebagai lembaga-lembaga hukum yang sah.

IV. KESIMPULAN:

Sejak kemerdekaan Indonesia pada tahun 1945, sejak itu pula Indonesia dihadapkan kepada masaalah Hukum Nasionalnya. Sistem apakah yang dapat dipakai sebagai landasan/dasar daripada pembinaan Hukum di negara Republik Indonesia yang baru merdeka itu? Bahwa sifat hukum baru khas Indonesia itu harus nasional sudah pasti dan tidak dapat diganggu-gugat atau ditawar, kerana semangat kebangsaan telah tertanam didalam jiwa rakyat Indonesia.

Selain dari itu kenyataan adanya Hukum Adat yang masih berlaku dikalangan besar rakyat Indonesia dan yang masih besar pengaruhnya atas jiwa bangsa Indonesia tidak dianggap sepi atau diabaikan begitu sahaja.

Pengaruh ini dirasakan didalam musyawarah penyusunan Undang-undang Dasar Republik Indonesia tahun 1945, dimana sistem Hukum Adat yang banyak dipakai dalam penyusunan itu.

Kalau kita tinjau keadaan Undang-undang dalam Kerajaan Persekutuan Malaysia ini dan kita bandingkan dengan keadaan Undang-undang Republik Indonesia, maka terdapat persamaan masaalahnya.

Menurut hemat saya pengalaman-pengalaman yang sangat berguna yang telah dialami di Indonesia sejak tahun 1945 dalam mencari satu landasan/dasar bagi Hukum Nasional Indonesia dapat dimanfaatkan oleh Malaysia dalam membena Undang-Undang Kebangsaan Malaysia dihari depan.

[3] lihat lebih lanjut tesis Koesnoe: *Perkembangan dari pemikiran dan cara-cara penyelesaian masaalah-masaalah hukum antara gulongan di Indonesia,* Surabaya 1965 dan kertas kerjanya yang berjudul: *Hukum Adat dan Pembangunan Hukum Nasional,* Den Pasar 1969).

Kemanfaatan itu akan lebih terasa jika kita kaji kedudukan bangsa Malaysia dan bangsa Indonesia yang banyak persamaannya, iaitu:

1. ditinjau dari sudut sains antropologi bangsa Malaysia dan bangsa Indonesia berasal dari satu rumpun.
2. ditinjau dari sudut sains sosiologi susunan masyarakat Malaysia dan masyarakat Indonesia adalah sama.
3. ditinjau dari sudut ugama, bumiputra Malaysia dan bumiputra Indonesia menganut ugama yang sama, iaitu ugama ISLAM.
4. ditinjau dari sudut kebudayaan dan Hukum Adat juga pada intisarinya tidak ada perbezaan, sebagaimana juga yang dapat disaksikan dengan bahasa Malaysia dan bahasa Indonesia yang berasal dari satu bahasa, iaitu bahasa Melayu.
5. ditinjau dari sudut kekuasaan, Malaysia dan Indonesia sama-sama merdeka dan berdaulat. Seterusnya berdasarkan pula kepada pengalaman-pengalaman penyelidikan saya di Rejang (Indonesia):[4] dan penyelidikan Hukum Adat Ngeri Sembilan yang sedang saya lakukan di Malaysia, maka menurut pendapat saya sistem Hukum Adat Malaysia dapat dijadikan landasan atau dasar dari Undang-Undang Kebangsaan Malaysia dalam pengertian bahwa dasar itu boleh diperkembangkan dengan unsur-unsur yang datang dari luar seperti Undang-undang Barat, Hukum Islam dan lain-lain, apabila unsur-unsur itu telah dapat diterima oleh masyarakat Malaysia.

Abdullah Siddik*

[4] '*The Adat Law of the Rejang*' yang penerbitannya sekarang sedang dipertimbangkan.

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CASE NOTES

ADULTERY WITH OWN SPOUSE
Abdoulie Drammeh v. *Joyce Drammeh*[1]

The word adultery may well bring to mind the picture of an illicit relationship, be it a momentary infatuation or a long-standing affair with a mistress. In short, adultery is usually associated with extra-marital sexual relationships. Adultery as a ground for divorce has been defined as "voluntary sexual intercourse between a married person and a person of the opposite sex, *the two persons not being married to each other.*" (*Tolstoy on Divorce*, (7th Edition) [1971], p. 54; See also, *Rayden on Divorce*, (11th. Edition) [1971], p. 178; emphasis supplied). From this definition it is apparent that sexual intercourse between a man and a woman who is his wife, cannot be termed 'adultery'. The Judicial Committee of the Privy Council however, does not seem to think so. Indeed its decision in *Abdoulie Drammeh* v. *Joyce Drammeh* has the somewhat startling effect of rendering a man an adulterer even though he may be lawfully married to the woman with whom he is having sexual relations.

The relevant facts of the case date back to 1956 when Abdoulie Drammeh, a law-student from the Gambia married a Jamaican lady domiciled in England (hereinafter referred to as 'the wife') at a Methodist Church in Liverpool. The parties lived together in various places in England until 1963 when Drammeh returned to his native Gambia after finally becoming a member of the English Bar and, incidentally, fathering six children. His wife, who had been ill when he left England joined him shortly thereafter. Drammeh began practice as a Barrister and Solicitor and all seemed well until April 1966 when he went through a Muslim form of marriage with one Mariama Jallow (hereinafter referred to as "the co-respondent"). The wife, unwilling to share her husband, petitioned for divorce on the ground of his adultery.

Drammeh's evidence was that in 1957 he had reverted to his original Muslim faith and that by his personal law he was permitted to marry and did in fact marry the co-respondent. However, he denied having sexual intercourse with her. The Chief Justice of the Gambia who heard the petition found as a fact that Drammeh had had sexual intercourse with the co-respondent basing his finding on an admission to that effect by

[1] (1970) LXXVIII C.L.W. 55.

the co-respondent herself. Though this was not made explicit, his Lordship may have felt that her admission was sufficiently corroborated by her rather pregnant condition. Consequently, he held that the wife was entitled to the divorce she sought and pronounced a decree nisi. In his judgement the learned Chief Justice said "(t)he respondent may contend that this second marriage is lawful in Islamic law, but it is still adultery within the meaning of a Christian monogamous marriage – one man, one wife – to the exclusion of all others." (*Ibid.*, p. 58).

The disgruntled Drammeh appealed to the Court of Appeal. His appeal was mainly on two grounds:

(i) that as the co-respondent was in the position of an accomplice, corroboration of her evidence was needed; the learned judge had failed to direct his mind to this need for corroboration.

(ii) that he was entitled to and did contract a valid second marriage with the co-respondent and therefore sexual intercourse between him and the co-respondent could not be adultery.

The first contention was dismissed by the Court of Appeal which held that the learned judge had not overlooked the question of corroboration. The second and far more important ground was, unfortunately, not given the consideration it deserved. The Court of Appeal, after stating the issue, perfunctorily dismissed it by asking rhetorically "(c)an this be the law of the Gambia?" The report does not disclose their reasons, if any, for the Court's conclusion that there was adultery and one is left to speculate as to why the argument put forward by Drammeh could not, in the opinion of the Court of Appeal, "be the law of the Gambia."

Drammeh, undaunted by failure, proceeded to appeal to the Judicial Committee of the Privy Council on the same two grounds. With regard to the first ground, the requirement of corroboration, their Lordships agreed with the Gambian Court of Appeal. With regard to the second ground, the question was framed clearly but answered ambiguously. After a somewhat irrelevant discussion relating to jurisdiction, their Lordships proceeded to extricate themselves from a "sticky situation" by concluding as follows:

> "Upon proof therefore that the husband had had intercourse with someone other than his wife without her connivance or condonation what reason, it may be asked, could there be for denying to the wife the dissolution of her marriage for which she prayed? No question could arise as to the jurisdiction of the Court in the Gambia to entertain the suit." (p. 58)

This conclusion it is submitted, did not really resolve the problem, which is, has a man committed adultery when the woman involved is his lawful wife? At this stage, it should be noted that the Privy Council considered it unnecessary to determine whether or not Drammeh's second marriage was valid. The Board expressly stated it was concerned only with

the Christian marriage. Presumably their Lordships agreed with the reasoning of the Chief Justice of the Gambia, for they said that they saw no reason for holding that the courts of the Gambia were wrong in holding that "the wife could assert that the relationship between her husband and the co-respondent was, so far as she was concerned an adulterous one." (p. 59)

Though the Privy Council failed to consider whether or not the co-respondent was a lawful wife of Drammeh, it did indicate that the result would have been the same in either event, by commenting:

> "Even if the second marriage was not void there can be no reason for denying to the wife the rights that are hers if she finds that her husband who has all the obligations to her which result from a validly subsisting monogamous marriage, has had intercourse with some other woman." (p. 59)

Their Lordships sought to buttress their opinion by reference to their celebrated decision in *Attorney-General of Ceylon* v. *Reid* ([2965] A.C. 720). They said:

> "The importance of the case for present purposes is that in their judgement the Board noted that it was not in controversy between the parties that the first marriage remained valid and subsisting notwithstanding the second marriage (for there had been no divorce under the Marriage Registration Ordinance) and that the first wife could if she so desired, treat the second marriage as an adulterous association by her husband on which she could found a petition for divorce."

Though there is a somewhat superficial similarity in the facts of both cases, the matters in dispute were quite different. Reid was prosecuted for bigamy under section 362B of the Penal Code of Ceylon. The crux of the matter therefore was whether his second marriage was void by reason of his first subsisting marriage. The first wife's rights and remedies were not in issue. On the other hand, in *Drammeh's* case the sole matter for consideration was the first wife's right to have her marriage dissolved. The views expressed in *Reid's* case on this issue, did not form part of the *ratio decidendi* of that case.

Furthermore, the *dictum* was made at the very beginning of the judgement in reference to a matter not in dispute between the parties. This point was mentioned undoubtedly, only because it had been part of counsel's submission. In trying to establish that Reid was not guilty of bigamy, counsel argued that he had a right to change his personal law and thereby acquire the capacity to re-marry but that the first wife would not be left without a remedy. In this context, it is submitted that their Lordships' pronouncement has little value as precedent.

It is interesting to note that in *Reid's* case their Lordships quoted with approval a portion of the judgement of Beaman J. in the Indian

case of *Attorney-General of Bombay* v. *Jimababai* ([1915] 1 L.R. 41. Bom. 181), the relevant portion of which reads:

> "After his conversion Dukhiram was governed by the Mohammedan law. There can be no question that under that law he was entitled to contract a valid marriage with Alfatanessa. It would, therefore, be a serious thing to say that such a union was a mere adulterous connection." (p. 196)

Jimababai's case was on all fours with *Reid's* and the decision there was that if the second marriage was valid according to the man's personal law then it could not be regarded as a mere adulterous connection and must be considered valid for all purposes. Their Lordships purported to follow this authority when they acquitted Reid but on that rationale, the result would not only have been that Reid's second marriage was valid but also that it was not an adulterous connection, in which case Reid's first wife would not have been able to allege his adultery. As *Drammeh's* case was considered in the light of both those cases, it seems obvious that the wife should have failed in her petition. It appears however, that their Lordships considered the matter only from the point of view of the first wife. They appear to have felt that as she had entered into a Christian monogamous marriage with no intention of being one of two or more wives, she could not be compelled to accept a relationship wholly different from that which she had contracted for. It is possible therefore, that the Privy Council came to its decision only because of the desire to help the wife who would not otherwise have been able to get a divorce. It should be noted that today a remedy is available under the Gambian Dissolution of Marriage (Special Circumstances) Act, 1967 (Act No. 18 of 1967), s. 2 of which reads as follows:

> "— (1) Notwithstanding the provisions of any other enactment having the force of law in the Gambia, the Supreme Court shall have jurisdiction to dissolve by decree any marriage at the instance of either party thereto in the following circumstances:-
>
> (a) The marriage was in monogamous form recognised by the law of the Gambia; and (b) since the celebration of the marriage one of the spouses has in good faith and to the satisfaction of the court became converted to a religion which recognises polygamous marriages and the other spouse has not become so converted."

This additional ground for divorce was enacted after the lower courts decision in *Drammeh's* case but before it was heard by the Privy Council. Though clearly not applicable to *Drammeh's* case, it is submitted that it should have been brought to the attention of the Privy Council who would have realised that as the law in the Gambia now stands, a wife in the position of the petitioner would be able to obtain a divorce without having to rely on adultery. Then perhaps the Privy Council would have felt free to take into consideration the definition of adultery when making its decision.

The above criticism of the Privy Council may seem somewhat short-sighted inasmuch as it does not consider the possibility that the Board may have been applying the "functional test" in deciding both *Reid's* and *Drammeh's* case. This functional approach involves the court's considering the purpose for which the validity of the polygamous marriage is in issue and, depending on the proper law applied in each instance, the same marriage could be held valid for one purpose and invalid for another purpose. If the Privy Council did in fact proceed on this principle, then their decision in *Drammeh's* case would be correct and consistent with both their decision in *Reid's* case and the traditional definition of adultery. Drammeh's second marriage therefore would be valid in the context of a bigamy prosecution if he had been so charged, (following *Reid's* case), but invalid in an action for divorce by his first wife on the ground of adultery (the proper law applied being the "Christian" law applicable to the first marriage, on the basis that it has the closest connection with the marriage). Whatever the merits of that approach may be, it is submitted that the Privy Council did not have it in mind when deciding *Drammeh's* case. There is no indication whatsoever of such an approach anywhere in the judgement. In any case, it is submitted that the functional test could not be used in *Drammeh's* case as the kind of situation created by *Drammeh* and *Reid* is slightly different from that in *Baindail* v. *Baindail* ([1946] P. 122.) and other similar cases which gave rise to that approach. In the latter category of cases, polygamous marriages were not recognised by a "monogamous" society which, however, subsequently made concessions when the need arose. In the former category, polygamous marriages are acceptable in the countries where they are contracted and if they are declared valid for one purpose there can be no justifiable reason for finding them invalid for any other purpose. The writer finds some support for this view in the comments made by M.B. Hooker ([1967] 9 Mal. L. Rev. 383) when reviewing the eighth edition of Morris's, *Dicey and Morris on the Conflict of Laws*. Hooker appeard to be of the opinion that the book is of somewhat limited use in Malaysia and Singapore inasmuch as the traditional English conflict rules are inadequate to resolve the special problems that are peculiar to this region. In relation to the case of *A.G. of Ceylon* v. *Reid*, Hooker says: "In the context of this note the point is that English conflict rules do not have the necessary machinery for deciding as a matter of principle the position in regard to such "conversion" marriages. Further this is not just a matter of principle alone, since a decision which is valid according to English conflict rules as in *Hertogh's* case ([1951] 17 M.L.J. 12) may be followed by undesirable practical consequences. Thus the decision in *Hertogh* was followed by several days of rioting in Singapore." It is submitted therefore that the Privy Council did not apply the functional test, and that therefore their decision in *Drammeh's* case is either inconsistent with their decision in

