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CHAPTER 10

PRIDE AND PREJUDICE OF LEGAL IMPERIALISM WITH REFERENCE TO PRESEVERING ENGLISH LAW IN MALAYSIA: MAKING SENSE THE DOCTRINES OF RECEPTION AND SUBSEQUENT ATTRACTION[1]

10.1 INTRODUCTION

The legal saga of the British Colonisation is undeniable, through the antiquity and immutability of English Common Law in Malaysia. Today, the common law forms the backbone and the foundation of the Malaysian legal system. The legal and political mystic of the English Common Law and Act of Parliaments (legislative influencers) can be traced as way back to 1608 the case of *Calvin*'s (1608) where it was concerned with the right of a Scottish to sue in English courts. This case sets the supremacy of the English Common Law's legal framework, although the above case may not be directly relevant to the overseas colonised countries.[2] This case delivers the understanding on the beginnings of the common law jurisprudence of the time. In order to appreciate the current reception of the English Law in Malaysia pursuant to the Civil Law Act 1956 (CLA), the distinction of "ceded" and "settled" colonies or even by "peaceful colonisation" is inevitable. Therefore, it is necessary to explore the meanings of the above terminologies and with reference to *Calvin*'s case where it was held, *inter alia*, that once a territory had been ceded to the crown, the sovereign was obligated to "maintain and defend" the people who inhabit that territory and thus, these people owed the sovereign (and the sovereign's laws) their allegiance. Once the status of being a subject was established, the

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2 (1608) 7 Co Rep 1a, 4b; 77 ER 377.

consequences of cession for pre-existing legal systems were generally the same as those of conquest, whereby the existing laws and customs survived until expressly altered by the Crown.

It is noteworthy that the distinction between colonies acquired through conquest and those that were ceded on the one hand, and those acquired through settlement on the other was stressed in *Blanchard v. Galdy*.[3] In this case, it was held that while in an "uninhabited country newly founded out by English subjects, all laws in force in England are in force there", and in the case of Jamaica, "being conquered, and not pleaded to be parcel of the kingdom of England, but part of the possessions and revenue of the Crown of England, laws of England did not take place there, until declared so by the conqueror or his successors." So, in a settled colony it was assumed that the British settlers brought British institutions and practices of governance and the principles and rules of English law with them.

In fact, there has been much debate on whether Prince of Wales Island or now known as Penang was a "settled" or "ceded" colony. The "*terra nullius*" principles will give legal effect of the differences between the above two terms as found in William Blackstone's book entitled *Commentaries on the Law of England*.[4] In *Milirrpurn v. Nabalco Pty*,[5] Justice Blackburn laid down the similar distinction as found in the *Blanchard v. Galdy*'s case namely, that where in a settled colony, the English law formed the basis foundation and immediately in force while the conquered or ceded colonies, the laws that were already in existence remained until it was altered.

A perusal of historical records of Penang, before the island was colonised by the East India Company, shows that the island was inhabited by some Malays and was already the playing ground of the Kedah royalties. Therefore, to argue that English law in Penang was "settled law" would be inaccurate and contrary to the above established facts. Interestingly, the evolution of the law is seen during the British empire by taking on colonies and clearly it was to ensure that the heritage of the English law

3 91 ER 356.

4 William Blackstone (2003) *Commentaries on the Law of England*, The Lawbook Exchange, Ltd.

5 (1971) 17 FLR 141 (27 April 1971) Supreme Court (NT).

will live on and hence, making English law the law of the colony. The benefit of the British Empire was that by the 18th Century, English Law was already well settled in the Malay Peninsular and it was relatively easy to determine which laws that can be received and applied. In light of the above, this chapter reviews the history of English law in Malay Peninsular with special focus on why the need to review ss. 3 and 5 of the Civil Law Act 1956, which relates to the current application of English Law in Malaysia.

10.2 ENGLISH LAW IN MALAYSIA: REVISITING THE HISTORICAL DEVELOPMENT

Malaysia by and large is a peninsula surrounded by water hence it made it easier for the British imperial Government to land on the Penang Island. The main objective of the British was to enforce their supremacy to their colonized subjects as the main intention of the Imperial Government was to gain access through Malaysia to the South Asia and North Asia trade. Malaysia even then was made up of a mosaic of varied cultures hence, in the case of *R v. Aphoe and Kehim* (1797) when the accused persons who were convicted of adultery and as a punishment, their head were shaved bald. These events had caused dissatisfaction among the locals as their Customary law was ignored. From this case, it is observed that the administration of justice is dictated according to their consciences. The Magistrates applied the principles of Natural Justice; that is any concept of what was fair. Although British is said to have come into Penang in 1786, where the Sultan of Kedah at that time needed the military assistance of the British against Siamese invasion, there may have been a conspiracy to take over Penang as the request fell on deaf years. Fear drove the Kedah Sultan to request assistance but was declined and subsequently, both Penang and Province Wellesley was ceded to the British.

Due to the chaos of the murkiness of the punishment levied for offences committed between 1786 to 1807 it can be said that the British Empire took advantage and introduced the Royal Charter of Justice in 1807. The purpose of the charter was to hear and determine criminal and civil cases and the judges were expected to follow the provisions set out in the Charter of Justice and not what a judge would deem to be just and fair according to his "conscience". Judgment and sentencing must be according to justice and right.

The Charter of Justice was further espoused by Sir Ralph Rice that only in the state of Penang criminal law was part of law of England whilst the Native law and customs were administered to the natives of Malaysia in a just and right manner. In *Kamoo v. Thomas Bassett*,[6] Stanley R held, *inter alia*, that the Charter of Justice shall have retrospective effect to civil injury cases in order to accord protection and redress to locals who were being oppressed and treated unjustly. However, it was unfortunate that the British failed to maintain their promises to allow for the local customary law authority with the exclusion of religious, manner and customs of the locals over the English Law and their justification was that it was in the interest of natural justice of the local inhabitants.

