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The Legal and Practical Issues Related to the System of Two High Courts in Malaysia

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ABSTRACT

Malaysia was formed on 16 September 1963 when among others, the two states in East Malaysia (Sabah and Sarawak) were federated with West Malaysia or Peninsula Malaysia (then known as the Federation of Malaya). The Federal Constitution of the Federation of Malaya was then extensively amended to accommodate the creation of the new Federation of Malaysia. However, as a compromise for the states of Sabah and Sarawak to join Malaya and become the Federation of Malaysia, many aspects of the judicial and legal system, as it was before the formation of Malaysia, were maintained. This included, among others, having two High Courts of co-ordinate jurisdiction and status, namely the High Court in Malaya for West Malaysia and the High Court in Sabah and Sarawak for East Malaysia, the use of different languages in both these courts, separate legal profession for West Malaysia, Sabah and Sarawak respectively, and different laws on the same subject matter between East and West Malaysia. Although this system has been in place now for over five decades, it has

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given rise to various legal and practical issues which have remained unresolved up till now. This paper seeks to highlight some of these issues.

Keywords: High Court in Malaya; High Court in Sabah and Sarawak; Co-ordinate jurisdiction and status; Language in court; Legal profession in Malaysia

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1. Introduction

Malaysia today is a federation of thirteen states[1] and three Federal Territories.[2] Malaysia was formed on 16 September 1963 when, among others, the two states in East Malaysia (Sabah and Sarawak) were federated with West Malaysia or Peninsula Malaysia (then known as the Federation of Malaya). The Federation of Malaya attained its independence from the British on 31 August 1957. At that time, both Sabah (then known as North Borneo) and Sarawak were Crown Colonies of the British.[3] However, despite being separated by about 650 kilometres of the South China Sea, there were many similarities between East and West Malaysia in terms of history, geography, economy, as well as racial and cultural factors.[4] It was thus perhaps inevitable that the homogeneity between East and West Malaysia would one day result in their futures being intertwined.

The idea of a political association among Malaya, Sabah and Sarawak had been discussed for many years before the formation of Malaysia. Before coming to any final decision, a commission under the chairmanship of Lord Cobbold was set up to ascertain the views of the people of Sabah and Sarawak on these questions. In its report published on 1 August 1962, the Commission unanimously agreed that a Federation of Malaysia was in the best interests of Sabah and Sarawak and that an early decision in principle should be reached.[5] In its report published on 1 August 1962, the Commission unanimously agreed that a Federation of Malaysia was in the best interests of Sabah and Sarawak and that an early decision in principle should be reached.[6]

The Cobbold Commission recommended that the existing Federal Constitution be amended to envisage the entry of Sabah and Sarawak as States within the Federation.[7] At

[1] See Federal Constitution, art 1(2). The thirteen states are Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Sabah, Sarawak, Selangor and Terengganu.

[2] See Federal Constitution, art 1(4). The three Federal Territories are Kuala Lumpur, Putrajaya and Labuan.

[3] See Ahmad Ibrahim, Towards a History of Law in Malaysia and Singapore (Dewan Bahasa dan Pustaka 1992) 119; Mohd Hishamudin Mohd Yunus, 'An Essay on the Constitutional History of Malaysia (Part 2)' [1995] 3 Current Law Journal xxxi.

[4] Charles Richard Ostrom, 'A Core Interest Analysis of the Formation of Malaysia and the Separation of Singapore' (PhD thesis, Claremont Graduate School 1970) 127.

[5] See the Terms of Reference, Cobbold Commission Report 1962.

[6] Excerpt from the Report of the Inter-Governmental Committee 1962.