Reid's case or alternatively, it substantially changes the definition of adultery. Though this case is not binding on Malaysian courts, it exercises persuasive authority and is especially important because so many similar cases arise here. Adultery is a ground under all the ordinances in force in Malaysia relating to divorce (see s. 7, The Divorce Ordinance, 1952; Ordinance No. 74 of 1952, States of Malaya; s. 6, The Matrimonial Causes Ordinance, 1932, Chap. 94, Laws of Sarawak; s. 7, The Divorce Ordinance, 1963, Ordinance No. 7 of 1963, North Borneo (Sabah). In Sabah adultery is the only ground available to a wife in circumstances comparable to that in *Drammeh's* case and as such *Drammeh's* case would be most significant there. In Sarawak, a wife has the alternative of proceeding under s. 6(2) of The Matrimonial Causes Ordinance which gives the court a discretion to grant a decree of dissolution of marriage where circumstances have arisen which make it reasonable and just that the marriage should be dissolved. However, it is difficult to say whether a *Drammeh*-type situation would move the court to exercise its discretion in favour of the petitioner. In the States of Malaya, it is submitted, adultery need not be relied on as a ground because s. 7(2)(a) of the Divorce Ordinance entitles a wife to petition for a divorce when her husband contracts a marriage with another during the subsistence of the prior marriage. As such the doubtful decision in *Drammeh's* case need not be resorted to

Mehrun Siraj

CALLING A SPADE A PICKAXE

Government of Malaysia v. *Lionel*[1]

The respondent, Lionel, was appointed a temporary clerk interpreter in 1953 with the Police Clerical Service on a contract of employment which incorporated the right of either party to terminate the contract. In 1962 disciplinary action was instituted against him for alleged breaches of discipline. His attempt to exculpate himself made no impression on the Chief Police Officer who proceeded to terminate his services. The Privy Council set aside the order of the Federal Court and ruled that the trial judge was correct in deciding that the respondent's employment was terminated in accordance with the terms of his appointment. As such a

[1] [1974] 1 M.L.J. 3.

termination did not constitute dismissal, there was no merit in the respondent's argument that his dismissal was void for failing to comply with Article 135 of the Malaysian Constitution. The relevant provisions of that Article provide:

> "(1) No member of any of the [public] services. . . shall be dismissed or reduced in rank by an authority subordinate to that which, at the time of the dismissal or reduction, has power to appoint a member of that service of equal rank. (2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard."

As a preliminary observation, it may be stated that the Privy Council has happily corrected the erroneous impression created by H.T. Ong, C.J. (as he then was) in the court below that Article 135 guaranteed public servants a security of tenure ([1971] 2 M.L.J. 172, Federal Court). It is difficult to perceive the basis on which Ong C.J. concluded that the protection was anything more than procedural. Article 135 of the Constitution makes it clear that a dismissal can be effected by an authority with power to appoint a member of that service of equal rank, provided he first affords the public servant concerned an opportunity of being heard. The Privy Council by emphasing that the constitutional safeguards gave a "degree of security of tenure" was in fact restating a proposition of law already enunciated by Winslow J. in *Amalgated Union of Public Employees* v. *Permanent Secretary of Health* ([1965] 2 M.L.J. 209) and by Suffian F.J. (as he then was) in *Haji Ariffin* v. *Government of Pahang* ([1969] 1 M.L.J. 6).

Of more fundamental interest is the Privy Council's ruling which appears to establish the primacy of contract over constitutional safeguards. If the Government has the option of either terminating the service in accordance with the terms of the contract or dismissing for misconduct, and it chooses the former course of action, Article 135, according to the Privy Council, is not attracted. This is apparently so "even though misconduct is also present and even though that is a real reason for the action taken" (dictum of Bose J. in *Parshotam Lal Dhingra* v. *Union of India* A.I.R. 1958 S.C. 36, cited approvingly by Suffian F.J. in *Haji Ariffin's* case, *supra*). Whilst *Haji Ariffin's* case envisaged a situation where the Government had to decide which course of action to take *before* any disciplinary proceedings were undertaken, *Lionel's* case has clearly steered our law into more dangerous waters by ruling that even *after* the institution of disciplinary proceedings, the Government still has the final choice of dismissing or terminating in accordance with the terms of engagement. The Government has thus been given blanket-authority to raise the banner of contract to side-step constitutional safeguards. In *Lionel's* case, for example, a deft manoeuvre at the eleventh hour successfully ousted the applicability of Article 135.

It must not be forgotten that Article 135 is directed towards regulating

dismissal procedures in an area where arbitrary action could undermine the image and ultimately the durability of the public service. Whilst an arrangement by contract, entered into by the free will of the contracting parties, ought to be given effect in law, it ought not to be allowed currency as a contrivance for setting aside an important constitutional right. It is well to keep foremost in one's mind that when a critical constitutional right is under review an interpretation least restrictive of that right ought to be adopted. Ong C.J.'s view in the Federal Court that "calling a spade a pickaxe does not alter the character of that agricultural implement" provides the clue to an alternative interpretation, which would give efficacy to constitutional protections. It is respectfully submitted that a statement that the termination of service rests on a right flowing from contract should be no more than *prima facie* evidence that this is in fact so. The courts should undertake a vigorous scrutiny of every purported termination to ensure that the constitutional safeguards are not abrogated by allowing what is really a dismissal to be clothed in contractual garb. The penalty test, that is, 'whether evil consequences such as forfeiture of pay or allowances, loss of security. . . follow," (*Lord Hodson J.* in *Munusamy* v. *P.S.C.* [1967] 1 M.L.J. 199 P.C.), would be a useful criterion in this determination, provided it is recognised that losing a livelihood is as much a penalty as is forfeiture of pay or loss of seniority. The need for such an approach is made all the more imperative when it is realised that most Government servants are subject, or can be readily made subject, to the kind of contract under which Lionel was engaged. Following the Privy Council approach, this constitutional safeguard will soon be relegated to a capacity so marginal as to be undeserving of constitutional status.

Unfortunately the emphatic ruling by the Privy Council may have already placed our Courts in a straight-jacket and constrained them from ever correcting this injustice. The necessary return to basal principle may only be possible by a short amendment of Article 135 bringing terminations which presuppose disciplinary proceedings within the purview of its protection. Amendments of the Constitution have never been taboo to our legislators. At least this once it would be in protection of a fundamental personal right.

Gurdial Singh Nijar

A LESSEE AND A REGISTERED PROPRIETOR UNDER THE NATIONAL LAND CODE

Lee Chuan Tuan v.
Commissioner of Lands and Mines, Johore Bahru[1]

The registered proprietor of a piece of land, in excess of twenty-nine acres in area, granted a lease to the applicant for seventy-five years. The lease in the statutory form was registered at the Land Office. The lessee was entitled to subdivide the land for the purposes of developing it into a residential area. He applied to the Collector of Land Revenue for approval to subdivide the land. This application was refused as was a subsequent one by the Commissioner of Lands and Mines. The two questions for determination in this originating summons were firstly, whether a lessee in the circumstances of this case is a registered proprietor within the meaning of the National Land Code. The Court answered this in the negative. Secondly, if he is not, whether the lease gives power to the lessee to apply to the Commissioner of Lands and Mines for subdivision of the leased land. This too, the Court answered in the negative.

In support of the first ground, the applicant relied on the definition of "proprietor" in Francis *Torrens Title in Australia* (Vol. 1 at pages 49 and 50) as being "any person seized or possessed of any estate or interest in land, at law or in equity, in possession or expectancy." On the lessee's view this definition was persuasive authority in Malaysia because of its connection with Australia – the cradle of the Torrens system. He claimed it extended the meaning of "proprietor" to include a lessee. Syed Othman J. quite rightly rejected this contention, noting that the "provisions of Australian laws have no force in this country. . . unless Parliament so enacts." (p. 189). In the alternative the lessee claimed the wording of section 227, which reads:

> "(1) The interest of any lessee, . . . shall, whether or not it takes effect in possession, vest in him on the registration of the lease. . .
>
> (2) The said interest shall include the benefit of all registered interests then enjoyed with the land to which it relates,"

entitled him on registration of the lease to claim the rights of the proprietor of the land. His argument was that the registration which created his interest as proprietor of the lease extended this proprietorship to that of ownership of land. This contention was also rejected: "the

[1] [1973] 2 M.L.J. 188.

'registered interests' here can only refer to those interests which are registered in accordance with the Code or any previous land law. The expression here does not mean powers of the proprietor conferred by law." (p. 189).

On the second question for decision the applicant had relied on the terms of the lease as authorizing him to take over the rights and powers of the proprietor in applying for approval to subdivide. He argued that the terms of the lease read in conjunction with section 135(1) – ". . . the proprietor . . .may . . .with the approval . . .of the State Commissioner or Collector. . . subdivide the land. . . ," authorized him to apply for approval if the proprietor himself did not do so. Syed Othman J. expressed the view that:

> "When Parliament enacts that a particular person may do a thing it means that only that person may do the thing and no one else and that the word 'may' in the ordinary usage and in the context of section 135(1) is permissive in the sense that it gives a personal discretion to the proprietor; it is a matter for him whether or not he wishes to subdivide the land. I can find no way in which the word 'may' in this section may be construed as enabling other persons to apply for sub-division if the proprietor does not do so."

Why one may reasonably inquire, does this case merit comment? Why indeed did this case ever come to court? The Code states unambiguously that a proprietor of land is the owner and proprietor; no one else is able to be so designated. Yet this was precisely the issue queried here. The National Land Code, 1965 (Act No. 56) is a codifying enactment promulgating a uniform "Torrens type" system of conveyancing throughout West Malaysia. Torrens, in introducing the system in 1858, had presented it as one removing "involvement, uncertainties and expenses" (R.R. Torrens, "*A Handy Book on the Real Property Act of South Australia* p. 3) from the Australian land law then in force – the general law transported from England to the Colonies. The Torrens system, he argued, would enable the "man in the street" to do his own conveyancing; to read and understand the meaning of the statute; to follow the procedures laid down therein. So what then has gone wrong? Here we find a lessee seeking to claim inclusion within the definition of a proprietor, defined by section 5 of the Code as – "any person or body for the time being registered as the proprietor of any alienated land." Although a man who takes over the land of another with exclusive possession thereof for a substantial fixed term can compare himself to an owner for certain reasons because he is probably paying the quit rent to the State Authority and all outgoings connected therewith, and because within his lifetime he will – if the lease is not forfeited or otherwise determined – be entitled to the exclusive possession of that land, yet he cannot be said to be the proprietor of that land within the unequivocal meaning of section 5. The only way he may become the

proprietor is by purchasing the reversion.

The Torrens system has, since its introduction in 1858, been described as a simple, effective method of conveyancing, meant "to simplify the title to land and to facilitate dealings therewith. . . " (South Australian, Real Property Act, Section 10). These are times of specialization, of advanced technology. Yet when we seek simplicity and clarity in a Torrens-type enactment, to escape the growing complexities of life requiring expertise in all pursuits, its meaning is confused and misinterpreted. Whether or not such an exercise is possible in Malaysia today, it is of no value for us to seek explanation of the Malaysian National Land Code by reference to Australian sources. There the original Torrens concept authorizes the use of equitable principles which serve only to clutter up a system of legal rights by registration. Nay more, this original concept is now being replaced by an "up-grading" in the importance of equitable interests, even for those obtained in breach of the traditional equitable doctrines (see *J.H. Just (Holdings) Pty. Ltd.* v. *Bank of New South Wales Ors.* (1971) 45 ALJR 625). The modern surge of equitable interests is replacing legality and any similarities between the two systems are fast disappearing. Technically there is no place for equitable interests in the Malaysian Torrens system. Equitable interests are not maintained yet they receive a grudging protection of sorts. Australia's development and evolution of Torrens enactments is not appropriate for the legalistic aura of our Torrens system. But are we now being bogged down by the very things that the Torrens system sought to eliminate? Does "the man in the street" understand "equitable" estates or "legal" interests? How can he rely on the face of the title in situations where equitable concepts prevail. At least up to now in the Malaysian scheme equitable concepts are subordinate – but for how long?

Torrens said every man should be his own conveyancer and proceeded to adapt the concepts and legislation of the Merchant Shipping Acts to land. Simplicity in land dealings is essential in any nation no matter what its stage of development. But have the Torrens principles moved with the times? One hundred and fifteen years after Torrens, we are still seeking complex interpretations of the simple terms of the Code. Dealings with land may still be easier than under general law conveyancing – but easier for whom? For the farmer buying or leasing his padi? For the citizen buying his land and home for the first time? For the practitioner acting for his client? In these times the inappropriateness of the original Torrens enactments is strikingly brought home to us by the necessity for a lessee to seek Court guidance on whether or not he can be classified as a "proprietor".

Judith Gleeson.

NATURAL JUSTICE IN SCHOOLS

Mahadevan v. *Anandarajan*[1]

This decision of the Judicial Committee of the Privy Council brings to a close yet another of the numerous cases on the application of the principles of natural justice to quasi-judicial hearings. What would be of special interest to many is the fact that this particular decision concerns the discretionary power of the headmaster of a school to suspend or expel a pupil by virtue of Regulation 8 of the Education (School Discipline) Regulation, 1959, of Malaysia which provides:

> "Whenever it appears to the satisfaction of the head teacher of any school –
>
> (a) to be necessary or desirable for the purpose of maintaining discipline or order in any school that any pupil should be suspended or expelled. . . he may by order expel him from such school."

There was no controversy over the proposition that a head teacher is thereby invested with a quasi-judicial function. What was in contention was the implementation of Regulation 8 which prescribes no special form of procedure for exercising the function.

The appellant, then a minor, was expelled from his school, the King George V School, Seremban, for alleged misbehaviour at a talentime show held in the school on 1st April, 1968. The respondent, headmaster of the school, interviewed the appellant the following day and after consulting members of the teaching staff, made up his mind about the expulsion on 10th April. However he did not convey this decision to the appellant until 4th May, 1968, his reason being that the school was about to close for the first term holidays and he, the respondent, had to leave for Johore Bahru on official business.