This was clearly seen in 1872 case of *Yeap Cheah Neo v. Ong Cheng Neo*,[7] when the Privy Council held that it was irrelevant to debate about "ceded" or "settled" in relation to Penang. It was further stated that English law was considered to be the governing law of Penang as far as it was application to the circumstance of the place and modified in its application by these circumstances. In other words, the laws that were peculiar to the local condition of England would not be adapted to Penang nor does it become part of its law although the general English laws may be introduced in other circumstances.

10.3 THE PUNGENT REALITY OF THE CHARTER OF JUSTICES

In as much as the British justified the Royal Charter of Justice 1807 which was to prevent oppression and unjust decision to the locals by the earlier administration, the reverse was however seen where it can be argued that the British were in fact unjust in their court decision towards the local religious and Customary laws as seen in the *Goods of Abdullah*'s case.[8] In this case, the deceased, a Muslim left a will as he died. The administration granted a letter to his widower declaring

6 (1808) 1 Ky. 1.

7 (1872) 1 Ky. 32.

8 (1835) 2 Ky. 8.

that the will is invalid as not conformable to the rules of Mohamed Law (Islamic Law). However, they argued that the issues at hand were unclear and confusing based on the clarification of facts in relation to the Charter of Justice 1807 on whether a Muslim who expired in Penang could with a will, dispose of his property and what laws were acceptable? This is a clear case of ensuring that justice was given to uphold the intention of the deceased as English law justly believed that a Muslim was capable of transferring his own property through a will even though it is against the Islamic law.

Again, the case of *Fatimah v. Logan*,[9] had put an end to the argument on lex loci of Penang. In this case, the court ruled that Penang was a *terra nullius* state in 1794 and it was settled as the British stated. In fact, Penang was a playing ground for the royalties of Kedah. There existed no fixed institution and since no powers was exercised by the Sultan there, Penang was declared *terra nullius* hence, the allowance for the reception of English law. The argument set forth by Hacket J was that any previous existing laws – Islamic law – ceased in its applicability on the immediate possession of British into Penang. A point note worth is that the judge used the term "no civilized country" in the context of this case as clearly the statement that British merchant based in a country occupied was not seen in the context of Penang.

Taking this subject a little further, the Second Royal Charter of Justice was introduced when the East India Company requested the same from the Imperial Government. In fact, the pace of the change in the East India Company was uneven and, therefore, the Second Charter of Justice was promulgated in 1826 as to enable the King to make provision for the administration of justice in the British colonies of Singapore and Malacca. These, together with the Prince of Wales' Island (now known as 'Penang') formed the Straits Settlements. In addition, the second Charter abolished the Recorder's Court, which served only the Prince of Wales' Island, and established the Court of Judicature of Prince of Wales' Island, Singapore and Malacca.

9 (1871) 1 Ky. 621.

This court further strengthened the position of English Law although the Charter of 1826, like the 1807 Charter did not expressly mentioned on the application of English law in the Straits Settlements. However, in 1858 in the case of *R v. Willans*,[10] Penang adopted the English common law and rules of equity as it stood in 1826. In areas of law that affected British commercial interests, such as contract, commercial law, procedure and evidence, English law was followed completely and thus, replacing the local or indigenous laws. This was to ensure uniformity of law throughout the British Empire and to protect the commercial interests of the East India Company.

By the 1850s, however, there was much dissatisfaction with the quality of justice administered in both Malacca and Singapore. In 1853-54, Chinese immigration levels reached a new peak when men involved in the civil war in southern China began pouring into Singapore in large numbers. This resulted in much unrest and bloodshed, necessitating stricter legislation and law enforcement and the administration of justice.[11] There was a need to re-organise the structure of the court in order to provide for a separate division with its own Recorder serving just Malacca and Singapore. This was made possible with the granting of the third Royal Charter of Justice on 12 August 1855.

Under the third Charter, the Court of Judicature was reorganised into two divisions: the first division had jurisdiction over Malacca and Singapore, while the second division had jurisdiction over the Prince of Wales Island and Province Wellesley. The first division had jurisdiction over Malacca and Singapore, and comprised the Recorder of Singapore, the Governor and the Resident Councillors of Singapore and Malacca. The second division had jurisdiction over the Prince of Wales' Island and Province Wellesley, and comprised the Recorder of Prince of Wales' Island, the Governor and the Resident Councillor of the Prince of Wales' Island. As see from the above, the very reason for

10 (1858) 3 Ky. 16.

11 See Report of the Royal Commission on Non-Muslim Marriage and Divorce Laws.

the granting of the Royal Charter of Justices in the jurisprudence of Malaysian courts were largely to obliterate the local Customary law and therefore, making the English law the precedents that will stand in test of time to date.

10.4 THE FORTIFICATION OF ENGLISH LAW IN MALAYSIA – A BEACON OF HOPE?

Just as the multi intricate designs of the *Batik* fabric in Malaysia, the sources of law has its intricacies wound by the British colonization of Malaysia and this various designs in law can be seen through the lenses (fabric) of current laws and institutions that exists in Malaysia. Certainly, a legal system cannot be frozen in time and stagnant as the consequence of it would result in the country's progression curtailed or limited. However, it can be seen that the legal system bounded by a unique multicultural identity has had to inevitable improve its laws due to the socio-economic, political and legal tensions.

Therefore, this is where Malaysia has justified its position in many aspects moving away from the past common law UK cases to creation of new cases adapting with the values and culture of the country. Although it cannot be argued that the legal development of Malaysia is derived from other old colonial British masters-servant relationship. In the early stages, it can be said that the British administrators disregarded the local practices and cultures of the country. Certainly, the English local customs and traditions were vastly different than the local culture and traditions of Malaysia. History shows that prior to the British administration of Malaysia, clearly existed Malay *adat* (customary) laws that formed the basis of the legal sources in Malaysia. Though it must be noted that the British Parliament however, when legislated laws, advised the British administration that the courts should respect local culture and sensitivities of the locals. The justification for not following the Parliamentary rule was perhaps because of the lack of understanding and uncertainty about what was and was not law in reaction to the Customary law of the land.