[7] The Cobbold Commission Report 1962, para 148(b).

that time, the Federal Constitution was only applicable to West Malaysia. In particular, the Commission had this to say:

> On the one hand, the Federal Parliament must have sufficient powers to ensure alignment of policies in matters essential to the creation and maintenance of a real and strong Federation. On the other hand, the Borneo territories should be enabled to maintain their separate identities within the Federation.
>
> … In view of the special circumstances which apply to the Borneo territories, autonomy and safeguards should be given in certain matters which are not enjoyed by the other States. We are anxious in this connexion that some form of guarantee should be provided whereby no amendment, modification or withdrawal of whatever special powers or safeguards may be given can be made by the Central Government without the positive concurrence of the Government of the State concerned.[8]

Following the findings of the Cobbold Commission, various amendments were made to the Federal Constitution. However, as a compromise for the states of Sabah and Sarawak to join Malaya and become the Federation of Malaysia, many aspects of the judicial and legal system as it was before the formation of Malaysia were maintained. This included, among others, having two High Courts of co-ordinate jurisdiction and status, namely the High Court in Malaya for West Malaysia and the High Court in Sabah and Sarawak for East Malaysia, the use of different languages in both these courts, separate legal profession for West Malaysia, Sabah and Sarawak respectively, and different laws on the same subject matter between East and West Malaysia.

With specific regard to legislation, the Malaysia Act 1963 extended the laws of the former Federation of Malaya to Sabah and Sarawak. Be that as it may, many laws remain different between East and West Malaysia. In particular, with regard to the laws affecting legal practice in Malaysia, there are different acts within West Malaysia, Sabah and Sarawak on issues such as the legal profession, limitation, the application of English laws, and interpretation and revision of laws. For example, there are three laws on the legal profession in Malaysia: Legal Profession Act 1976, Advocates Ordinance 1953 in Sabah and Advocates Ordinance 1953 in Sarawak. The Advocates Ordinance 1953 in Sabah prohibits advocates and solicitors from West Malaysia and Sarawak from practising in Sabah. Similarly, the Advocates Ordinance 1953 in Sarawak prohibits advocates and solicitors from West Malaysia and Sabah from practising in Sarawak.

These differences pose various legal conundrums with no clear resolution, which lead to confusion and inconsistency in the application of the law, for example, the inability to transfer cases between the High Court in Malaya and the High Court in Sabah and Sarawak.[9]

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[8] The Cobbold Commission Report 1962, para 154.

[9] See for example *Fung Beng Tiat v Marid Construction Co* [1996] 2 MLJ 413 and *The Board of Trustees of The Sabah Foundation & Anor v The Board of Trustees of Syed Kechik Foundation & Ors; Syed Salam Albukhary & Ors (Discovery*

Although this system has been in place now for over five decades, it has given rise to various legal and practical issues which have remained unresolved till now. Hence, this paper seeks to highlight some of these legal and practical issues still enduring in Malaysia today as a result of the system of two High Courts in Malaysia.

2. The Non-Transferability of Cases Between the Two High Courts

One of the legal issues that has arisen as a result of there being two High Courts in Malaysia is that there are no powers to transfer a case between the two High Courts. The civil jurisdiction of the High Courts is provided for in Section 23(1) of the Courts of Judicature Act 1964 which states that the High Court shall have jurisdiction to try all civil proceedings where: (a) the cause of action arose; (b) the defendant or one of several defendants resides or has his place of business; (c) the facts on which the proceedings are based exist or are alleged to have occurred; or (d) any land the ownership of which is disputed is situated. Section 3 of the Courts of Judicature Act 1964 further defines 'local jurisdiction' to mean, in the case of the High Court in Malaya, the territory comprised in the States of Malaya, namely, Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Selangor, Terengganu and the Federal Territory of Kuala Lumpur; and in the case of the High Court in Sabah and Sarawak, the territory comprised in the Borneo States, namely, Sabah and Sarawak, including, in either case, the territorial waters and air space above those States.

Based on this section, there may be an overlap in jurisdictions; for example, a defendant may reside in Kuantan but breached a contract in Kuala Lumpur. In this scenario, if the plaintiff filed a suit against the defendant in the High Court at Kuala Lumpur, the defendant could apply to transfer the proceedings to the High Court at Kuantan relying on Section 23(1)(b) of the Courts of Judicature Act 1964. However, if the defendant resides in Kuching but breached a contract in Kuala Lumpur, and if proceedings are filed against the defendant in the High Court at Kuala Lumpur, the defendant cannot apply to transfer the proceedings to the High Court at Kuching. This is because the High Court in Malaya is not conferred with powers to transfer proceedings to the High Court in Sabah and Sarawak, and vice versa. This problem has arisen in many instances, as discussed in the following case laws.