These findings of fact were accepted by the trial judge in the judgement of the High Court ([1970] 1 M.L.J. 50). He held that the language used in Regulation 8 supported the view that the order of a head teacher is quasi-judicial and not merely administrative, thus the making of the order required the observance of the rules of natural justice. These rules, as enumerated by Lord Hodson in *Ridge* v. *Baldwin* ([1964] A.C. 40, 132), are: ". . . (1) the right to be heard by an unbiased tribunal. (2) the right to have notice of charges of misconduct; (3) the right to be heard in answer to these charges." As to the first requirement, both the trial judge and the

[1] [1974] 1 M.L.J. 1.

majority of the Federal Court ([1971] 2 M.L.J. 8) found that the respondent had not been actuated by any unlawful motive in expelling the appellant. However, Gill F.J., and Suffian, Ag. L.P. (as he then was), did not agree with the trial judge's further finding that the requirements of natural justice had not been fully complied with because the respondent had not, at the time of questioning the appellant, informed him specifically that he would be expelled if he did not provide a satisfactory explanation. Whereas the trial judge had made a declaration that the explusion order was null and void and of no effect on this ground, the Federal Court reversed this decision by holding that Regulation 8 enabled a headmaster to determine a procedure which in his opinion would best comply with the requirements of natural justice; and furthermore that since a quasi-judicial body is not bound to treat an inquiry as a judicial hearing, a headmaster is not required to hold an elaborate inquiry before making an explusion order. A school, on this view, fits within the vast category of cases in which the natural justice rule of *audi alteram partem* can only be applied upon the most general considerations. Accordingly, the Federal Court held, with Ali F.J., dissenting, that the procedure followed by the headmaster satisfied the rules of natural justice.

The appellant's three grounds of appeal to the Judicial Committee were first, as the trial judge and Ali F.J. had concluded, that the rules of natural justice had been contravened by not specifically informing the appellant of the penalty contemplated; secondly that the appellant should have been given an opportunity to consult his parents before answering the headmaster's questions at the interview on 2nd April; and thirdly, that the headmaster had wrongly taken into account another instance of misconduct by the appellant which occurred before he had become headmaster, and which was reported to him for the first time when he was obtaining the views of his fellow teachers. The second argument, which was not specifically referred to by the Federal Court, was summarily dismissed by the Judicial Committee, which held that the 17-year old youth was old enough to proffer his own explanations for his misconduct. Natural justice rules were sufficiently satisfied so long as he had been given an opportunity to put forward his explanation in answer to the charges made. As for the previous report of misconduct, which the respondent had taken note of after the interview and before the explusion order, the Board said that the appellant had been given the opportunity to explain it at the time the misconduct had been discovered. Accordingly, the headmaster was not under a duty to invite another explanation from him. With regard to the main contention, which had caused differences of opinion between the High Court and Federal Court judges, their Lordships on the Judicial Committee found themselves in agreement with the majority opinion of the Federal Court. Natural justice did not require the headmaster specifically to inform the appellant that he intended to expel him if a satisfactory

explanation was not forthcoming. Nothing more than the appellant's knowledge of the risk of explusion was necessary. This, as the trial judge had found, was apparent to the appellant during the interview.

Their Lordships took this opportunity to restate the requirements of natural justice in administrative matters such as the expulsion of a pupil from a school in the following terms: ". . . it would be quite inappropriate to model the procedure on that of a criminal trial. All that natural justice requires is that the person charged with making the decision should act fairly. What is fair depends on the circumstances and is a matter of commonsense." Although this formulation does not add anything new to the principle of *audi alteram partem* as enunciated in recent English and Commonwealth cases, it has added to the category of situations in which the rule is applicable. Such is the language of Regulation 8 that head teachers have been endowed with wide subjective powers of suspension and expulsion. While it can be conceded that the object to be achieved, namely the maintenance of discipline and order in schools, is a necessary and commendable one, yet the powers conferred essentially impinge on the status, if not also the reputation and future livelihood, of pupils affected. In the interest of fairness to pupils, the importation of natural justice rules to regulate the enforcement of powers conferred by Regulation 8 is a necessary restriction. Conversely, it should be accepted that the subjective satisfaction of a head teacher must not be subject to further judicial review for that would only impede his freedom of action to utilise the powers afforded him by the Regulation.

The circumstances of this case indicate that their Lordships have refused to allow any unprecedented extension of the *audi alteram partem* rule which would necessitate the headmaster giving some kind of "caution" to the pupil as to the specific action to be taken. It is reasonable enough that some form of guideline has been laid down whereby a pupil is protected from arbitrary decisions adversely affecting him. From their Lordships' remarks an inference could safely be drawn to negate any suggestion that a pupil of a school has no right whatsoever under the Education Act. The trend of modern decisions has clearly illustrated that students of universities are in principle entitled to natural justice when they are faced with a disciplinary charge, be it explusion for alleged cheating (*University of Ceylon* v. *Fernando* [1960] 1 All E.R. 631), or being sent down for failure in examinations (*R.v. Senate of the University of Aston, ex p. Roffey & Anor.* [1969] 2 All E.R. 964).

The application of this principle to school pupils is undoubtedly a healthy sign that the courts today are more willing to exercise their discretion in applying the rules of natural justice whenever administrators or persons in authority have their decisions or acts impugned for not observing the fundamentals of fair procedure. Though ideas of fairness may vary and the range of factual situations in administrative matters is

obviously great, yet bodies vested with discretionary powers may now undertake more readily to observe minimum standards of procedural fairness.

Azmi Khalid

NOTES ON LEGISLATION

Akta 123 . . . . . Akta Biro Siasatan Negara, 1973.
Biro Siasatan Negara Act, 1973.

A naive observer might be forgiven if he comes to the conclusion that Malaysia subconsciously seeks to emphasise its similarities with the U.S.A.. Both countries are federations, were formerly dominated by the British, revere the common law, fly a flag with 13 Stripes and so on. This superficial similarity seems to be further enhanced with the establishment of the Malaysian equivalent of the F.B.I. – the National Bureau of Investigation which replaces the Badan Pencegah Rasuah, or, Anti Corruption Agency.

By section 3(i) of the Biro Siasatan Negara Act, 1973, there is established, for purposes of this Act, the Prevention of Corruption Act[1] and any other legislation (referred to as "prescribed law")[2] to which the Minister may extend the provisions of the Act, a bureau known officially as "Biro Siasatan Negara" (or in English, the National Bureau of Investigation). Provision is made for the appointment of a Director-General of the Bureau by the Yang DiPertuan Agung acting on the advice of the Prime Minister[3] and for the appointment of officers of the necessary classes or grades[4]. It is further provided that the Directive-General shall have all the powers of an officer of the Bureau.[5] This official is also vested with the powers of a Deputy Public Prosecutor under the Criminal Procedure Codes of the Federated Malay States, the Straits Settlements, Sabah and Sarawak.[6] In connection with the Prevention of Corruption Act, 1961, and any prescribed law, officers of the Bureau are given all the powers of a police officer[7] and a customs officer[8] appointed under the Police Act, 1967[9] and the Customs Act, 1967[10], respectively, and it is

[1] Act 57.

[2] s. 2.

[3] s. 3(2).

[4] s. 4.

[5] s. 5(1).

[6] s. 5(1).

[7] s. 5(2).

[8] s. 5(2).

[9] Act 41/67.

[10] Act 62/67.

expressly provided that the Criminal Procedure Code as may be applicable (i.e. in that particular part of the Federation) shall be construed accordingly.[11] It is submitted, therefore, that unless the relevant legislation expressly makes provisions to the contrary an officer of the Bureau while exercising his functions under any law to which the provisions of this Act apply, would impliedly be subject to the same limitations and duties as are placed on a police (or customs) officer by the relevant Criminal Procedure Code; and that therefore the observations of Ong Hock Sim, F.J. in *Nathan* v. *P.P.*[12] would not be applicable to officers of the N.B. I.

Provision is also made[13] to empower the Minister, from time to time to prescribe (by means of order published in the Gazette) any legislation with respect to which provisions of this Act shall apply. The Minister may specify, in the same or subsequent order, that an officer of a class or grade of the Bureau shall be regarded for the purpose of the law to be equivalent to an officer of a class or grade under the prescribed law.[14]

It seems to be implied that a person who is being investigated or questioned by an officer of the N.B.I. under the Prevention of Corruption Act, 1961,[15] or any prescribed law, can demand that the investigating (or interrogating) officer declare his office and produce such authority card as the officer is directed to carry by the Director-General[16]. Should the officer refuse to declare his office and produce his authority card on demand the person so demanding would not be guilty of an offence if he refuses to comply with any request, demand or order made by such officer of the Bureau.[17] Finally, there is the usual provision that all officers of the Bureau shall be deemed to be public servants within the meaning of

[11] Act 123, s. 5(2), (3).

[12] "I would also note another unsatisfactory aspect of the case, which is the learned president's approach on the question of the credit to be given to Mr. Manickavasagam (PWI). He would reject the evidence of PWI solely by reason of the failure of the Anti-Corruption Agency officers who interviewed Manickavasagam on the 17th-18th February, 1970, to record a "first statement", I may add here that he has thereby misdirected himself in regard to this failure of the Anti-Corruption Agency officers to record that which he termed a first information in writing. . . . The officers, though members of the police force, were not, in my view exercising functions or powers under Cap. XIII Part V, (Criminal Procedure Code), [of the Straits Settlements] "but were acting under directions of the Anti Corruption Agency." [1972] 2 M.L.J. 101, 102.

[13] Act 123, s. 6(1).

[14] Act 123, s. 6(2).

[15] Act 57.

[16] see Act 123, s. 7(1).

[17] Act 123, s. 7(2).

the relevant Penal Code that is in force in that particular part of the Federation.[18]

In conclusion it may be appropriate to make reference to the Bahasa Malaysia text of the Act. By virtue of the provisions of the National Language Act[19] all Acts of Parliament must be in the National Language (Malay) and in English but the Malay text is authoritative unless the Yang DiPertuan Agung otherwise prescribes.[20] It would, therefore, appear to be desirable that a standard terminology be maintained in the Malay text of all laws. It is somewhat unfortunate in this connection that the Akta Biro Siasatan Negara, 1973 refers to the Criminal Procedure Code as "Kanun Acara Jenayah" while in the Malay version of the Penal Code,[21] the Kanun Keseksaan,[22] the Criminal Procedure Code is referred to as "Kanun Peraturan Jenayah"[23] [The writer has also seen "unofficial" versions of the Malay translation of the Criminal Procedure Code itself entitled "Undang-Undang Acara Jenayah"!

I.S.A.

Akta 206 – Akta Perlembagaan (Pindaan) (No. 2) 1973. Constitution (Amendment) (No. 2) Act, 1973.

While this Act appears to provide, *inter alia*, the machinery for the severance of [Greater] Kuala Lumpur from the State of Selangor and its establishment as "Wilayah Persekutuan", or the Federal Territory, it can be viewed, less prosaically, as another fascinating facet in the panorama of a much amended Constitution.[1]

The setting for this Act was laid by the earlier Constitution (Amendment) Act, 1973[2] which provided,[3] *inter alia*, for the amendment of

[18] i.e. the 'Penal code in force in the States of Malaya or the Penal Code in Sabah or Sarawak as the case may be [s.2].

[19] Act 32 (Revised 1971).

[20] Act 32, s. 6.

[21] F.M.S. Cap. 45.

[22] Translated in the Attorney-General's Chambers.

[23] Kanun Keseksaan (N.M.B. Bab 45) s. 86 (i).

[1] The Constitution of the independent Federation has been amended 17 times, at least, since its promulgation in 1957 and thus averages slightly more than one amendment for each year of independence.

[2] Akta A193.

[3] Akta A193 S. 6.

S.19(5) of the 8th Schedule to the Federal Constitution. The 8th Schedule contains provisions known as "essential provisions" which must be inserted in the Constitution of all the States of the Federation. On the event of the failure by any State to include such essential provisions in its Constitution, Parliament is empowered to make laws to give effect in that State to such essential provisions[4]. Subsection (4) of Section 19 of the 8th Schedule states that, generally, bills for amending the State Constitution shall not be passed unless supported by two-thirds of the total membership of the Assembly. Subsection (5) refers to matters where amendment to the State Constitution is permitted without the necessity of a two-thirds majority and the earlier Constitution (Amendment) Act, 1973 had amended Section 19 (5) of the 8th Schedule to the Federal Constitution by adding a new clause (aa) so that the definition of the territory of a State can be amended by a mere simple majority if the amendment is consequential upon the passing of a law altering the boundaries of the State with consent given by the Legislative Assembly and the Conference of Rulers under Article 2 of the Federal Constitution.

The Legislative Assembly of the State of Selangor consequently enacted the Selangor Constitution (Amendment) Enactment, 1973.[5] This Enactment first recites:

> "WHEREAS section 19 of the Eighth Schedule to the Federal Constitution has been amended to include a new provision which shall be incorporated in the State Constitution;
>
> "AND WHEREAS the amendment to incorporate the aforesaid new provision shall not* be required to be supported by the votes of not less than two-thirds of the total number of members of the Legislative Assembly" . . .

The Enactment goes on to provide, in effect, that Article XCVIII of the Selangor State Constitution is amended so that a simple majority is sufficient for an amendment to the definition of the territory of the State which is made in consequence of the passing of a law altering the boundaries of the State under Article 2 of the Federal Constitution.

The earlier Constitution (Amendment) Act, 1973 and the Selangor Constitutional (Amendment) Enactment, 1973 thus seem designed to ensure that even if a two-third majority was not forthcoming[6] in the

[4]Federal Constitution Article 72(4).

[5]Selangor Enactment No. 1 of 1973.

[6]The Selangor Legislature as constituted on 1st May 1973 was made up on the basis

*This may not be entirely correct. See the discussion that follows.

State Assembly, the State Constitution could be amended to facilitate the excision of the proposed Federal Territory from Selangor and its handing over to the Federal Government. (It may be noted in passing that at the Federal Parliamentary level a two-thirds majority is not required since, according to Article 2 of the Constitution, Parliament may by law alter the boundaries of any State.) According to the Federal Constitution, the Selangor Constitutional (Amendment) Enactment itself, being an enactment the effect of which is to bring the Constitution of Selangor into accord with the provisions of the 8th Schedule to the Federal Constitution, needed only a simple majority to be passed.[7] However, the Article in the Selangor State Constitution dealing with amendments thereto, i.e. Article XCVIII, does not appear to contain[7a] a provision similar to the one in the Federal Constitution. (This is in contrast with, for example, the position under the Laws of the Constitution of Perlis which states, in effect, that a two-thirds majority is not needed for "any amendment the effect of which is to bring this Constitution into accord with any of the provisions" of the Eighth Schedule to the Federal Constitution.[7b]) Therefore, there is the probability that, despite its recital, the Selangor Constitutional (Amendment) Enactment, 1973 still requires a two-thirds majority before it becomes law. On the other hand, Article I of the Laws of the Constitution of Selangor, 1959, provides, *inter alia,* that the State Constitution "shall be read subject to the Federal Constitution" and perhaps this provision could be used to argue in favour of the proposition that the essential provisions in the 8th Schedule of the Federal Constitution override the limitations of the State Constitution. Article 2 of the Federal Constitution also provides that no such law altering the boundaries of a State shall be passed without the consent of the Conference of Rulers and of the Legislature of that State. The consent of the Legislature must be expressed by a law made by that Legislature.[8] Accordingly, the Selangor State Legislature passed the Federal Territory Enactment, 1973[9] to "give

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of party membership as follows:-

Alliance (Ruling Party)	16
DAP	6
Pekemas	3
Gerakan	1
Independents	2
Total	28

Thus the ruling party would have had to get the support of 3 other members in order to get a two-third majority of 19 votes.