The practice of the British Empire of establishing better Government through the rule of law was, nonetheless, an effective way to bring a measure of stability and modernity to the countries like Malaysia and

furthermore, with the various races that were already in existence in Malaysia. Hence, the laws of England derived from a common law tradition is clearly from the old English customs and traditions where they were most suited in Malaysia was perhaps not considered seriously. English law was adaptable enough to suit its populations without totally disrupting local cultural traditions would have been what the British Empire would have liked to argue, perhaps it would have made sense. It can be argued that these Royal Charters of Justice were more of a self-made claim that the effect and application of it was undertaken and applied for the justice of the natives however, the question of suitability and modification of it still remains to be seen and whether it was viable system for the natives would already had effect on Customary laws in practice. This is more of a story of having a good set of teeth and deciding that braces would straighten the teeth even more.

Cleary, it was more for the interest of the British in the Straits Settlements[12] where the imperial Government so conveniently and effortlessly used their legal system and controlled the then Malaya through the colonial office and its trades. G.W. Bartholomew, in his article entitled "*The Reception of English Law Overseas*",[13] stated that the doctrine of suitability was more of a double edged sword where the courts are able to control the reception of English law rather than a rule where the courts are forced to operate. Can this then be argued that the imperial Government was a "despotic regime" that their sole intention was to control the executive, judicial and legislative arms of the colonised territory[14] or to cast inference on this would be unspeakable awful assertion that their intention was indeed noble?

12 Jack Jin Gary Lee, Plural Society and the Colonial State: English Law and the Making of Crown Colony Government in the Straits Settlements, 2 Asian JLS 229 (2015).

13 (1968) 9 Me Judice 1, at p. 9.

14 *Ibid.*

Perhaps even justified was the un-compensatable reality on the need for their constitution of the Straits Settlements by the "rule of difference"?[15] During the colonial rule, there had been serious incidences of racial tensions in fact there were racial riots linking to the Chinese Secret Societies[16] and the Straits Settlements were vulnerable and exposed to these threats that arose from the "natives" communities. In the case of *Mong v. Daing Mokkah*,[17] Terell J held that injustice or oppression would in fact occur if English law was not applied. Looking at how the judge interpreted the need of the reception of English law, it is interesting to note that the rule of injustice and oppression is a subjective interpretation according to how an English judge perceives it to be i.e., seeing it not through the lenses of the natives but of an English man. The doctrine of reception was said to be a "wise provision" by Lord Denning in *Nyall Ltd v. Attorney General*,[18] as the provision had its limitations in that it was said to be only applicable in the circumstances that are suitable to the country.[19]

15 The initial meaning was to European colonisers and their "native" subjects was necessary for elites in the empire to justify the "permanent domination and inequality" that defined colonial rule, however, this meaning was further expanded where an individual's legal personhood ultimately depended on one's belonging to a racial community see Halliday, Terence C., and Lucien Karpik. 2012. "Political Liberalism in the British Post-Colony: A Theme with Three Variations." In Fates of Political Liberalism in the British Post Colony: the Politics of Legal Complex. Cambridge. Cambridge University Press.

16 This secret societies controlled Chinese secret societies that controlled the trade of coolies, opium, and prostitution, over the mid-nineteenth century see Turnbull, C. M. (1972). *The Straits Settlements, 1826-67: Indian presidency to crown colony* (pp. 54-73). London: Athlone Press. Call no.: RSING 959.57 TUR.

17 [1935] MLJ 147.

18 (1956) 1 QB 16.

19 O' Regan, R. S. "The Common Law Overseas: A Problem in Applying the Test of Applicability." *The International and Comparative Law Quarterly*, vol. 20, no. 2, 1971, pp. 342-347. JSTOR, (www.jstor.org/stable/758036).

10.5 THE COBBLED ROAD LEADING TO THE CIVIL LAW ACT 1956 (CLA) AND ITS STARK REALITY

The 'doctrine of subsequent attraction' was another doctrine that was enunciated in the case of *Fitzgerald and Luck* where Downing CJ stated that the common law doctrine of sale in market overt although not applicable in 1828 may subsequently become applicable in the colony when the public markets were establish.[20] Hence, in as much as enunciated again in *Cooper v. Stuart*,[21] by Lord Watson, it was rejected in *Sheehy v. Edwards Dunlop & Co*,[22] where it was stated that the Common law cannot be introduced through the doctrine of subsequent attraction as the only way that it can ever be introduced afterward was through a legislation. However, the same judge in the case of *Nichols v. Anglo-Australian Investment Finance and Land Co*,[23] had implicitly admitted the possibility of the doctrine of subsequent attraction of common law. Perhaps it could be argued due to this hazy understanding of the applicability of Common law, the Civil law Ordinance 1956 was aptly enacted just before the independence to give effect to the applicability in Malaysia.

As the doctrine of subsequent attraction would have proven to be tough to be justified as to why the common law would later be applicable to Malaysian legal scenario as this doctrine can lead to uncertainty. Sir Kenneth Roberts Wray, in his writings '*The Commonwealth and the Colonial Law 1966*',[24] stated that a local court might apply a Common law doctrine that was previously rejected as inapplicable and that he believed to be more appropriate for the legislature to decide. The court is not amending the law but applying the law to changed circumstances.

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20 See Cote, J. E. "The Reception of English Law." *Alberta Law Review* 15.1 (1977): 29.

21 (1889) 14 App Cas 286.