In *Syarikat Nip Kui Cheong Timber Contractor v Safety Life and General Insurance Co Sdn Bhd*,[10] one of the issues was whether the plaintiffs who had their place of business in Tawau, Sabah could sue in Peninsula Malaysia as a firm. It was held, among others, that both the High Court in Malaya and the High Court in Borneo (now the High Court in Sabah and Sarawak) have separate and distinctive territorial jurisdiction. Article 121(1) of the Federal Constitution provides that the two High Courts have co-ordinate jurisdiction, and the definition of 'local jurisdiction' as provided in the Courts of Judicature Act 1964 speaks of the territorial jurisdiction of each of the two High Courts.[11] In *Dayasar Corp Sdn Bhd v CP Ng*

Defendants) [2009] 1 LNS 799.

[10] [1975] 2 MLJ 115.

[11] ibid 116.

& Co Sdn Bhd,[12] a winding-up petition was filed against the respondent in the High Court in Malaya. The respondent had its registered office in Kuching, Sarawak. In striking out the petition, the High Court held, among others, that it was never the legislative intention for the High Court in Malaya to assume jurisdiction over a matter arising in or which should have been filed in the Kuching High Court.[13] It was also held that a transfer of proceedings would not be appropriate as the matter was in the Borneo High Court's jurisdiction.[14]

In *Fung Beng Tiat v Marid Construction Co,*[15] the debtor opposed a bankruptcy petition filed against him in the High Court at Kuala Lumpur on the basis that the bankruptcy petition ought to have been filed in the High Court at Sabah. This is because the debtor was ordinarily resident in Sandakan, Sabah for the one year preceding the presentation of the petition. The creditor argued, among others, that it was open to the creditor to present its petition in any state within the Federation and that the proceedings could, after the making of the receiving and adjudicating orders, be transferred to the state in which the debtor was resident. The Federal Court held as follows:

> First, it is crystal clear from art 121 of the Federal Constitution that there are two separate High Courts in Malaysia exercising distinct territorial jurisdiction over different geographical areas of the country. There is the High Court in Malaya and there is the High Court in Sabah and Sarawak. Each has jurisdiction over disputes that arise within its territory. As presently advised, there is absent in any Federal legislation that confers power upon the one High Court to transfer proceedings to the other.[16]
>
> It follows, accordingly, that when s 93(7) [of the Bankruptcy Act 1963] speaks of transferring proceedings from one State to another, it refers to a State within the territorial jurisdiction of the respective High Courts.[17]

Consequently, the bankruptcy petition was struck out as it ought to have been filed in the High Court at Sabah.

The above-mentioned dictum was followed in the High Court case of *Cita Marine Sdn Bhd v Progressive Insurance Bhd & Ors*[18] The plaintiff filed this action against the defendants in the High Court in Sabah and Sarawak. The first defendant had a place of business in Kota Kinabalu, Sabah, although the defendants had its headquarters in Kuala Lumpur. Initially, one of the prayers of the defendants was to transfer the proceedings to the High Court in Malaya, but this prayer was subsequently withdrawn by the defendants. In commenting on the withdrawal of the prayer, the High Court had this to say:

[12] [1990] 2 CLJ (Rep) 11.

[13] ibid 13.

[14] ibid.

[15] [1996] 2 MLJ 413.

[16] *Fung Beng Tiat v Marid Construction Co* [1996] 2 MLJ 413, 419 paras [F–G].

[17] ibid 420, para [D].

[18] [2001] 6 CLJ 506.