[7] Federal Constitution 8th Schedule Section 19(5)(b).

[7a] So far as the writer can ascertain!

[7b] Laws of the Constitution of Perlis, Article 4(5)(b).

[8] *vide* Federal Constitution Article 2.

[9] Selangor Enactment No. 4 of 1973.

consent under Article 2 of the Federal Constitution."

The Federal Territory Enactment, 1973 recites that it has been agreed between the State of Selangor and the Federation of Malaysia that the Federal Territory shall be established. It also recites that the Conference of Rulers has consented to the establishment of the Federal Territory and to the alteration of the boundaries of the State of Selangor as contained in Part I and the Schedule to the Constitution (Amendment) (No. 2) Bill, 1973,[10] and that the Conference of Rulers has consented to the passing of the said Part I and the Schedule.

The Enactment then provides[11] that the boundaries of the State of Selangor are altered by the exclusion of the Federal Territory which shall consist of the areas shown in the deposited plan. (Reference will be made to this plan *infra* in relation to the discussion of the substantive Federal Act, Akta A206.) It is further provided[12] that the definition of "State" under Article XLVI of the Laws of the Constitution of Selangor is amended so as to exclude the areas of the Federal Territory. This is necessary because by virtue of the Interpretation Article (Art. XLVI) of the Second Part of the Laws of the Constitution of Selangor, 1959 the word "State" included "all the dependencies, islands and places which on the first day of December, 1941, were administered as part" of the State of Selangor.

Section 3 of the Enactment clarifies the exclusion of the Federal Territory by expressly stating that it shall cease to form part of the State and that the State Ruler shall relinquish and cease to exercise any sovereignty over the Federal Territory. Furthermore, all power and jurisdiction of the Ruler and State Legislature in or in respect of the Federal Territory shall come to an end.

The requirement in Article 2 of the Federal Constitution, that the State Legislature shall express its consent to a (Federal) law altering the boundaries of that State, seems to be expressly borne in mind as Section 4 of the Enactment states that "consents are hereby given to:-

"(a) the alteration of the boundaries of the State . . . .
(b) the establishment of the Federal Territory . . .
(c) the transfer of jurisdiction, powers, rights and prerogatives (specified in the Bill) and
(d) the execution of an agreement" between the Paramount Ruler of the Federation (the Yang DiPertuan Agung) and the State Ruler (the Sultan) "setting out, *inter alia*, provisions relating to financial arrangement with regard to the Federal Territory."

[10] The present Akta A206.

[11] Section 2.

[12] S.2(3).

The Schedule to the Enactment recites the relevant provisions of the Constitution (Amendment) (No. 2) Bill, 1973.

In passing it may be noted that the Constitution of Selangor does not appear to contain any provision declaring it unlawful for the Ruler to enter into any negotiation relating to the cession or surrender of the State or any part thereof. A provision such as the one appearing in the Kelantan Constitution, however, may cause problems. The Laws of the Constitution of Kelantan, Second Part, Article XXXIV states, "It shall be unlawful for the Sovereign or any other persons or body of persons to surrender or cede the State and Territories of Kelantan and its Dependencies or any part thereof."[12a] Thus should there ever be a necessity to excise, say, Kota Bahru, the capital of Kelantan and convert it to Federal Territory, and should there be significant opposition in the Kelantan State Legislative Assembly then, presumably, section 19(5) of the 8th Schedule to the Federal Constitution would be amended to permit the Kelantan Legislative

[12a] A slightly different provision can be found in Part I of the Laws of the Constitution of Perak. Article XXII states:

"(1) It shall be unlawful for the sovereign without the knowledge, advice and consent of the Dewan Negara* and the concurrence of the Legislative Assembly—

"(a) To surrender or cede the State or any part thereof;

"(b) to make any treaty, enter into any negotiation, agreement or plan to surrender or cede the State or any part thereof;

"(c) to enter into any treaty or engagement to altering the position of the State.

"(2) Such surrender or cessation or the making of any treaty or the entering into any negotiation, agreement or plan to surrender or cede without the knowledge and advice of the Legislative Assembly shall be null and void and shall have no effect."

The legal historian may also be interested in the now wholly superceded 1911 Constitution of Trengganu — "The Constitution of the Way of Illustrious Sovereignty" — which provided in Chapter Twenty-Six:

"It is not lawful and right in any way for ministers and the Council of Regency to plan or execute any treaty with any race or Government for the purpose of surrendering the country and Government of Trengganu or derogatory to the authority and interests of the Trengganu Government. If this restriction and provision is disregarded they must be accounted as guilty of treason against the Raja and the Government and may be punished in accordance with their crime and if they act contrary to what is right then the blame rests upon them and not in any way upon the Raja."

[From an unofficial translation, made by W.A.C. Goode, Esq., M.C.S., reprinted in Malayan Constitutional Documents, 2nd Edition, Vol. 2, p. 391].

*This is a body established under Article LVII of the Second Part of the Laws of the Constitution of Perak, to aid and advise the Perak Sultan in the exercise of certain of His functions, and should not be confused with the Senate or Upper House of the Federal Parliament.

Assembly to repeal Article XXXIV by an enactment requiring a simple majority. Against this background we can now consider the Constitution (Amendment) (No. 2) Act, 1973 (hereinafter referred to as "the Act"). The preamble to the Act states that it is "An Act to amend the Federal Constitution to make provisions for the establishment of the Federal Territory, for the allocation of members of the House of Representatives by States and for matters connected therewith." While the stress and publicity has been laid on the provisions for the establishment of a Federal Territory separate from the State of Selangor it is submitted that what is more vital and perhaps of more long-lasting significance to the nation are the other amendments which may, at first glance, seem merely consequential to the establishment of the Federal Territory. These latter amendments relate to the provisions regarding elections and electoral constituencies.

It is therefore proposed in this note to discuss these two sets of provisions separately. This task is facilitated by the fact that each set of provisions comes into force on a different day. While Part I and the Schedule, which both relate to the Federal Territory, come into force on 1st February 1974,[13] or Federal Territory Day, the other provisions of the Act come into force on the date of publication of the Act in the Gazette.[14]

PART A—AMENDMENTS DEALING WITH THE FEDERAL TERRITORY

Part 1 of the Act deals with the Federal Territory. It provides that the boundaries of the State of Selangor are altered by the exclusion of the Federal Territory.[15] It should be noted that the Federal Territory is not merely what was previously known as Kuala Lumpur but is a much larger area. Under Article 154 of the Federal Constitution it is provided that until Parliament otherwise decides, the municipality of Kuala Lumpur shall be the federal capital. (Kuala Lumpur attained City Status on 1st February 1972 *vide* City of Kuala Lumpur Act, 1971.*) Article 154 also provides that Parliament has the exclusive power to make laws with respect to the boundaries of the federal capital. In the Act the Federal Territory is identified by reference[16] to a plan "certified by the Chief Surveyor, Selangor, as a true and correct plan of the areas" incorporated in the Federal Territory and "dated and deposited in the office of the Chief Surveyor, Selangor."

[13] Act A 206, S. 1(3).

[14] Act A 206, S. 1(2). The date of publication in the Gazette was 23rd August 1973.

[15] S. 2(1).

[16] S. 2(2).

*Laws of Malaysia Act 59.

It is then provided that the Federal Territory shall cease to form part of the State of Selangor and sovereignty over the Federal Territory shall pass from the Selangor Ruler to the Federation and power and jurisdiction of the Ruler and State Legislative Assembly in or in respect of the Federal Territory shall pass to the Federation.[17] Under the 9th Schedule to the Federal Constitution, land (including mineral rights) and forests fall within the State List and therefore would belong to Selangor State. Thus Section 5 provides for the transfer of all property in and control of all land, minerals and rock material within the Federal Territory vested in Selangor to the Federation without the necessity of any other formal transfer or conveyance. Further, all estates and interests in lands, mining rights and forest rights within Federal Territory held from Selangor State by any person, will henceforth be held from the Federal Government on the same terms and conditions as they were held from the State.[18]

There is provision in section 6 of the Act for the preservation and continuation of the operation of existing State laws in force in the Federal Territory until such time as Parliament passes laws to repeal, amend or replace them. One important result of this to Muslims in the Federal Territory would be that the penal provisions of the Selangor Administration of Muslim Law Enactment, 1952 would continue to apply to them. Consequential provisions[19] transfer powers and functions in relation to the Federal Territory vested, by such State laws, in the State Ruler or any authority in the State to the Yang DiPertuan Agung or the Minister responsible for the Federal Territory or to such persons or authorities as the Yang DiPertuan Agung may by order direct. Moreover, the authority in the State which previously exercised such power or function may continue to do so should the Yang di-Pertuan Agung so direct with the approval of the State. However, this power or function is to be exercised or performed on behalf of the Federal Government and for this purpose such authority of the State is deemed to be an authority of the Federal Government.

There is a separate provision[20] which deals with bye-laws of local authorities, where such a local authority area, or part thereof, becomes part of the Federal Territory. These bye-laws are to continue in force.

The Federal Government is given extremely wide (perhaps unnecessarily wide) powers under sub-section (4) of section 6, which reads, "The Yang DiPertuan Agung may, whenever it appears to him necessary or expedient so to do whether for the purpose of removing difficulties or in consequence

[17] SS. 3 and 4.

[18] S. 5(4).

[19] S. 6(2).

[20] S. 6(3).

of the passing of this Act, by order make such modifications to *any* provisions in any" Federal or State laws or subsidiary legislation made thereunder "as he may think fit." (italics added).

The Yang DiPertuan Agung is to act, of course, in accordance with the advice of the Cabinet or of a minister acting under the general authority of the Cabinet.[21] Therefore, we have a situation where the Federal Government by a simple executive decree, may apparently modify any law in the country and, since this sub-section is replete with expressions suggesting a subjective test of necessity or expediency, all that has to be done is to recite in the order that it appears expedient to the Yang DiPertuan Agung that in order to remove difficulties (a suitably vague phrase) the following modifications have to be made. And there is nothing in the Act to say that these modifications by executive decree will apply only to the Federal Territory. Indeed, they can apply to all parts of the country which are, otherwise, totally unaffected by the establishment of the Federal Territory. One is tempted to ask whether such wide powers are really necessary. It might be argued that one can rely on the Government to use these powers sparingly and solely with regard to legislation affecting the Federal Territory. Nevertheless, to borrow from a slightly different context the words of R.H. Hickling, a former Law Revision Commissioner (Malaya), this provision "opens the door to all manner of modifications, without the tedious necessity of obtaining the support" of Parliament.[22] And, to quote Hickling again, "[w]here a power exists, however, then sooner or later various pressures are liable to compel its exercise."[23] Since this Act excises the Federal Territory from Selangor State provision is also made to abrogate the State constituencies within the Federal Territory. However, the members of the State Assembly who represent these abrogated constituencies shall continue to be members of the Assembly until the next dissolution of the Assembly.[24] Somewhat surprisingly, it was felt necessary to provide that the present federal (or Parliamentary) constituencies "within the Federal Territory and the State of Selangor shall continue to exist" until the next dissolution of Parliament, and that the present members elected from these constituencies "shall continue to be members of Parliament."[25] Perhaps, this provision was designed for a

[21] Federal Constitution, Article 40(1).

[22] R.H. Hickling, "The First Five Years of the Federation of Malaya Constitution (1962) 4 *Mal. L.R.* 183, 203. This comment was made with regard to the 1962 amendments to Article 159 of the Federal Constitution.

[23] *Ibid*, p. 193. This comment was made with regard to the power to dismiss persons in the public service.

[24] Akta A206, S. 7(1).

[25] Act 35 of 1960.

case where a Parliamentary constituency, as presently delineated, straddles the Territory/State boundary.

The Federal Capital Act, 1960[26] which dealt with the administration of Kuala Lumpur will now apply to the whole of the Federal Territory.[27] The Act provides that the area of the municipality of Kuala Lumpur shall be extended as provided for in section 15(2) of the Federal Capital Act, 1960. It is made mandatory for the Yang DiPertuan Agung to appoint two persons nominated by the Ruler in Council of the State of Selangor to be members of the Advisory Board under section 6 of the Federal Capital Act, 1960, which Board shall advise the Government of the Federation upon matters connected with the administration of the Federal Territory.[28]

If on the commencement of the Act responsibility for a matter is transferred from the State Government to the Federal Government then all rights, liabilities and obligations relating to that matter shall devolve upon the Federation in the absence of any agreement to the contrary between the two Governments.[29] Insofar as financial liabilities and obligations were previously a charge on the State Consolidated Fund they shall now be a charge on the Federal Consolidated Fund but only to the extent of the transfer of such liabilities and obligations.[30] In any proceedings any interested party may apply to the Attorney General to certify whether by virtue of this section, a right, liability or obligation is that of the State or of the Federation. The Attorney General must give this certificate which will then be final and binding on all courts for the purpose of those preceedings.[31] Perhaps because the present Attorney General is a member of the Federal Cabinet, it is provided that the foregoing will not apply in the case of proceedings between the Federation and Selangor, nor shall the Attorney General's certificate operate to prejudice the rights and obligations, as between themselves, of Selangor and the Federation.[32]

[26]Act 35 of 1960.

[27]Akta A 206, S.8.

[28]The second Proviso to S. 8. It is interesting to note that at the Bill stage, the Federal Territory Enactment, 1973 (Selangor no. 4 of 1973) provided, in its schedule, that the Yang DiPertuan Agung shall "appoint *a* person nominated by the Ruler". The Act, too, in its Bill stage contained a provision for only *one* person to be nominated by the Ruler.

[29]S. 9(1).

[30]S. 9(2).

[31]S. 9(3).

[32]*Ibid.*

Furthermore, it is provided that in pending civil proceedings there shall be such substitution of parties as may be necessitated by any transfer of jurisdiction, executive authority, rights, liabilities or obligations.[33] Where a decision has been given before the commencement of this Act and no appeal is brought on or after the commencement of the Act then a similar substitution will be made. If, however, such an appeal or application for leave to appeal is brought, then the parties to the appeal or application can be similarly substituted.[34] Again, there is a provision that the Attorney General shall, on the application of a party to any proceedings[35], give a certificate (which shall be final and binding for the purposes of any such proceedings or appeal) stating what substitutions, if any, are to be made in such proceedings or appeal therefrom.[36]

Section 11 of the Act provides that the consequential amendments to the Federal Constitution which are set out in the Schedule to the Act shall have effect.