22 (1897) 13 W. N. NSW 166.

23 (1890) 11 NSWLR 354.

24 WRAY, Sir Kenneth Owen Roberts. *Commonwealth and Colonial Law*. London: Stevens & Sons, 1966. pp. liv, 1008. 26 cm., 1966.

The ripples of discontent today can be seen through the application of the Civil Law Act 1956 (CLA), ss. 3 and 5[25] especially the fact that Malaysia once a colony of the British Empire achieved her independence on 31 August 1957; however, the legal of imperial dependence may be argued still lives on. Certainly, when one looks at the above two sections of the CLA and its cumulative development in local cases thus far, the sense queries if there is still any sensibility to retain this act, a legacy from the colonized era. Perhaps the Imperial governance of the superiority of its laws has curtailed the country from developing and progressing its own law.

Ideally, the literature on the legal imperialism needs to be revisited. Legal scholarly application of cases in the Malaysia courts has changed. Inevitably, there is no denial that there is a stark reality between the reception of English law and the doctrine of *stare decisis* that culminates the very foundation many Malaysia cases today. However, it can be argued that we are still a conquered nation in so for as legal and judicial is concerned as we are dependent on the legal imperialism of the CLA. If this contention is favoured, how we can then claim the superiority of our legal system or can we justify the removal of the above two sections of the CLA and thereby eliminating the legal imperialism. If we choose to depart from the CLA are we then reducing or eliminating the confidence of the judiciary. This would build upon the precept that there is a lack of intellectual confidence on the judiciary to independently develop law and not be sub-judicated by the English laws.

Certainly the CLA comes with challenges and problems.[26] One of the main challenges would be the rules of construction and the interpretation of s. 3 of the CLA.[27] The first look would be towards the

25 http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act%2067.pdf retrieved 25 March 2019

26 See *MacDonald v. Levy* (1833) 1 Legge 39, at pp. 51 to 53.

27 See, also, G.W. Bartholomew, The Commercial Law of Malaysia (1965); Joseph Chia, "Reception of English Law under ss. 3 and 5 of the Civil Law Act (Revised 1972)", [1974] J.M.C.L. 42; and L.A. Sheridan, Malaya and Singapore—The Borneo Territories (1961).

doctrine of reception of English law, and to argue on the significance of the doctrine would be to accept the fact that English laws were received and thereby binding on the ordinary courts in Malaysia.

There are two understandings of what is Common law, the most famous and powerful figure in championing Common law based judicial precedent was Sir Edward Coke. He was the most powerful judicial and scholarly champion of this precedent-based common law. The phrase "*Neminem opportet esse sapientiorem legibus*" as written by him means that "no man out of his own private reason ought to be wiser than the law, which is the perfection of reason."[28] The key point to note is law as an "artificial perfection of reason". This means that law include that incorporates a judicial discussion and reasoning based on experiences and precedent through the time. This gives a resolution to the problem of cases where judges are, in many ways forced to apply law in similar facts cases in a just and equal manner whilst having the flexibility that surrounds the facts of new cases. Hence, the CLA gives effect to the Malaysian judiciary in that the judges are made to give effect to the judicial precedent that brings justice through the scholarship of precedent.

This brings to the discussion of the doctrine of *stare decisis* which have been the corner stone and foundation of the Common law system[29] and the rule of this doctrine clearly states judicial precedent has no applicability to courts outside of England and if this was the correct interpretation how then does the doctrine of reception justify the development of English cases in other countries. The doctrine of binding

28 Coke, Institutes of The Laws of England, Lib. 2. Cap. 6. Sect. 138 (3d. ed. 1633).

29 Harold J. Berman, Law And Revolution: The Impact of The Protestant Reformations on the Western Legal Tradition, 270 (2003) explained the common law system as "The new emphasis on the historicity of English law, that is, on the normative character of its historical development over generations and centuries, was manifested in new ways of systematizing it. The most obvious methodological manifestation of the new historical jurisprudence was the emergence of the modern doctrine of precedent."

precedent in the form we know and practice today – evolved around the doctrine of reception which may be traced to Blackstone where he "regarded precedent as the ultimate cornerstone of the common law". To tread deeper into Blackstone's thoughts, he asserted that the scales of justice is tilted for the greater good as it keeps a sense of certainty to the new judges' decisions unless of course the judges are able to justify departure due to absurdity or unjust.[30]

Therefore, to argue the doctrine of reception is applicable but not in one possible way out of this conundrum is to argue of reception binds, however, not in an inflexible manner though the suitability of the laws can be questioned and perhaps modified. The argument theorizes that the doctrine of reception is not applicable to Malaysia would be slim to succeed as the tenets of precedent resides in the flexibility whereby it can be modified when there exists unfairness or oppressiveness to the local populations. However, an issue still very much contended is that it is the judge's opinion that may contradict the Customary laws of the land and hence, leading to complications in the application of the Common law. However, the CLA certainly is clear authoritative that the decisions from the House of Lords (now the Supreme Court) and the English Court of Appeal are binding on the Malaysian courts. Therefore, the legal conclusion would be that English decisions bind as it has a fettering power on the development of the local laws. Then again, the very reason the CLA needs to be relooked and abolished is the argument that the laws are too outdated or unclear to its application to the local scenarios.

30 "For it is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion" and "the doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust." from the William Blackstone, Commentaries On The Laws Of England: In Four Books 69 (New ed., with the last corrections of the author ... ,with notes/by John Frederick Archbold, London, 1811)).