> In the course of the hearing of this application the defendants withdrew the alternative prayer to have the action transferred to the High Court of Malaya at Kuala Lumpur for the obvious reason that the High Court of Malaya and the High Court of Sabah and Sarawak have distinct territorial jurisdiction and is not vested with any power to transfer proceedings from one jurisdiction to another (see *Fung Beng Tiat v Marid Construction Co* [1997] 2 CLJ 1).[19]

Similarly, in *Bank Utama (Malaysia) Bhd v Perkapalan Dai Zhun Sdn Bhd,*[20] the High Court followed the dicta laid down in *Fung Beng Tiat v Marid Construction Co* and held as follows:

> In Malaysia, there are two High Courts of co-ordinate jurisdiction and status, that is, the High Court of Malaya and the High Court of Sabah and Sarawak. Each has jurisdiction over disputes that arise within its territory and there are presently no provisions that confer power on one High Court to transfer proceedings to the other …

The meaning of co-ordinate jurisdiction was aptly summarised by Hamid Sultan Abu Backer, JC (as he then was) in the case of *Bumiputra-Commerce Leasing Bhd v Nethaven Pacific Sdn Bhd & Ors,*[21] as follows:

> Co-ordinate literally means, equal or of the same order or rank and not subordinate to the other. However, the literal meaning of co-ordinate jurisdiction in Malaysian context must be read with caution and with reference to case laws. The term concurrent literally means having the same authority, ie, concurrent jurisdiction means jurisdiction of several courts each authorised to deal with the same subject matter at the choice of the litigant, or jurisdiction exercised by different courts, at the same time, over the same subject matter, and within the same territory, and wherein litigants may, in first instance, resort to either court indifferently.

In *Malaysian Assurance Alliance Bhd v Comsa Properties Sdn Bhd,*[22] the petitioner petitioned to wind up the respondent in the High Court in Malaya at Kuala Lumpur. The respondent was a Sabah company with its registered address in Tawau, and the landed properties which were charged by the respondent were all situated in Sabah and registered under the Sabah Land Ordinance. The Court of Appeal held, among others, that based on the facts of this case, Tawau would clearly fall within the local jurisdiction of the High Court in Sabah, thereby excluding the jurisdiction of the Kuala Lumpur High Court.[23] The petition was accordingly dismissed (and not transferred).

[19] ibid 509.

[20] [2003] 1 CLJ 450.

[21] [2008] 5 CLJ 69.

[22] [2013] 1 CLJ 69.

[23] ibid 74 para [10].

The inability to transfer cases from one High Court to another is not confined to the issue of want of jurisdiction, but also to the issue of *forum non conveniens*. The Supreme Court in *American Express Bank Ltd v Mohamad Toufic Al-Ozier & Anor*[24] had occasion to consider the doctrine of *forum non conveniens*. In applying the dicta of the House of Lords in *Spiliada Maritime Corp v Consulax Ltd (The Spiliada)*,[25] the Supreme Court accepted that the fundamental principle with regard to the doctrine of *forum non conveniens* is that 'there is some other tribunal, having competent jurisdiction, in which, the case may be tried more suitably for the interests of all parties and for the ends of justice.' The word *'conveniens'* in *forum non conveniens* meant suitability or appropriateness of the relevant jurisdiction and not one of convenience. Some of the factors that the Court should take into consideration when deciding on an issue of *forum non conveniens* are whether it would be unjust to the plaintiff to confine him to remedies elsewhere, and whether any particular forum is one with which the action has the most real and substantial connection.[26]

In *The Board of Trustees of The Sabah Foundation & Anor v The Board of Trustees of Syed Kechik Foundation & Ors; Syed Salam Albukhary & Ors (Discovery Defendants),*[27] one of the issues before the court was whether the High Court at Sabah lacks jurisdiction to hear and adjudicate the suit and if not, whether the High Court at Sabah is the *forum conveniens* to hear and adjudicate the matter. On the facts of the case, the learned Judge decided that both the High Court in Malaya and High Court at Sabah had jurisdiction over the matter, but that the High Court in Malaya was the proper forum to hear the case as most of the witnesses were residing in Kuala Lumpur. However, since the courts are not conferred with the power to transfer proceedings from one High Court to another, the Judge had no choice but to strike out the suit.

As can be seen from the literature discussed, there is no resolution to date of the issue of non-transferability of cases between the two High Courts notwithstanding that (or perhaps because) they are of co-ordinate jurisdiction and status, and notwithstanding that they both may have jurisdiction over a matter but one High Court is a more appropriate forum. This can cause grave injustice, especially in cases where limitation has set in. Without the option to have the case transferred, a plaintiff will have no choice but to file his case afresh in the proper court. However, if by that time limitation has setin, the plaintiff is forever barred from legal recourse solely because of a *lacuna* or an omission in the law on the power to transfer cases from one High Court to another. It is all the more incomprehensible as both High Courts are in one country but separated by the Federal Constitution.