Since Clause (3) of Article 1 of the Federal Constitution provides that the territories of each of the States in the Federation are the territories comprised therein immediately before Malaysia Day a proviso had to be added making this Clause subject to a new Clause (4), which provides that the territory of the State of Selangor shall exclude the Federal Territory established under this Act. Somewhat surprisingly this is deemed to be sufficient consequential amendment to Article 1. The marginal note to Article 1 reads "The name, states and territories of the Federation". One would have thought that now that there is a Territory as well as States in the Federation it would have been appropriate to amend Clause (2) of that Article to read somewhat like Article 1 of the Indian Constitution, as follows:

"The States *and territories* of the Federation shall be –

"(a) the States of Malaya" etc.

"(b) the Borneo States" etc.

"(c) (Repealed)

"(d) *the Federal Territory established under the Constitution (Amendment) (No. 2) Act, 1973*", and, with an eye to future contingencies, another sub-clause could have been added,

"(e) and such other states and territories as may be created, acquired, or admitted into the Federation".

The next consequential amendment relates to Article 3 which concerns

[33] S. 10(1).

[34] S. 10(2), (3).

[35] One wonders why S.9 allows any party *interested* in any legal proceedings to apply for a certificate while S. 10 allows only a party to any proceedings to so apply.

[36] S. 10(4).

the Religion of the Federation. Despite the fact that Islam is the religion of the Federation,[37] there is no provision stating that the Yang DiPertuan Agung is the Head of the Muslim Religion in the Federation. Indeed, Clause (2) of Article 3 guarantees the position of the Malay Rulers as Head of the Muslim religion in their respective States. Thus in nine States[38] the State Ruler is the Head of the Muslim Religion. There is no provision for a State Head of the Muslim religion in the Borneo States of Sabah and Sarawak. Insofar as the two States[39] of Malaya that do not have Rulers are concerned Article 3(3) provides that their [State] Constitutions shall each make provisions for conferring on the Yang DiPertuan Agung the position of Head of the Muslim religion in that State.[40] With the establishment of the Federal Territory a new Clause (5) as follows is added:

> "notwithstanding anything in this Constitution the Yang Di-Pertuan Agong shall be the Head of the Muslim religion in the Federal Territory; and for this purpose Parliament may by law make provisions for regulating Muslim religious affairs and for constituting a Council to advise the Yang DiPertuan Agung in matters relating to the Muslim religion."

This would therefore mean that the Yang DiPertuan Agung is Head of the Muslim religion in four parts[41] of the Federation – the Federal Territory, Penang, Malacca and in his own State.[42]

The next consequential amendment deals with the right to propagate one's religion. Despite the fact that Islam is the official religion of the country, Article II guarantees every person the right to profess and practise his religion. However, in view of the fact that there is an official religion, the right of a person to propagate his religion is subject to the

[37] Federal Constitution, Article 3(1).

[38] i.e. Johore, Kedah, Kelantan, Negri Sembilan, Pahang, Perak, Perlis, Selangor and Trengganu.

[39] Penang and Malacca.

[40] They have done so – Malacca Constitution Article 5(1); Penang Constitution, Article 5(1).

[41] This may soon have to be charged to 5 areas as recent events in Sabah seem to indicate – see the Sabah Constitution (Amendment) Enactment No. 8 of 1973, which now establishes Islam as the official religion of Sabah State.

[42] The writer is grateful to Professor Ahmad Ibrahim, Dean of the Law Faculty, University of Malaya, for drawing his attention to this factor in Article 34(1), Federal Constitution. One could also refer to, for example, Article VI(2) of the First Part of the Laws of the Constitution of Kelantan, "notwithstanding that there is a Regency in the State by reason of the fact that His Highness is elected to the office, or is exercising the functions of the Yang DiPertuan Agung, His Highness shall continue to exercise his functions as Head of the Religion of the State." See also Article LVIIA of the First Part of the Laws of the Constitution of Johore, 1895, which is to the same effect.

condition that State law may control or restrict the propagation of any religious doctrine or belief among persons professing the Muslim religion.[43] This clause has been amended by this Act so as to provide that federal law may so control or restrict the right to propagate one's religion in the Federal Territory.

Five consequential amendments are made to Article 42 which deals with the power of pardon. The Yang DiPertuan Agung is Supreme Commander of the armed forces[44] and previously his power to grant pardons, reprieves and respites or to remit, suspend or commute sentences was restricted solely to offences tried by court martials[45] or by any Court in Penang or Malacca established under any law regulating Muslim religious affairs in those two states[46]. Now these powers can also be exercised in respect of offences tried by, or sentences imposed by, civil courts in the Federal Territory or by Courts established under any law regulating Muslim religious affairs in the Federal Territory. In respect of all other offences such powers are exercisable by the Ruler or Governor of the State where the offence is committed. Moreover, where an offence is either committed partly in Malaysia and partly outside or in more than one State or in circumstances rendering it difficult to decide where exactly an offence was committed, then it is deemed to have been committed in the State in which it is tried[47] and now, for the purposes of this clause, i.e. Clause (3), the Federal Territory is to be regarded as a State. The other clauses of the Article deal with the constitution of State Pardons Boards, their activities, duties and so on and the role of the Ruler/Governor and the Chief Minister of that State with regard to the Board. Provision is now made for a Federal Territory Pardons Board and the other clauses apply to this Board as well with the references to Ruler or Governor construed to refer to the Yang DiPertuan Agung, and the reference to Chief Minister construe to refer to the Minister responsible for the Federal Territory.

Article 97(3) deals with Muslim revenue raised in accordance with State law. It is provided that such revenue shall not be paid into the State Consolidated Fund but paid into a separate fund and shall not be paid out except under the authority of State law. Similar provision is now made for Muslim revenue raised, in the Federal Territory in accordance with federal law, not to be paid out except under the authority of federal law.

Five consequential amendments are made to the Ninth Schedule to the Constitution. This Schedule lists out the separate Legislative Lists which

[43] Federal Constitution, Article II (4).

[44] Federal Constitution, Article 41.

[45] Federal Constitution, Article 42(1) and (2).

[46] Federal Constitution, Article 42(10).

[47] Federal Constitution, Article 42(3).

enumerate the matters wherein the State Legislature or Parliament have exclusive jurisdiction or concurrent jurisdiction.

Item 6 of the 9th Schedule previously provided that the Federal List included the machinery of government, including "(e) Local government and town planning in, and water supply to the federal capital." A more comprehensive new sub-item now replaces the old sub-item (e), i.e., "(e) Government and administration of the Federal Territory including Muslim law therein to the same extent as provided in item 1 in the State List."[48]

Consequential amendments to the State List have also to be made as previously the states were given exclusive jurisdiction over matters in the State List. These consequential amendments, in effect, provide that, except with respect to the Federal Territory, the States have exclusive jurisdictions over matters set out in item 1 of the State List.[48] land,[49] agriculture and forestry,[50] local government,[51] and services of a local character.[52]

PART B — AMENDMENTS RELATING TO CONSTITUENCIES AND ELECTIONS

The other amendments contained in Part II and III of the Act are of far-reaching effect and further reduce the functions and powers of a once-independent Election Commission, which already had much of its stature reduced by the Constitution (Amendment) Act, 1962.

It might be useful to refer to the 1962 amendments and the views thereon of two distinguished commentators on the Malaysian Constitution, Hickling and Groves. Hickling said:

> "A basic change in electoral law was effected by the amending Act of 1962: for this Act affirmed the composition of the House of Representatives as 104 members, instead of 100; transferred from the Election Commission to that House the power to delimit Parliamentary Constituencies; and abolished the formula for the delimitation of constituencies under a 'quota' system, written into the original constitution: substituting in place thereof certain principles set out in Part I of a new Thirteenth Schedule. Of these

[48] In effect Item 1 in the State list empowers States to make laws regarding various aspects of Muslim law, the personal laws of Muslims, Muslim institutions, offences against Muslim law, and courts having jurisdiction with regard to these matters.

[49] Federal Constitution, 9th Schedule, List II, item 2.

[50] *Ibid*, item 3.

[51] *Ibid*, item 4.

[52] *Ibid*, item 5. These services are (a) fire brigades; (b) boarding houses and lodging houses; (c) burial and cremation grounds; (d) pounds and cattle trespass; (e) markets and fairs; and (f) licensing of theatres, cinemas and places of public amusement.

principles the most important one is that permitting a weightage of up to two to one in favour of rural constituencies . . . ."[53]

Professor Groves's view of the earlier amendments does not appear very favourable, as he states:

"It is apparent that the [1962] amendments as to elections have converted a formerly independent Election Commission, whose decisions became law and whose members enjoyed permanent tenure, into an advisory body of men of no certain tenure whose terms of office, except for remuneration, are subject to the whims of Parliament. The vital power of determining the size of constituencies as well as their boundaries is now taken from a Commission, which the Constitution-makers had apparently wished, by tenure and status, to make independent and disinterested, and has been made completely political by giving this power to a transient majority of Parliament, whose temptation to gerrymander districts and manipulate the varying numerical possibilities between 'rural' and 'urban' constituencies for political advantage is manifest. It is, perhaps, not unworthy of comment that the constitution does not offer any cirteria for the determination of what is 'rural' and what 'urban'."[54]

After examining the 1973 amendments one may be tempted to observe that the scope to gerrymander districts and manipulate constituencies for political advantage is vastly more manifest. Prior to this Act, Article 46 of the Federal Constitution read as follows:-

"(1) The House of Representatives shall consist of one hundred and forty-four elected members;

"(2) There shall be

"(a) one hundred and four members from the States of Malaya;

"(b) sixteen members from Sabah;

"(c) twenty-four members from Sarawak;

"(d) (Repealed)" [Provision relating to Singapore]

As Professor Groves says of clause (2) above, "These figures are not proportionate to the relative populations of these areas, but resulted from hard political bargaining preceding the formation of the Federation and take into account, *inter alia*, the large land area of the Borneo States . . ."[55] Further, this proportion was guaranteed. As is stated in the

[53] R.H. Hickling "The First Five Years of the Federation of Malaya Constitution' (1962) 4 *Mal. L.R.* 183, 191.

[54] H.E. Groves, "Constitution (Amendment) Act, 1962" (1962) 4 *Mal. L.R.* 324,329.

[55] H.E. Groves *The Constitution of Malaysia*, p. 66.

Malaysia Report of the Inter-Governmental Committee 1962 (set up to work out the terms of entry of the Borneo States into Malaysia),

> "The proportion that the number of seats allocated respectively to Sarawak and to North Borneo [Sabah] bears to the total number of seats in the House should not be reduced (except by reason of the granting of seats to any other new State) during a period of seven years after Malaysia Day without the concurrence of the Government of the State concerned[56], and thereafter (except as aforesaid) shall be subject to Article 159(3) of the existing Federal Constitution (which requires Bills making amendments to the Constitution to be supported in each House of Parliament by the votes of not less than two-thirds of the total number of members of that House".[57]

It can be seen that while there was no breakdown by States of the members from the States of Malaya there was the need to do so for the Borneo States since their special circumstances demanded that they have more members in the House of Representatives than they would otherwise be entitled to on the basis of a strict population ratio. The breakdown for the States of Malaya was achieved by the operation of Article 116, especially clause (2) thereof, and the provisions of the Thirteenth Schedule. This schedule contained various principles which as far as possible were to be taken into account in dividing the States of Malaya into constituencies. Of these principles the most important, perhaps, was the one contained in Section 2(c) and, in view of its importance, it is set out here in full:

> "The number of electors within each constituency ought to be approximately equal throughout the unit of review except that, having regard to the greater difficulty of reaching electors in the country districts and the other disadvantages facing rural constituencies, a measure of weightage for area ought to be given to such constituencies, to the extent that in some cases a rural constituency may contain as little as one half of the electors of any urban constituency."

Under this principle should there be a massive movement of population from, say, Penang to Pahang then it would have been possible for the Election Commission, after carrying out a review of the division of the Federation and States into constituencies[58], to recommend to the Prime Minister that the number of constituencies be reduced in Penang and increased in Pahang. The Prime Minister may then embody these recommendations[58a] in a draft order for the approval of the House of

[56] Federal Constitution, Article 161E(2)(e) and (3).

[57] *Malaysia Report of the Inter-Governmental Committee* 962, p. 10 para 19(2).

[58] Federal Constitution Article 113(2).

[58a] The Prime Minister can modify these recommendations – Federal Constitution 13th Schedule, s. 9.

Representatives (i.e. the approval of not less than one-half of the total membership of that House) and the order would then be made by the Yang DiPertuan Agung.[59] However, with the 1973 amendment this is no longer possible. Article 46 has been amended in two respects.[60] The first is that the total membership of the House of Representatives has been increased from 144 to 154 and all the new members are from the States of Malaya.[61] The second point is that, for the first time, the Constitution stipulates the number of representations from each State of Malaya and provides that there shall be 5 members from the Federal Territory. (A student of political science may come to some interesting conclusions should he study the amendment in the light of the increased membership for less-developed States as against that of the more developed States.)[62] It is now not possible despite any substantial shift or growth of population for the number of constituencies in a State or the Federal territory to be altered unless two-thirds of the total membership of *each* House of Parliament agrees to a constitutional amendment.

The next amendment[63] is to Article 113. Clause (2) of the Article provides that the Election Commission shall at intervals, of not more than ten nor less than 8 years, review the division of the country into constituencies. A new clause (8) has been added to provide that the period of review for the States of Malaya shall be calculated from the first delimitation of constituencies immediately following the passing of the Act.

An amendment[64] has also been made to Article 116 clause (2), which previously read:

> "The total member of constituencies shall be equal to the number of members, so that one member shall be elected for each constituency, and of that total in the States of Malaya a number determined in accordance with the provisions contained in the Thirteenth Schedule shall be allocated to each State."

[59] Federal Constitution, 13th Schedule, ss. 4, 9, 10 and 12.

[60] Akta A 206, s. 12.

[61] It is to be noted that, therefore, the proportion of the Borneo members to the total membership of the House has been decreased. Prior to August 1970 such a decrease would not be constitutional without the concurrence of the Governors of the Borneo-States, *vide* Federal Constitution, Article 161E(2)(e).

[62] The break-down of constituencies per State is as follows, with the number of constituencies existing in 1969 given in brackets: Johore, 16(16); Kedah, 13(12); Kelantan, 12(10); Malacca, 4(4); Negri Sembilan, 6(6); Pahang, 8(6); Penang, 9(8); Perak, 21(20; Perlis, 2(2); Trengganu, 7(6); Selangor, 11, and Federal Territory, 5 (whole of Selangor, formerly, 14).