The Federal Constitution being the highest system in the hierarchy of law has included the 'common law' in the definition of 'law' in article 160[31] and thus, an endorsement of the CLA. Section 3(1) of the CLA states that English law applicable in Malaysia which automatically includes not only the common laws but also the rules of equity and some statutes. Further, s. 5 of the same Act allows for the application of the English Commercial law and therefore states such as Penang, Malacca, Sabah and Sarawak have uninterruptedly been subjected to the doctrine of reception in relation to English Commercial law. However, in other states of West Malaysia the doctrine of reception of the English Commercial law came through the CLA enacted on 7 April 1956. This does not mean that all three components of English law mentioned above can be freely used and referred to without any limitations. In the book *Malaysian Legal system* edited by Ashgar Ali, a chapter on the CLA has been dissected thoroughly, where the authors, Trakic and Hamid has discussed the CLA and the general application of English law pursuant to ss. 3 and 5. The discussion also revolved on whether there is a need for the provisions currently in Malaysia.[32] The argument put forth by these learned scholars were debates by learned legal scholars such as the late Ahmad Ibrahim, Alsagoof, Tun Abdul Hamid Omar and Tun Ahmad Firuz Sheikh Abdul Halim among others. The debate centred around the justification that Malaysia should not have an albatross hanging around her neck as the colonial Common law free itself from the English Common law restrained Malaysia from developing its own Common law. Further, the grouses were that the Federal Court being the most supreme omnipresent court in Malaysia ought not to be referring to cases that were decided more than a century ago however with the experience of the learned judged they could stand on their grounds to find local laws based on local legislations.

31 http://www.agc.gov.my/agcportal/uploads/files/Publications/FC/Federal%20Consti%20(BI%20text).pdf retrieved 25 March 2019

32 See Ashgar Ali Ali Mohamed, Malaysian Legal System, Malaysian Current Law Journal, Ampang, 2014.

The late Ahmad Ibrahim in his article entitled '*The Civil Law Ordinance in Malaysia*',[33] contended that English common law should not be enforced in Malaysia but rather the judges ought to be looking for local solutions. The issue here, however, would be that the solutions cannot be manifested through thin air as the rule of law clearly begs that a judge is obliged to find law and not to make law. Certainly, the esteemed scholar's argument stems from s. 3(1) of CLA that this section gives the judges the authority to depart rather than from being bound by English common law provided of course there is a lacuna.[34] Perhaps the hesitance displayed by the legal fraternity in moving forward toward this may be due to the fact that Malaysia was once colonised by the British, it is unfortunate that we are still colonised mentally by their past glorious supremacy of the English Common law. In as much as there has been furious calls for the total abolishment of reception of English law under the CLA, many legal scholars are strongly of the view that Malaysia judges should step up and no longer be a slave to laws that were made about a century ago. They ought to be dignified and stand tall to meet out decisions confidently without clouds of anxiety, guessing themselves if they are capable to find good laws according to the local Common law.[35]

Despite these strong opinions to abolish the CLA, there have been equally vocal views on the contrary, resolutely disagreeing on the abolishment of the CLA. The recent article written in *Malaysiakini* hurled out serious inferences that nepotism and cronyism exist in our

33 [1971] 2 MLJ lviii.

34 'Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary'.

35 See Syed Ahmad Alsagoff, *Principles of the Law of Contract in Malaysia* (3rd Edn) (LexisNexis, Kuala Lumpur, 2010), p. 22.

judiciary.[36] To the extent the superior court judges could be said to make laws for the interest of the crony politician and the nepotism business associates instead of finding law – clearly a miscarriage of justice. Therefore, if these allegations are indeed true facts, drawing the calls for the abolishment of the CLA will further give the *carte blanche* to these kinds of judges to makes laws and egoism would prevail to perpetuate their self-interestedness. Alluding from the above, the issue of honour and integrity of judges becomes the scrutiny, the author further claims that many of the judges are incompetent in their ability and skill to make proper ruling and sometimes even make decisions hastily and justify it by moral outrage. This goes against the very essence of an adversarial court system. Be that as it may, judges are seen to be people without fear or favour, however, it is unfortunate that judges today are subjected to Key Performance Indexes (KPI). Being subjected to KPI, puts the judge in a dilemma whether to decide the case speedily and be elevated or to produced quality judgments and good judicial reasoning.

Indeed, quite apart from these problems, another serious problem faced is the complexity of race-based politics that permeates everything in Malaysia. In fact, when a judge decides to make a decision he is confronted by political, religious and race and thereby cowering to the pressure ultimately losing the respect of the judiciary in the international arena. Equality and justice being the pillars of democracy eroded when the judicial crisis of Malaysia in 1988 that led to the sacking of respected icons like Lord President Salleh Abbas and two other judges, George KS Seah and Wan Suleiman. Other unjust removal followed suit such as Azmi Kamaruddin and Eusofee Abdoolcader. These removal, one may ask, what relevance has it to CLA? The article entitled '*Comment: Tun Salleh and the Judiciary*'[37] sheds light in the reference of the second

36 Gerard Lourdesamy, '*Is our judiciary beyond redemption?*' Malaysiakini: 17 Feb 2019, retrieved on 17 Feb 2019, at 5:53 am.

37 http://www.malaysianbar.org.my/members_opinions_and_comments/comment_tun_salleh_and_the_judiciary.html

allegations[38] where the then Lordship was accused of eroding the Civil law of Malaysia and thence creating restless amongst the multi-racial and multi-religious society in Malaysia. Perhaps what has to be realised is that his lordship did not intend for the Civil law to be completely abandoned but for the Islamic Legal System and the Civil law of Malaysia to complement each other like bread and butter. However, the tribunal responded[39] to that allegations the statement made by Tun

38 The second allegations – At the launching of the Book "Malaysia Law" and "Law, Justice and the Judiciary: Transnational Trend," on 12 January 1988 in his speech he made several statements discrediting the Government and thereby sought to undermine public confidence in the Government's administration of this country in accordance with the law. In the same speech he made special reference to the interpretative role of judges and advocated the acceptance of the Islamic Legal System not only in the interpretation of the Civil Law of Malaysia but in its general application. In particular he advocated thus "This system consists mostly of the Quran and *Hadith* (tradition of Prophet Mohammad (s.a.w.)). The interpretation of these two sources of law is done according to the established and accepted methodology. Volumes of literature have been written as commentaries and exegesis of the Qur'anic law the Prophet Mohammad's *Hadith* or tradition. In this situation, not only is the judiciary bound by Islamic law as propounded by juris-consult (*muftis*, who give legal rulings on particular matters), but as Parliament and the executive too are certainly bound by these rulings." His attempt to restate the law generally along Islamic legal principles ignores the character of Malaysian society as one which is multi-religious and multi-racial with deep cultural differences. No responsible government can allow the postulation of such views by the head of the Judiciary without causing fear and consternation among its non-Muslim population. Furthermore, his statement violates established principles of judicial interpretation widely accepted in the courts in Malaysia and in the Commonwealth.