[63] Akta A206, s. 13.

[64] Akta A 206, s. 14.

The amendment replaces the words "Thirteenth Schedule" with the words "Article 46 and the Thirteenth Schedule." One would have thought that since Article 116 relates to Federal constituencies and since Article 46 now expressly states the number of members allocated to each State, the provisions contained in the Thirteenth Schedule can play no part in determining the number of constituencies allocated to each State. It is submitted, therefore, that it would have been more logical to amend Article 116(2) by deleting all the words immediately following the words "so that one member shall be elected for each constituency." (It is also rather strange that there is no reference to the Federal Territory in Article 116(2) as amended.).

It has already been pointed out that section 2(c) of the Thirteenth Schedule to the Federal Constitution contains the most important of the principles relating to the delimitation of constituencies. Two amendments[65] are made to this paragraph. Unless the proportion of electors remains the same in all States it would be impossible to follow, in view of the provisions of the new Article 46, the principle that the number of electors within each constituency ought to be approximately equal throughout the unit of review (i.e. States of Malaya). The principle is therefore now changed to provide that "the number of electors within each constituency *in a State* ought to be approximately equal."

Thus, whatever little powers the Election Commission had in recommending the allocation of constituencies to each State is further reduced and all the Election Commission apparently has left is recommending how the constituencies already allocated to each State (or the Federal Territory) ought to be delineated. It might be wise to bear in mind the warning note sounded by Hickling in relation to the 1962 amendments which severely curtailed the powers of the Election Commission:

> "[T]he abolition of the powers of an independent Commission smacks a little of expediency: and expediency can be a dangerous policy. Indeed, these particular amendments, coupled with those affecting the Service Commissions, suggest that the Federation is intent upon destroying the relics of a paternal policy, embedded in the original constitution, under which a number of independent bodies (in addition to the Supreme Court) shared, with the legislature, the authority of the Federation. . . The present policy is, no doubt, in line with orthodox constitutional doctrine in the United Kingdom: but there Parliament has lost much of its authority and most of its magic; and (ridden with the doctrines of Dicey as some of us are) it seems an unfortunate example to follow. Power is properly assumed by politicans, but the increasing complexity of

[65] Akta A 206, s. 15(1)(a) and (b).

life compels them to throw much to the civil service and, of this benighted body of men, those fare best who think least: for who would move one step, if by doing so he put a foot wrong? That, surely, is not the way battles are lost, even on paper. The original architects of the Constitution may have been wiser than we know, in creating a complex division of powers designed to frustrate the politician and alarm the law student. To transfer all powers to the myth of a legislature and the reality of an executive is to make the way straight for authoritarian rule. This may not be a fear for today, but what of tomorrow, when these powers may be in other hands?"[66]

The other amendment to Section 2(c) of the Thirteenth Schedule to the Constitution is potentially quite far-reaching, though it is phrased quite innocuously:

"Paragraph (c) of section 2 of the Thirteenth Schedule to the Constitution is hereby amended by

"(a) . . .

"(b) deleting all the words immediately following the words 'a measure of weightage for area ought to be given to such constituencies'."[67]

What are these words that are deleted? They read:

"to the extent that in some cases a rural constituency may contain as little as one half of the elections of any urban constitutency."

In other words, there is now no limit to the weightage that can be given to a rural constituency and it now need not contain even as little as one half of the electors of any urban constituency. This is a far cry from the pre-1962 Amendment days when the permissible variation was only fifteen per cent above, or below, the electoral quota[68]. Just as there was no explanation in the Bill in 1962 regarding the amendment of the weightage provision no explanation is afforded in the Explanatory Statement to the Bill in 1973 except a bland treatment that this amendment is "consequential".

Part III of this Act contains two sections. It has already been noted that Article 113(2) provides that the Election Commission shall review the division of the Federation and the States into constituencies at intervals of between 8 to 10 years. Section 16(1) of the Act, according to the Explanatory Statement to the Bill provides that notwithstanding this

[66] R.H. Hickling, "The First Five Years of the Federation of Malaya Constitution" (1962) 4 *Mal. L.R.* 183, 191.

[67] Akta A206, s. 15(1)(b).

[68] Federal Constitution, Article 116, Clause (4) repealed by Act 14/1962, s. 22(c), w.e.f. 21-6-1962.

Article, the Election Commission is required immediately after the passing of this Act to undertake the review of the division of the States of Malaya into constituencies and to recommend the necessary changes so as to comply with the amendments made to the Constitution. This section may appear superfluous since there already exists sufficient provision in clause (3) of Article 113 for such a situation. The clause requires the Election Commission, if it is of opinion that in consequence of a law made under Article 2 (relating to the lateration of the boundaries of a State and to the admission of new States into the Federation) it is necessary to undertake the review of the division of the Federation and the States into constituencies, to do so notwithstanding that eight years may not have elapsed since the last review. As this Act is indubitably a law made under Article 2 of the Federal Constitution one wonders why section 16(1) of this Act was considered necessary – unless it is included *ex abundanti cautela* in case the Election Commission should *not* be of opinion that such a review is necessary. Sub-section (2) of Section 16 renders ineffective any report or recommendation already prepared or submitted by the Election Commission to the Prime Minister and provides that no further action required under the provisions of the Thirteenth Schedule to the Constitution need be taken with regard to such report or recommendations. (One sympathises with the Election Commission when, on top of everything else, even its labours, if any, are to come to naught.).

Section 17 of the Act reiterates the provisions of section 12 of the Thirteenth Schedule to the Constitution that the recommendations of the Election Commission (presumably as embodied in the Order made by the Yang DiPertuan Agung pursuant to s. 12, Thirteenth Schedule of the Constitution) following the review undertaken pursuant to s. 16(1) of this Act will not apply to any election to either the House of Representatives or a State Legislature until the next dissolution of Parliament or the Assembly, as the case may be, occurring on or after the date of coming into force of the Order.

I.S.A.

LEGISLATION

The following is a list of Acts and Enactments passed and revised in Malaysia in 1973:—

FEDERAL ACTS PASSED

Act No.	*Short title*
101	Tabong Angkatan Tentera Act, 1973. Akta Tabong Angkatan Tentera, 1973.
102	Banking Act, 1973. Akta Bank, 1973.
104	Lembaga Kemajuan Trengganu Tengah Act, 1973. Akta Lembaga Kemajuan Trengganu Tengah, 1973.
105	Malaysian Timber Industry Board (Incorporation) Act, 1973. Akta Lembaga Perindustrian Kayu Malaysia (Perbadanan) 1973.
106	Women and Girls Protection Act, 1973. Akta Perlindungan Wanita dan Gadis, 1973.
107	City of Kuala Lumpur (Planning) Act, 1973. Akta (Perancangan) Bandaraya Kuala Lumpur, 1973.
108	Good Shepherd Nuns (Incorporation) Act, 1973. Akta (Perbadanan) *Good Shepherd Nuns*, 1973.
109	Farmers' Organization Act, 1973. Akta Pertubuhan Peladang, 1973.
110	Farmers' Organization Authority Act, 1973. Akta Lembaga Pertubuhan Peladang, 1973.
111	National Tobacco Board (Incorporation) Act, 1973. Akta Lembaga Tembakau Negara (Perbadanan), 1973.
112	Securities Industry Act, 1973. Akta Perusahan Sekuriti, 1973.
123	Biro Siasatan Negara Act, 1973. Akta Biro Siasatan Negara, 1973.
124	Local Government (Temporary Provision) Act, 1973.

Akta Kerajaan Tempatan (Peruntukkan-peruntukkan Sementara), 1973.

FEDERAL ACTS REVISED

Act No.	*Short Title*
100	Trust Companies Act, 1949.
103	Entertainments Duty Act, 1953.
113	Post Office Savings Bank Act, 1948.
114	Judicial Proceedings (Regulation of Reports) Act, 1962.
115	Notaries Public Act, 1959.
116	Electricity Act, 1949.
117	Architects Act, 1967.
118	Housing Developers (Control & Licensing) Act, 1966.
119	Commissions of Enquiry Act, 1950.
120	Government Contracts Act, 1949.
121	Price Control Act, 1946.
122	Control of Supplies Act, 1961.
125	Companies Act, 1965.

FEDERAL AMENDMENT ACTS

Act No.	*Short Title*
A158	Akta Cukai Pendapatan (Pindaan), 1973. Income Tax (Amendment) Act, 1973.
A159	Akta Cukai Pendapatan Tambahan (Pindaan), 1973). Supplementary Income Tax (Amendment) Act, 1973.
A160	Akta Stem (Pindaan), 1973. Stamp (Amendment) Act, 1973.
A161	Akta Kastam (Pindaan), 1973). Customs (Amendment) Act, 1973.
A162	Akta Perbekalan Tambahan (1971 dan 1972), 1973. Supplementary Supply (1971 and 1972) Act, 1973.

A163	Akta Perbekalan, 1973. Supply Act, 1973.
A164	Akta Lalulintas Jalan dan Kereta-Kereta Motor (Negeri-Negeri Tanah Melayu, Sarawak dan Sabah) (Pindaan), 1973. Road Traffic and Motor Vehicles (States of Malaya, Sarawak and Sabah) (Amendment) Act, 1973.
A165	Akta Suruhanjaya Pilihanraya (Pindaan), 1973. Election Commission (Amendment) Act, 1973.
A166	Akta Suruhanjaya Perkhidmatan (Pindaan), 1973. Service Commissions (Amendment) Act, 1973.
A167	Akta Galakan Pelaburan (Pindaan), 1973. Investment Incentives (Amendment) Act, 1973.
A 168	Akta Lembaga Urusan dan Tabung Haji (Pindaan), 1973. Lembaga Urusan dan Tabung Haji (Amendment) Act, 1973.
A169	Akta Peruntukan Diraja (Pindaan), 1973. Civil Lists (Amendment) Act, 1973.
A170	Akta Pencen (Pindaan), 1973. Pensions (Amendment) Act, 1973.
A171	Akta Akitek (Pindaan), 1973. Architects (Amendment) Act, 1973.
A172	Akta Pendaftaran Juruukur (Pindaan), 1973. Registration of Surveyors (Amendment) Act, 1973.
A173	Akta Pendaftaran Jurutera (Pindaan), 1973. Registration of Engineers (Amendment) Act, 1973.
A174	Akta Menteri Muda (Pindaan), 1973. Assistants Ministers (Amendments) Act, 1973.
A175	Akta Pencen (Sabah) (Pindaan), 1973. Pensions (Sabah) (Amendment) Act, 1973.
A176	Akta Pencen (Sarawak) (Pindaan), 1973. Pensions (Sarawak) (Amendment) Act, 1973.
A177	Akta Pencen Balu dan Anak Yatim (Sabah) (Pindaan), 1973. Widows' and Orphans' Pensions (Sabah) (Amendment) Act, 1973.

A178 Akta Pencen Balu dan Anak Yatim (Sarawak) (Pindaan), 1973.
Widows' and Orphans' Pensions (Sarawak) (Amendment) Act, 1973.

A179 Akta Setiausaha-Setiausaha Parlimen (Saraan) (Pindaan), 1973.
Parliamentary Secretaries (Remuneration) (Amendment) Act, 1973.

A180 Akta (Pencen dan Ganjaran) Anggota Pentadbiran dan Ahli Parlimen ((Pindaan), 1973.
Members of the Administration and Members of Parliament (Pensions and Gratuities)(Amendment) Act, 1973.

A181 Akta Perkahwinan Sivil (Pindaan), 1973.
Civil Marriage (Amendment) Act, 1973.

A182 Akta Insuran (Pindaan), 1973.
Insurance (Amendment) Act, 1973.

A183 Akta Kumpulan Wang Simpanan Pekerja (Pindaan), 1973.
Employees Provident Fund (Amendment) Act, 1973.

A184 Akta Pinjaman Luar Negeri (Pindaan), 1973.
External Loans (Amendment) Act, 1973.

A185 Akta Lanjutan Kredit (Pindaan), 1973.
Extended Credit (Amendment) Act, 1973.

A186 Akta Eksais (Negeri-negeri Tanah Melayu, Sarawak dan Sabah) (Pindaan), 1973.
Excise (States of Malaya, Sarawak and Sabah) (Amendment) Act, 1973.

A187 Akta Kastam (Pindaan) (No. 2), 1973.
Customs (Amendment) (No. 2) Act, 1973.

A188 Akta Pertahanan Awam (Pindaan), 1973.
Civil Defence (Amendment) Act, 1973.

A189 Akta Bank Negara Malaysia (Pindaan), 1973.
Central Bank of Malaysia (Amendment) Act, 1973.

A190 Akta Perbandaran (Pindaan), 1973.
Municipal (Amendment) Act, 1973.

A191 Akta Imigresen (Pindaan), 1973.

Immigration (Amendment) Act, 1973.

A192 Akta Kutipan dari Rumah ke Rumah dan Lorong-lorong (Pindaan), 1973.
House to House and Street Collections (Amendment) Act, 1973.

A193 Akta Perlembagaan (Pindaan), 1973.
Constitution (Amendment) Act, 1973.

A194 Akta Dadah Berbahaya (Pindaan), 1973.
Dangerous Drugs (Amendment) Act, 1973.

A195 Akta Cukai Jualan (Pindaan), 1973.
Sales Tax (Amendment) Act, 1973.

A196 Akta Kawalan Bekalan (Pindaan), 1973.
Control of Supplies (Amendment) Act, 1973.

A197 Akta Pemegang Amanah Raya (Pindaan), 1973.
Public Trustee (Amendment) Act, 1973.

A198 Akta Kesatuan Sekerja (Pindaan), 1973.
Trade Unions (Amendment) Act, 1973.

A199 Akta Kilang dan Jentera (Pindaan), 1973.
Factories and Machinery (Amendment) Act, 1973.

A200 Akta Lembaga Pemasaran Pertanian Persekutuan (Pindaan), 1973.
Federal Agricultural Marketing Authority (Amendment) Act, 1973.

A201 Akta Lembaga Kemajuan Ikan Malaysia (Pindaan), 1973.
Lembaga Kemajuan Ikan Malaysia (Amendment) Act, 1973.

A202 Akta Lembaga Kemajuan Perusahaan Haiwan Negara (Pindaan), 1973.
Lembaga Kemajuan Perusahaan Haiwan Negara (Amendment) Act, 1973.

A203 Akta Institiut Penyelidikan dan Kemajuan Pertanian Malaysia (Pindaan), 1973.
Malaysia Agricultural Research and Development Institute (Amendment) Act, 1973.

A204 Akta Pejabat Pos (Pindaan), 1973.
Post Office (Amendment) Act, 1973.