39 Allegation 2(iv)

The Tribunal held:

(i) that it was manifestly clear in the absence of an explanation from Tun Salleh who made the speech that he was seeking to advocate in the guise of interpretation, the acceptance of the principles of Islamic law as propounded by the "muftis" and to assert that such rulings bound not only the Judiciary but also both the Parliament and the Executive of the country.

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Salleh Abbas may in fact cause uneasiness amongst the non-Muslims in Malaysia and further, the Constitution after Merdeka is the Supreme law of Malaysia where the Constitution today expressly includes the English law pursuant to CLA as part of the Local law.[40]

Before addressing on amendments or abolishment of the CLA, the first wise step would be to address on the selection, appointment and promotion of judges. The amendments or the abolishment of the CLA will reflect the proper administration of justice provided the judicial bench internalises the highest standards of integrity, ethics and competency. Tun Abdul Hamid Mohamad commented that s. 3 of the CLA was justified in the early years prior and post-independence as our judicial system was crafted based on the English judicial system *albeit* with minor adjustments. He believed that lawyers in the early times

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(ii) that it must be borne in mind that Islam is the religion of the Federation, the Constitution of Malaysia by arts. 3 and 11 assures and guarantees to all persons complete freedom of religion by vesting in every person "the right to profess and practise his religion" in accordance with the law.

(iii) that it must also be borne in mind that Malaysia is a multi-racial and multi-religious country. That being so, the assertion of principles as spelt out in the said speech by Tun Salleh is likely to cause not only uneasiness but also fear and doubt in the minds of those who profess a religion other than Islam and do not subscribe to the tenets and principles advocated by Tun Salleh in his speech.

(iv) that it must also be borne in mind that the Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with the Constitution shall be void to the extent of such inconsistency. Therefore, it was ill-advised for Tun Salleh as head of the Judiciary to make an authoritative statement that "Islamic laws bind not only the Judiciary but Parliament and the Executive also".

40 See p. 156 of the Malaysian Legal System book: Adnan Trakic and Tun Hamid "The country's highest law, the Federal Constitution (FC), includes the 'Common law' in the definition of 'law'. A more specific endorsement of English law has been made by the Civil Law Act 1956 (Revised 1972) (Act 67). Section 3 of the Act dictates that English law applicable in Malaysia means: Common law, rules of equity and certain statutes. Further the application of English Commercial law is allowed pursuant to s. 5 of the Civil Law Act 1956.

were legally trained under the Common law legal system hence, they were familiar, confident and comfortable at all time to the applicability of the Common law from England.[41] Therefore, to his mind the CLA has a pivotal role to play especially in the areas of Tort law and Trust law especially since Malaysia courts apply the rules of equity in many instances. He further emphasised that with the CLA, the court's jurisdiction to apply laws is carved in stone and the end result would be that there would be no argument as to the certainty and consistency in the application of the rules.

However, his commentary also mentioned that if there are any possible amendments, these should include not only local case laws but also laws of the Commonwealth jurisdiction. Perhaps this would have given a sense of progressiveness if each other (Commonwealth countries) absorbed the greater knowledge in the areas of common laws form the learned judges in the Commonwealth countries. He further recommended that the word "shall" in s. 3 of the CLA should be replaced with "may" as this would give judges the discretion to decision to adopt the English law. It is undoubted that the Common law principles may not necessary be suitable to the local circumstances.

Interesting to note that Tun Abdul Hamid realised something valuable because between the Common law of Malaysia today and the judicial practices as laid down in the last century by the British, lies a wealth of judicial practices and in many instances there have been famous quotes from the British judges and will always be considered to be classic judgments and in many instances these law present an appearance of remarkable similarity and there is no wrong or even loss of dignity in trying to formulate their main principle of law whilst distinguishing or differentiating them from our very own local circumstances, hence, the justification for the replacement of the word "shall" to "may" in s. 3 of the CLA.

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41 Comments on the Review of Civil Law Act 1956 (Act 67).

The next issue that Tun Abdul Hamid explored was the "cut-off date"[42] where he argued that the courts ought to be given the choice to decide if they wish to still adopt cases after 1956, he cited his challenges of not being able to apply the famous case of *Hedley Byrne & Co Ltd v. Heller & Partners Ltd*,[43] in *Nepline Sdn Bhd v. Jones Lang Wootton*,[44] a case which he presided. The justification would be that common law is believed to be dynamic and continuous developing as per the declaratory theory i.e. that the common law, existing in customs and usages, is 'just there', 'waiting' to be discovered by the courts; judges do not, therefore, 'make' law as such.[45] Similarly, the highest echelons of the strength of Malaysian judiciary were seen in the subsequent cases, where clearly it is not open for English courts to give gratuitous advices to Malaysian courts. One such example was when Hashim Yeop A Sani CJ in the cases of *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor*[46] where his lordship interpreted s. 3 of the CLA and held that "[t]he development of the Common law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the court of this country".[47] Indeed, it appears that the same views were expressed in the Court of Appeal case of *Sri Inai (Pulau Pinang) Sdn Bhd v. Yong Tit Swee & Ors*[48] that it was "entirely up to our courts to develop our Common law jurisprudence according to the needs of our local circumstances".[49]

42 'Cut-off' date for the common law as set out in section 3(1) of the CLA is 7 April 1956 (West Malaysia), 1 December 1951 (Sabah) and 12 December 1949 (Sarawak).

43 [1964] AC 465.

44 (1995) 1 CLJ 865.

45 See Rupert Cross, *Precedent in English Law*, 3rd edition (1977), at pp. 26-33. For a jurisprudential perspective, see Ronald Dworkin, Taking Rights Seriously (1978).

46 [1990] 1 MLJ 356.

47 *Ibid* at 361. Cited and applied by Gopal Sri Ram JCA in *Sri Inai (Pulau Pinang) Sdn Bhd v. Yong Yit Swee* [2002] MLJ LEXIS 650 at 32-33.

48 [2002] MLJ 650 at 31-32.

49 *Ibid.*

At this juncture, it is also worth noting the argument set forth by Downing CJ in the case of *Ex parte Nichols*,[50] where the trial judge suggested that if it is an issue of "Fundamental laws" in relation to personal rights, then it is acceptable for the Common law of England to apply beyond the "cut-off" date. However, this has been argued to open the flood gates, perhaps a more acceptable way would be to introduce legislation that codifies classical important cases that brings universally acceptable principles especially in the Commonwealth nations. This is nothing new if one sees the repeal Companies Act 1965 and the new Companies Act 2016, s. 21 which is a direct application of the case of *Salomon v. A Salomon and Co Ltd*,[51] and the effect of the case law in itself.

A plausible answer to the effect of the "cut-off date" can be observed from the case of *Jamil Bin Harun v. Yang Kamsiah bte Meor Rasdi & Anor*,[52] a decision of the Judicial Committee of the Privy Council where Lord Scarman stated: "The Federal Court is well placed to decide whether and to what extent the guidance of modern English authority should be accepted. On appeal the Judicial Committee would ordinarily accept the view of the Federal Court as to the persuasiveness of modern English case law in the circumstances of the States of Malaysia, unless it could be demonstrated that the Federal Court had overlooked or misconstrued some statutory provision or had committed some error of legal principle recognised and accepted in Malaysia." There was no direct reference made to s. 3 of the CLA although it was within the knowledge of the Privy Council.

50 (1839) 1 Legge 123. The issue here was whether the English Prisoners' Counsel Act (which was passed after the 'cut-off' date in New South Wales) applied so as to enable an accused to conduct his defence in a summary trial before a Magistrate by counsel

51 [1897] AC 22.

52 [1984] 1 MLJ 217.

Referring to the article by Paul Subramanian entitled the "*Common Law*", Datuk Mahadev Shanker,[53] stated: "To me, the best encapsulation of the close relation between common sense and Common law, and the judge who works his magic to transform the former into the latter, were the parting words of Lord Bridge in his final judgment in *Ruxley Electronics and Construction Ltd v. Forsyth* (1994) 3 All ER 801. "My Lords, since the populist image of the geriatric judge, out of touch with the real world, is now reflected in the statutory presumption of judicial incompetence at the age of 75, this is the last time I shall speak judicially in your Lordships' House. I am happy that the occasion is one when I can agree with your Lordships still in the prime of judicial life who the Malaysian Bar demonstrates so convincingly that common sense and the Common law here go hand in hand." Mahadev Shanker argued that the Common law and equity are universal concepts and what is illegal or unjust in one part of the world is generally viewed as being illegal and unjust everywhere else. They are the bedrock on which the Universal Declaration of Human Rights is based. No nation should be permitted to call itself civilised until it fully complies with its terms.

Coincidentally, this can be seen as the echo from the distant past where Winston Churchill's famous 1943 speech at Harvard University on the common ties of the English-speaking peoples, he defined the bond in terms of three main things: law, language, and literature. Indeed, when he elaborated on what he meant, he spoke mainly of concepts derived from and guaranteed by English law. He said: "Law, language, literature - these are considerable factors. Common conceptions of what is right and decent, a marked regard for fair play, especially to the weak and poor, a stern sentiment of impartial justice, and above all a love of personal freedom ... these are the common conceptions on both sides of the ocean among the English-speaking peoples."[54]

53 In his article written in the Star on Sunday 21 Nov 2010 entitled 'Common sense and the law'.

54 Churchill at Harvard: September 6, 1943 / Harvard Magazine at https://harvardmagazine.com/churchill-18.

10.6 JURISPRUDENCE ARGUMENTS OF THE FOSSILIZATION OF ENGLISH LAW

Moving away from the CLA echoes Sir Henry Maines view that law is found in a progressive society and not a stationary society, of course this was at that time in relation to colonial powers.[55] Therefore, it could be argued that to maintain the CLA in Malaysia as a progressive society is akin to adopting an archaic 1956 Act that is more than half a century, which in turn lends to arguments that we are not allowing for spontaneous development of the law. If we agree with Maine, then the CLA reflects something permanent and this goes against the idea of a progressive society.

Law reflects a changing society hence the evolution of mankind. Bryce (1902) in his study of history and jurisprudence argued that law was an effective instrument in colonisation of nations. In fact, using India as an example he quoted that the British had given their law due to the inefficiency of the Indian commercial law, hence could the same be said with CLA, with the adoption of the Act into Malaysia? Perhaps it could also be argued that the British were trying to display their dominant force over Malaysia? Hence, the over-confident superiority of the Imperial Government over its colonised nations. Indirectly emphasising British as the more progressive race over the colonised Asians, a slow progressive? If British used law as an instrument for social and economic control, was the outcome of it create a country that in years to come to be still dependent on the legal imperialism of the British's power? However, at the same time the justification of the CLA would be perhaps that the British wanted to ensure that no one race would have the superiority over law as perhaps a more National law would have distinguished the status of each race as believed by Byrne and Chamberlin. Therefore, it is interesting to note that Malaysia is comprised of three major races, hence, an urgent need to revamp the CLA due to the changes in the governing system that corresponded with the social and economic system.