A205 Akta Pencen Balu dan Anak Yatim (Sabah) (Pindaan)

(No. 2), 1973.
Widows' and Orphans' Pensions (Sabah) (Amendments) (No. 2) Act, 1973.

A206 Akta Perlembagaan (Pindaan) (No. 2), 1973.
Constitution (Amendment) (No. 2) Act, 1973.

A207 Akta Bank Simpanan Pejabat Post (Pindaan), 1973.
Post Office Savings Bank (Amendment) Act. 1973.

A208 Akta Perbekalan Tambahan (1972 dan 1973), 1973.
Supplementary Supply (1972 and 1973) Act, 1973.

A209 Akta Kumpulan Wang Disatukan (Pebelanjaan masuk Akaun), 1973.
Consolidated Fund (Expenditure on Account) Act, 1973.

A210 Akta Majlis Amanah Rakyat (Pindaan), 1973.
Majlis Amanah Rakyat (Amendment) Act, 1973.

A211 Akta Maklumat Pekerjaan (Pindaan), 1973.
Employment Information (Amendment) Act, 1973.

A212 Akta Perkapalan Saudagar (Pindaan), 1973.
Merchant Shipping (Amendment) Act, 1973.

A213 Akta Anggota Pentadbiran dan Ahli Parlimen (Pencen dan Ganjaran) (Pindaan) (No. 2), 1973.
Members of the Administration and Members of Parliament (Pensions and Gratuities) (Amendment) (No. 2) Act, 1973.

A214 Akta Suruhanjaya Pilihanraya (Pindaan) (No. 2), 1973.
Election Commission (Amendment) (No. 2) Act. 1973.

A215 Akta Suruhanjaya Perkhidmatan (Pindaan) (No. 2),1973.
Service Commissions (Amendment) (No. 2) Act, 1973.

A216 Akta Pengambilan Tanah (Pindaan), 1973.
Land Acquisition (Amendment) Act, 1973.

A217 Akta Letrik (Pindaan), 1973.
Electricity (Amendment) Act, 1973.

STATE ENACTMENTS

JOHORE

Enactment No.	*Short Title*
1.	Enakmen (Pindaan) Timbalan Setia Negeri Johor, 1973. Johore Military Forces (Amendment) Enactment, 1973.
2.	Enakmen Perbekalan Tambahan Yang Kelima (1972) Tahun 1973. Fifth Supplementary Supply (1972) Enactment, 1973.
3.	Enakmen Perbekalan Tambahan (1973) Tahun 1973. Supplementary Supply (1973) Enactment, 1973.
4.	Enakmen (Pindaan) Zakat dan Fitrah Tahun, 1973. Zakat and Fitrah (Amendment) Enactment, 1973.
5.	Enakmen Perbekalan Tambahan Yang Kedua (1973) Tahun 1973. Second Supplementary Supply (1973) Enactment, 1973.
6.	Enakmen (Pindaan) Suruhanjaya Perkhidmatan Awam, 1973. State Public Service Commission (Amendment) Enactment, 1973.
7.	Enakmen (Pindaan) Kumpulan Wang Kurnia Penuntut-penuntut Sultan Ibrahim, 1973. Sultan Ibrahim Studentship Fund (Amendment) Enactment, 1973.
8.	Enakmen (Pindaan) Kumpulan Wang Biasiswa Sultan Ismail, 1973. Sultan Ismail Scholarship Fund (Amendment) Enactment, 1973.
9.	Enakmen (Pindaan) Perbadanan Kemajuan Ekonomi Negeri Johor, 1973. Johore State Economic Development Corporation (Amendment) Enactment, 1973.
10.	Enakmen (Pindaan) (Bayaran Bagi Ahli-ahli) Dewan Negeri, 1973. Legislative Assembly (Members' Remuneration) (Amend-

ment) Enactment, 1973.

11. Enakmen Wakaf, 1973.
Wakaf Enactment, 1973.

12. Enakmen Perbekalan Tambahan Yang Ketiga (1973) Tahun 1973.
Third Supplementary Supply (1973) Enactment, 1973.

13. Enakmen (Pindaan) Biasiswa Pelajaran Tinggi Ugama Islam Negeri Johor, 1973.
Johore Muslim Religious Scholarship Fund (Amendment) Enactment, 1973.

14. Enakmen (Pindaan) Kumpulan Wang Biasiswa Kenangan Datuk Onn, 1973.
Datuk Onn Memorial Studentship Fund (Amendment) Enactment, 1973.

15. Enakmen (Pindaan) (Pencen dan Ganjaran) Anggota Pentadbiran dan Ahli Dewan Negeri, 1973.
Members of the Administration and Members of Legislative Assembly (Pension and Gratuities) (Amendment) Enactment, 1973.

16. Enakmen (Pindaan) (Bayaran) Speaker, 1973.
Speaker (Remuneration) (Amendment) Enactment,1973.

17. Enakmen (Pindaan) (No. 2) (Bayaran Bagi Ahli-ahli) Dewan Negeri, 1973.
Legislative Assembly (Members' Renumeration) (Amendment) (No. 2) Enactment, 1973.

18. Enakmen (Bayaran Bagi Ahli-ahli) Majlis Mesyuarat Kerajaan (Pindaan), 1973.
Executive Council (Members' Remuneration) (Amendment) Enactment, 1973.

19. Enakmen (Pindaan) Suruhanjaya Perkhidmatan Kerajaan Negeri, 1973.
State Public Service Commission (Amendment) Enactment, 1973.

20. Enakmen Perbekalan Tambahan Yang Keempat (1973) Tahun 1973.
Fourth Supplementary Supply (1973) Enactment, 1973.

21. Enakmen (Pindaan) (Elaun-elaun) Kerabat-kerabat Raja, 1973.

Sovereign's Relative (Allowances) (Amendment) Enactment, 1973.

22. Enakmen (Pindaan) (No. 2) Perbadanan Kemajuan Ekonomi Negeri Johor, 1973.
Johore State Economic Development Corporation (Amendment) (No. 2) Enactment, 1973.

23. Enakmen (Pindaan) Lembaga Bandaran, 1973.
Town Boards (Amendment) Enactment, 1973.

24. Enakmen (Pindaan) (No. 2) (Pencen dan Ganjaran) Anggota Pentadbiran dan Ahli Dewan Negeri, 1973.
Members of the Administration and Members of Legislative Assembly (Pensions and Gratuities) (Amendment) (No. 2) Enactment, 1973.

25. Enakmen Perbekalan (1974) Tahun 1973.
Supply (1974) Enactment, 1973.

KEDAH

1. Enakmen Peruntukan (Tahun 1973) Tahun 1973.
Supply (1973) Enactment, 1973.

2. Enakmen Peraturan—Peraturan Pegawai-Pegawai Awam (Kelakuan dan Tatatertib) (Perintah-perintah Am Bab D) (Pindaan) 1971 (Pemakaian bagi Negeri Kedah) 1973.
Public Officers (Conduct & Discipline) (General Orders, Chapter D) (Amendment) Regulations, 1971 (Application to Kedah) Enactment, 1973.

3. Enakmen Majlis Mesyuarat Kerajaan (Bayaran Wang Ahli-ahli) (Pindaan) Tahun 1973.
Executive Council (Members' Remuneration) (Amendment) Enactment, 1973.

4. Enakmen Pinjaman (Memperbesar Istana Anak Bukit) Tahun 1973.
Loans (Extension to the Istana Anak Bukit) Enactment, 1973.

5. Enakmen Peruntukan Tambahan Yang Kedua (Tahun 1972) Tahun 1973.
Second Supplementary Supply Enactment (1972) Enactment, 1973.

6. Enakmen Peruntukan Tambahan Yang Pertama, Tahun 1973.
First Supplementary Supply Enactment, 1973.

7 Enakmen Undang-Undang Tubuh Kerajaan Negeri Kedah (Pindaan Ketujuh) Tahun 1973.
Laws of the Constitution of Kedah (Seventh Amendment) Enactment, 1973.

8. Enakmen Lembaga Kemajuan Pertanian Muda (Penyerahanhak Tugas-tugas) 1973.
Muda Agricultural Development Authority (Assignment of Functions) Enactment, 1973.

9. Enakmen Perbadanan Stadium-stadium Negeri (Pindaan) Tahun 1973.
State Stadiums Corporation (Amendment) Enactment, 1973.

10. Enakmen (Pencen dan Ganjaran) Anggota Pentadbiran dan Ahli Dewan Negeri (Pindaan) 1973.
Members of the Administration and Members of Legislative Assembly (Pensions and Gartuities) (Amendment) Enactment, 1973.

11. Enakmen Hutan (Pindaan) 1973.
Forests (Amendment) Enactment, 1973.

12. Enakmen Peruntukan Tambahan Yang Kedua, Tahun 1973.
Second Supplementary Supply Enactment, 1973.

13. Enakmen Undang-undang Tubuh Kerajaan Negeri Kedah (Pindaan Keenam) Tahun 1973.
Laws of the Constitution of Kedah (Sixth Amendment) Enactment, 1973.

KELANTAN

1. Enakmen Perbekalan Tambahan Yang keempat (1972) Tahun 1973.
Fourth Supplementary Supply (1972) Enactment, 1973.

2. Enakmen Pinjaman (No. 1), 1973.
Loan (No. 1) Enactment, 1973.

3. Enakmen Perbekalan (1973) Tahun 1973.
Supply (1973) Enactment, 1973.

4. Enakmen Suruhanjaya Perkhidmatan Negeri (Pindaan) 1973.
State Service Commission (Amendment) Enactment, 1973.

5. Enakmen (Elaun dan Keutamaan) Majlis Perajaan dan Majlis Penasihat Raja (Pindaan), 1973.
Council of Succession & Council of Advisers Kelantan (Allowances & Privileges) (Amendment) Enactment. 1973.

6. Enakmen (Upahan) Ahli-ahli Dewan Negeri (Pindaan), 1973.
Members of the Legislative Assembly (Remuneration) (Amendment) Enactment, 1973.

7. Enakmen Perbekalan Tambahan Yang Pertama (1973) Tahun 1973.
First Supplementary Supply (1973) Enactment, 1973.

8. Enakmen (Pindaan) (Pencen dan Ganjaran) Anggota Pentadbiran dan Ahli Dewan Negeri, 1973.
Members of the Administration and Members of the Legislative Assembly (Pension & Gratuities) (Amendment) Enactment, 1973.

9. Enakmen Perbekalan Tambahan Yang Kedua (1973) Tahun 1973.
Second Supplementary Supply (1973) Enactment, 1973.

10. Enakmen (Upahan) Speaker Dewan Negeri (Pindaan) 1973.
Speaker (Remuneration) (Amendment) Enactment, 1973

11. Enakmen (Pindaan) Undang-undang Perlembagaan Tubuh Kerajaan Kelantan Bahagian Pertama, 1973.
First Part of the Laws of the Constitution of Kelantan (Amendment) Enactment, 1973.

12. Enakmen Kumpulan Wang Pinjaman Perumahan (Pindaan), 1973.
Housing Loan Fund (Amendment) Enactment, 1973.

13. Enakmen (Upahan) Ahli-ahli Dewan Negeri (Pindaan), 1973.
Members of the Legislative Assembly (Remuneration) (Amendment) Enactment, 1973.

14. Enakmen Perbadanan Perpustakaan Awam Kelantan, 1973.
Kelantan Public Library Corporation Enactment, 1973.

15. Enakmen Perbadanan Stadium Kelantan, 1973.
Kelantan Stadium Corporation Enactment, 1973.

16. Enakmen Perbekalan (1974) Tahun 1973.
Supply (1974) Enactment, 1973.

MALACCA

1. Enakmen (Pindaan) Lembaga Air Melaka, 1973.
Malacca Water Authority (Amendment) Enactment, 1973.

2. Enakmen (Pindaan) Ordinan Perbandaran Melaka, 1973.
Malacca Municipal Ordinance (Amendment) Enactment, 1973.

3. Enakmen (Pindaan) Ordinan Perbandaran Melaka, 1973.
Malacca Municipal Ordinance (Amendment) Enactment, 1973.

4. Enakmen Bekalan Tambahan Pertama (1973) Tahun 1973.
First Supplementary Supply (1973) Enactment, 1973.

5. Enakmen (Biaya Ahli-ahli) (Pindaan) Majlis Mesyuarat Kerajaan, 1973.
Executive Council (Members Remuneration) (Amendment) Enactment, 1973.

6. Enakmen Tabung Biasiswa Negeri Melaka (Pindaan), 1973.
State of Malacca Scholarship Fund (Amendment) Enactment, 1973.

7. Enakmen (Mansukh) Perlindungan Perlindungan Perempuan dan Gadis, 1973.
Women and Girls Protection (Repeal) Enactment, 1973.

8. Enakmen (Pencen dan Ganjaran) Angguta Pentadibran dan Ahli Dewan Negeri (Pindaan), 1973.
Members of the Administration and Members of Legislative Assembly (Pension and Gratuities) (Amendment) Enactment, 1973.

9. Enakmen (Pindaan) Perlembagaan Negeri Malaka, 1973.
Constitution of the State of Malacca (Amendment) Enactment, 1973.

10. Enakmen Bekalan Tambahan Kedua (1973) Tahun 1973.
Second Supplementary Supply (1973) Enactment, 1973.

11. Enakmen Wang Pinjaman (Pengambilan Tanah Untuk Perusahaan, Pelancungan dan Pembangunan), 1973.
Loans (Land Acquisition for Industries, Tourism and Development) Enactment, 1973.

12. Enakmen (Pindaan) (Biaya) Yang Dipertua Dewan Negeri, 1973.
Speaker of the Legislative Assembly (Remuneration) (Amendment) Enactment, 1973.

13. Enakmen (Biaya Ahli-Ahli) Dewan Negeri (Pindaan), 1973.
Legislative Assembly (Members Remuneration) (Amendment) Enactment, 1973.

14. Enakmen (Mansukh) Ordinan Perbandaran, 1973.
Malacca Municipal Ordinance (Repeal) Enactment, 1973.

15. Enakmen (Pindaan) Ordinan Perbandaran Melaka Tahun 1973.
Malacca Municipal Ordinance (Amendment), 1973.

16. Enakmen Bekalan Tambahan Ketiga (1973) Tahun 1973.
Third Supplementary Supply (1973) Enactment, 1973.

17. Enakmen (Pindaan) Perbadanan Kemajuan Negeri Malaka, 1973.
Malacca State Development Corporation (Amendment) Enactment, 1973.

18. Enakmen Bekalan (1974) Tahun 1973.
Supply (1974) Enactment, 1973.

NEGRI SEMBILAN

1. Enakmen Perbekalan Tambahan (1972) (No. 4), 1973.
Negeri Sembilan State Supplementary Supply (1972) (No. 4) Enactment, 1973.

2. Enakmen Perbekalan Tambahan (1973) (No. 1), 1973.
Negeri Sembilan State Supplemental Supply (1973) (No. 1) Enactment, 1973.

3. Enakmen (Pencen dan Ganjaran) Anggota Pentadbiran dan Ahli Dewan Negeri (Pindaan), 1973.

Members of the Administration and Members of the Legislative Assembly (Pensions and Gratuities) (Amendment) Enactment, 1973.

4. Enakmen Perbekalan Tambahan (1973) (No. 2), 1973.
Negeri Sembilan State Supplementary Supply (1973) (No. 2) Enactment, 1973.

5. Enakmen Perbekalan (1974) Tahun 1973.
Negeri Sembilan State Supply (1974) Enactment, 1973.

6. Enakmen (Pencen dan Ganjaran) Anggota Pentadbiran dan Ahli Dewan Negeri (Pindaan No. 2), 1973.
Members of the Administration and Members of Legislative Assembly (Pensions and Gratuities) (Amendment No. 2) Enactment, 1973).

7. Enakmen (Saraan) (Pindaan) Yang Dipertua Dewan, 1973.
Speaker (Remuneration) (Amendment) Enactment, 1973.

8. Enakmen Majlis Mesyuarat Kerajaan (Saraan Ahli-ahli) (Pindaan), 1973.
Executive Council (Members' Remuneration) (Amendment) Enactment, 1973.

9. Enakmen Dewan Undangan Negeri (Saraan Ahli-ahli) (Pindaan), 1973.
Legislative Assembly (Members' Remuneration) (Amendment) Enactment, 1973.

10. Enakmen Hutan (Pindaan), 1973.
Forest (Amendment) Enactment, 1973.

11. Enakmen (Pindaan) Undang-undang Tubuh Kerajaan Negeri Sembilan, 1973.
Laws of the Constitution of Negeri Sembilan (Amendment) Enactment, 1973.

PAHANG

1. Enakmen Perbekalan Tambahan (Bil. 5), 1972.
Supplementary Supply (No. 5) Enactment, 1972.

2. Enakmen Perbekalan Tambahan, 1973.
Supplementary Supply Enactment, 1973.

3. Enakmen Pinjaman (Pembangunan Kawasan-kawasan Perindustrian), 1973.
Loan (Industrial Development Areas Scheme) Enactment, 1973.

4. Enakmen (Pindaan) (Pencen dan Ganjaran) Anggota Pentadbiran dan Ahli Dewan Negeri, 1973.
Members of the Administration and Members of Legislative Assembly (Pension and Gratuities) (Amendment) Enactment, 1973.

5. Enakmen Perbadanan Stadium Darul Makmur Pahang, 1973.
Daruk Makmur Stadium Corporation Enactment Pahang, 1973.

6. Civil List (Amendment) Enakmen, 1973.
Civil List (Amendment) Enactment, 1973.

7. Enakmen (Pindaan) (Saraan Ahli-Ahli) Majlis Mesyuarat Kerajaan, 1973.
Executive Council (Members' Remuneration) (Amendment) Enactment, 1973.

8. Enakmen (Pindaan) Undang-Undang Tubuh Kerajaan Pahang (Bahagian Kedua), 1973.
Laws of the Constitution of Pahang (Second Part) (Amendment) Enactment, 1973.

9. Enakmen Perbekalan Tambahan (Bil. 2), 1973.
Supplementary Supply (No. 2) Enactment, 1973.

10. Enakmen (Pindaan) (Saraan Yang Dipertua) Dewan Negeri, 1973.
Legislative Assembly (Speakers' Remuneration) (Amendment) Enactment, 1973.

11. Enakmen Perbadanan Perpustakaan Awam Pahang, 1973.
Pahang Public Library Corporation Enactment, 1973.

12. Enakmen Perbekalan Tambahan (Bil. 3) 1973.
Supplementary Supply (No. 3) Enactment, 1973.

13. Enakmen Perbekalan (1974), 1973.
Supply Enactment (1974), 1973.

14. Enakmen (Perumahan dan Pengambilan atau Pembelian Tanah) Pinjaman, 1973.

Loan (Housing and Acquisition or Purchase of Lands) Enactment, 1973.

PERAK

1. Enakmen Perbekalan (1972) Tambahan Kedua, 1973.
Second Supplementary Supply (1972) Enactment, 1973.

2. Enakmen Perbadanan Pembangunan Pertanian Negeri Perak, 1973.
Perak Agricultural Development Corporation Enactment, 1973.

3. Enakmen Kumpulan Wang Biasiswa Pengajian Tinggi Anak-anak Melayu Perak (Pindaan), 1973.
Perak Malays Higher Studies Scholarships Fund (Amendment) Enactment, 1973.

4. Enakmen Kumpulan Wang Biasiswa Rakyat Perak (Bukan Melayu) (Pindaan), 1973.
Perak Nationals (Non-Malay) Scholarship (Amendment) Enactment, 1973.

5. Enakmen Perbekalan Tambahan, 1973.
Supplementary Supply Enactment, 1973.

6. Enakmen Melombong (Perak) (Pindaan), 1973.
Mining (Perak) (Amendment) Enactment, 1973.

7. Enakmen Perbekalan (1974), 1973.
Supply Enactment (1974), 1973.

8. Enakmen (Saraan Ahli-ahli) Dewan Negeri (Pindaan), 1973.
Legislative Assembly (Members' Remuneration) (Amendment) Enactment, 1973.

9. Enakmen (Pencen dan Ganjaran) Anggota Pentadbiran dan Ahli Dewan Negeri (Pindaan), 1973.
Members of the Administration and Members of Legislative Assembly (Pensions and Gratuities) (Amendment) Enactment, 1973.

10. Enakmen Dewan Negeri (Saraan Speaker) (Pindaan), 1973.
Legislative Assembly (Speaker's Remuneration) (Amendment) Enactment, 1973.

11. Waters Enakmen (Pindaan), 1973.
Waters (Amendment) Enactment, 1973.

12. Enakmen Pinjaman Wang (Kemajuan Perindustrian) (Pindaan), 1973.
Loans (Industrial Development) (Amendment) Enactment, 1973.

13. Enakmen (Pengambilan atau Pembelian Tanah) Pinjaman, 1973.
Loans (Acquisition or Purchase of Lands) Enactment, 1973.

14. Enakmen (Pindaan) Undang-undang Tubuh Kerajaan Perak, 1973.
Laws of the Constitution of Perak (Amendment), Enactment, 1973.

PERLIS

1. Enakmen Perbekalan Tambahan Yang Ketiga (Tahun 1972) Tahun 1973.
Third Supplementary Supply (1972) Enactment, 1973.

2. Enakmen Melarang Lembu-Kerbau Dalam Kawasan-kawasan Larangan, 1973.
Control of Cattle in Restricted Areas Enactment, 1973.

3. Enakmen Perbekalan, 1973.
Supply Enactment, 1973.

4. Enakmen Perbekalan Tambahan Yang Keempat (1972) Tahun 1973.
Fourth Supplementary Supply Enactment (1972) Enactment, 1973.

5. Enakmen Perbekalan Tambahan Yang Pertama, Tahun 1973.
First Supplementary Supply Enactment, 1973.

6. Enakmen Perbadanan Kemajuan Negeri Perlis, 1973.
Perlis State Development Corporation Enactment, 1973.

7. Enakmen Perbadanan Perpustakaan Umum Negeri Perlis, 1973.
Perlis State Public Library Corporation Enactment, 1973.

PULAU PINANG

1. Enakmen Perbekalan Tambahan (1973) (No. 1), 1973.
Supplementary Supply (1973) (No. 1) Enactment, 1973.

2. Enakmen Perbekalan Tambahan (1973) (No. 2), 1973.
Supplementary Supply (1973) (No. 2) Enactment, 1973.

3. Enakmen (Saraan) Yang DiPertua (Pindaan), 1973.
Speaker (Remuneration) (Amendment) Enactment, 1973.

4. Enakmen (Pencen dan Ganjaran) Anggota Pentadbiran dan Ahli Dewan Negeri (Pindaan), 1973.
Members of the Administration and Members of Legislative Assembly (Pensions and Gratuities) (Amendment) Enactment, 1973.

5. Enakmen Perbekalan (1974), 1973.
Supply (1974) Enactment, 1973).

6. Enakmen Perlembagaan Negeri Pulau Pinang (Pindaan), 1973.
Constitution of the State of Penang (Amendment) Enactment, 1973.

7. Enakmen (Keanggotaan) Dewan Negeri Pulau Pinang, 1973.
Legislative Assembly Penang (Composition) Enactment, 1973.

8. Enakmen (Saraan Ahli-ahli) Dewan Undangan (Pindaan), 1973.
Legislative Assembly (Members' Remuneration) (Amendment) Enactment, 1973.

9. Enakmen (Saraan Ahli-ahli) Majlis Mesyuarat (Pindaan), 1973.
Executive Council (Members'. Remuneration) (Amendment) Enactment, 1973.

SELANGOR

1. Enakmen (Pindaan) Undang-Undang Tubuh Kerajaan Negeri Selangor, 1973.
Selangor Constitution (Amendment) Enactment, 1973.

2. Enakmen Perbekalan Tambahan (Bil. 1) Tahun, 1973.
Supplementary Supply (No. 1) Enactment, 1973.

3. Enakmen (Projek Kompleks Perniagaan) Pinjaman, 1973.
Loans (Business Complex Projects) Enactment, 1973.

4. Enakmen Wilayah Persekutuan, 1973.
Federal Territory Enactment, 1973.

5. Speaker (Remuneration)(Amendment) Enakmen, 1973.
Speaker (Remuneration) (Amendment) Enactment, 1973.

6. Enakmen Perbekalan (1974) Tahun, 1973.
Supply (1974) Enactment, 1973.

7. Enakmen Perbekalan Tambahan (1972) (Bil. 3) dan Enakmen Perbekalan Tambahan (Bil. 2) Tahun, 1973.
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8. Enakmen Bilangan Ahli-Ahli Yang Dipilih bagi Dewan Undangan Negeri Selangor, 1973.
Composition of Elected Members of the Selangor Legislative Assembly Enactment, 1973.

9. Enakmen (Pindaan) Suruhanjaya Perkhidmatan Negeri (Saraan), 1973.
State Service Commission (Remuneration) (Amendment) Enactment, 1973.

TRENGGANU

1. Enakmen Perbadanan Memajukan Iktisad Negeri Trengganu (Pindaan), 1973.
Trengganu State Economic Development Corporation (Amendment) Enactment, 1973.

2. Enakmen Perbekalan Tambahan Pertama (1973) Tahun 1973.
First Supplementary Supply (1973) Enactment, 1973.

3. Enakmen (Tambahan) kepada Speaker (Pindaan) Tahun, 1973.
Speaker (Remuneration) (Amendment) Enactment, 1973, 1973.

4. Enakmen (Pencen dan Ganjaran) Anggota Pentadbiran dan Ahli Dewan Negeri (Pindaan), 1973.
Members of the Administration and Members of the Legislative Assembly (Pensions and Gratuities) (Amendment) Enactment, 1973.

5. Enakmen (Pindaan) Undang-Undang Bagi Diri Kerajaan

Trengganu (Bab Yang Pertama) Tahun, 1973.
Laws of the Constitution of Trengganu (First Part) (Amendment) Enactment, 1973.

6. Enakmen Perbekalan Tambahan Kedua (1973) Tahun 1973.
Second Supplementary Supply (1973) Enactment, 1973.

SABAH

1. First Supplementary Supply (1973) Enactment, 1973.
2. Country Land Utilization (Amendment) Enactment, 1973.
3. Fauna Conservation (Amendment) Enactment, 1973.
4. State Honours (Amendment) Enactment, 1973.
5. Second Supplementary Supply (1973) Enactment,1973.
6. Local Government (Amendment) Enactment, 1973.
7. National Language (Application) Enactment, 1973.
8. Constitution (Amendment) Enactment, 1973.
9. Third Supplementary Supply (1973) Enactment, 1973.
10. Supply (1974) Enactment, 1973.
11. Legislative Assembly (Elected Members) (Amendment) Enactment, 1973.
12. Forest (Amendment) Enactment, 1973.
13. Assistant Ministers (Remuneration) (Amendment) Enactment, 1973.
14. Government Trust Funds (Amendment) Enactment, 1973.

SARAWAK

1. National Parks (Amendment) Ordinance, 1973.
2. Supply (1973) Ordinance, 1973.
3. Sarawak Timber Industry Development Corporation Ordinance, 1973.
4. Loan (Sibu Water Supply Expansion) Ordinance, 1973.
5. Loan (Kuching Water Supply Expansion) Ordinance, 1973.

6. Forest (Amendment) Ordinance, 1973.

7. Consolidated Fund (Expenditure on Account) Ordinance, 1973.

8. Supplementary Supply (1972) (No. 2) Ordinance, 1973.

9. Supplementary Supply (1973) Ordinance, 1973.

10. Enakmen Perbekalan Tambahan Ketiga (1973) Tahun 1973.
Third Supplementary Supply (1973) Enactment, 1973.

11. Enakmen (Imbuhan) Kepada Speaker (Pindaan), 1973.
Speaker (Remuneration) (Amendment) Enactment, 1973.

12. Enakmen Peruntukan Di Raja (Pindaan), 1973.
Civil List (Amendment) Enactment, 1973.

13. Enakmen Perbekalan (1974) Tahun 1973.
Supply (1974) Enactment, 1973.

REVIEWS AND NOTICES

The following books have been received but owing to their late receipt, reviews will be published in the next issue of the Journal.

THE INTERNATIONAL LEGAL SYSTEM. By W.E. Holder, B.A., LL.B. (Hons.) (Melb.), LL.M. (Yale). Dip. Int. Law (The Hague), Senior Lecturer in Law, Australian National University, and G.A. Brennan, L.L.B. (Hons.) (Melb.), LL.M. (London) Dip. Int. and Comp. Air Law (London), Senior Lecturer in Law, University of Melbourne [Australia: Butterworths, 1972, xi + 1048 pp.].

AUSTRALIAN AND NEW ZEALAND CITATOR TO UK REPORTS 1558-1972. Edited by Margarita Adam LL.B., Barrister, Suan Chew B.A., and Kingsley Siebel, Barrister [Australia: Butterworths. 1973. ix + 444 pp. incl. index].

TORRENS TITLE IN AUSTRALASIA Vol. 2. By E.A. Francis, B.A., A.A.S.A., Barrister and Solicitor of the Supreme Court of Papua New Guinea, Solicitor of the Supreme Court of New South Wales. [Australia: Butterworths 1973. xxxvi + 314 pp. incl. index].