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55 Henry Sumner Maine, 'From status to contract' (1861).

It may be further added that in 1981, Martin Shapiro wrote a book entitled "*Courts: A Comparative and Political Analysis*" that perhaps was a more independent in the civil judiciary in the UK where the civil judges were able to exercise judicial discretion. Therefore, perhaps it was on this basis that the Imperial Government believed and saw that Malaysia needed the same judicial independence largely because, Malaysia being predominantly an Islamic state would be sunk in the presence of Governmental system based in Islam thereby denying the rights of non-Muslim citizens who the Imperial Government felt a sense of duty towards them as it was their action that landed the Chinese and Indians in Malaysia, based on the historical analysis of the complex society that they may have created. Therefore, this may have been the contributing factor to the evolution and the imposition of English law pursuant to the CLA that was made relevant then. This could also be due to the fact that Malaysia being an economic colony of the Imperial Government needed the legal and judicial systems in place and to argue otherwise would be myopic.

It is clear that the strategy of the Imperial Government was that in the years to come, to legitimise the British control by modifying Customary laws, and ensure that the enacted laws applies to Malaysians. Clearly, the British constitution at that time did not seek for equality of their colonized states that would have set the British Empire back in its socio-economic and cultural status and father paramount to deference to British authority.

It was also a central feature of this imperial ideology that, while the colonies would embody the structures and principles of the British constitution, they would necessarily be subordinate to the British Crown and Parliament. There was no place in the British constitutional and colonial theory, at that time, for equality between the imperial power and its colonies. No royal governor, it was asserted, could be accountable to two masters, the King in Parliament in London and locally elected colonial assemblies. Moreover, judges should be appointed by the Crown, so that the very best candidates could be secured, and insulated from the purse strings and unpredictable policies of those same assemblies.

The imperial system moved slowly and grudgingly in the direction of redefining and balancing the relationship between Britain and its colonies. The point is also important because it explains how a body of law which was introduced into many British colonies could be at one and the same time static and apparently incapable of responding to new realities, and relatively vigorous and responsive to change. This process of enforced change was not, however, uncontested. Local "common people" or "commoners" who viewed their rights as customary and embedded in Local law and regulation were ready in some cases to protest enclosure, by pulling down walls and fences, exercising their customary rights on enclosed land, engaging in riots or contesting enclosure before the courts.

Historians such as P.J. Cain, A. G. Hopkins, Niall Ferguson, and several authors who contributed to the Oxford History of the British Empire have demonstrated that, instead of British imperialism generating colonial exploitation and underdevelopment (as the decolonizes and the nationalists alleged) the opposite was true. Britain brought its home-grown modern systems of finance, transportation, and manufacturing to much of the undeveloped world. Far from a form of plunder that depleted the economies that came under its influence, British imperialism brought many of the institutions of modernisation to its territories.

10.7 CONCLUSION

English Common Law System is now the most widespread legal system in the world with 30% of the world's population living under this system.[56] English Common Law is the most common legal system in the world, not only because it applies to the largest slice of the world's population but also because it is used in 27% of the 320 world's legal jurisdictions.[57] Philip Wood explains that the use of English Common Law is so widespread because it was dispersed across the globe during the growth of the British Empire. Since then these former colonies have

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56 Revealed by Professor Philip Wood, author of the "Maps of World Financial Law" published by Sweet & Maxwell.

57 According to the book from Sweet & Maxwell, a Thomson Reuters business (NYSE: TOC; TSX: TOC),

decided to continue using the English Common Law system and it still remains the legal system for increasingly important economies such as India. The most significant justification in keeping with the Common law tradition can be derived from the case of *Invercargill City Council v. Hamlin*,[58] where Lord Lloyd prompted the distinguished members of the Commonwealth judiciary that the "ability of the Common law to adapt itself to differing circumstances of the countries in which it has taken root is not a weakness, but one of its greatest strengths. Were it not so, the Common law would not have flourished as it has, with all the Common law countries learning from each other". In other words, the distinguished judge was merely asserting that the Common law should not be monolithic and to ignore the local conditions and policy considerations would be in reality a rash judgment.

A new country has a choice to decide which system of law is most suitable for itself. The option is either to 'plagiarise' another country's codified laws or alternatively, to decide on a legal system that are made up of case laws i.e. Common law. Accusers of British colonisation will certainly disagree with historians[59] that the imperialism in fact did not bring in modernisation but colonial exploitation, depletion of natural resources and under development. However, in the eyes of the imperial Government they were doing justice in the colonisation as they were progressing these countries to a civilised status.

The downside of the latter decision would slow down a country's legal is lacking. That brings to the dilemma of the new country whether that ought to plagiarise the rules of a well-developed country. History has shown us that all the countries that were once conquered or colonised even as far as the Roman Empire inevitably chose to adopt the laws of the Imperial Government and here in Malaysia, the English laws. The triumphant and legitimisation of Malaysian law post 1957 and the omnipresence of the English common law to exercise imperium that was an anathema. Today, English laws in the historical epoch of British Empire continues to live on through and in many cases, the Malaysian civil courts frequently quote the past English precedents. Therefore, to speak of the need to reform the CLA must go to the roots of the substance whilst to frivolously talk of it would be gaseous rhetoric.

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58 [1996] 1 NZLR 513, at pp. 764-765.

59 See Historians such as P. J. Cain, A. G. Hopkins, Niall Ferguson, and several authors who contributed to the *Oxford History of the British Empire*.

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