[24] [1995] 1 CLJ 273.

[25] [1986] 3 All England Law Reports 843.

[26] ibid 281.

[27] [2009] 1 LNS 799.

3. Language in Courts

Article 161(1) read together with Article 161(2)(b) of the Federal Constitution prohibits any legislation purporting to terminate or restrict the use of the English language for proceedings in the High Court in Sabah and Sarawak, or for such proceedings in the Federal Court or the Court of Appeal, until ten years after Malaysia Day. Any such legislation must be approved by enactments of the Legislatures of the States of Sabah and Sarawak.[28] The 'proceedings in the Federal Court or the Court of Appeal' are clarified as any proceedings on appeal from the High Court in Sabah and Sarawak or a judge thereof, and any proceedings under Article 128(2) for the determination of a question which has arisen in proceedings before the High Court in Sabah and Sarawak or a subordinate court in the State of Sabah or Sarawak.[29]

Article 152(1) of the Federal Constitution provides that the national language shall be the Malay language and shall be in such a script as Parliament may by law provide. For a period of ten years after Merdeka Day, and thereafter until Parliament otherwise provides, all proceedings in the Federal Court, the Court of Appeal or a High Court shall be in the English language. This is provided that if the Court and counsel on both sides agree, evidence taken in the language spoken by the witness need not be translated into or recorded in English.[30] Until Parliament otherwise provides, all proceedings in subordinate courts, other than the taking of evidence, shall be in the English language.[31]

The National Language Acts 1963/1967 applies throughout Malaysia but shall only come into force in Sabah and Sarawak on such dates as the respective State Authorities may by enactments of the Legislatures decide.[32] Section 8 of the Act provides that all proceedings (other than the giving of evidence by a witness) in the Federal Court, Court of Appeal, the High Court or any Subordinate Court shall be in the national language, provided that the Court may either of its own motion or on the application of any party to any proceedings and after considering the interests of justice in those proceedings, order that the proceedings (other than the giving of evidence by a witness) shall be partly in the national language and partly in the English language. Section 3 of the Interpretation Acts 1948/1967 defines the 'National Language' as 'the national language provided for by Article 152 of the Federal Constitution'. Section 3 of the Courts of Judicature Act 1964 defines 'proceeding' as 'any proceeding whatsoever of a civil or criminal nature and includes an application at any stage of the proceeding'.

In 1973 the State Government of Sabah passed the National Language (Application) Enactment 1973 that extended the National Language Acts 1963/1967 to the State of Sabah. This Act therefore has the effect of terminating or restricting the use of English for official

[28] Federal Constitution, art 161(3).

[29] Federal Constitution, art 161(4).

[30] Federal Constitution, art 152(4).

[31] Federal Constitution, art 152(3).

[32] National Language Acts 1963/1967, s 1.

purposes in Sabah. The application of the National Language Acts 1963/1967 was extended to Sabah and Sarawak in 1983 via the National Language (Amendment and Extension) Act 1983, but provided that it is adopted by State Enactments.[33] The 1983 Act arguably allows the National Language (Application) Enactment 1973 to officially take effect although the latter was enacted before the 1983 Act, although the exact legal status of the 1973 Enactment is not entirely clear. The National Language Acts 1963/1967 has not been adopted in Sarawak. Due to the ambiguity of the 1973 Enactment in Sabah, the position in East Malaysia as it stands now is that encapsulated in Article 161 of the Federal Constitution, ie English is the language of the courts in East Malaysia.

The rules of court practice also make this position abundantly clear. Order 92 of the Rules of Court 2012, Rule 101 of the Rules of the Court of Appeal 1994 and Rule 133 of the Rules of the Federal Court 1995 provide, among others, that any document required for use in pursuance of these Rules shall be in the national language and may be accompanied by a translation thereof in the English language.[34] Whereas for Sabah and Sarawak, the converse is true ie any document required for use in pursuance of these Rules shall be in the English language and may be accompanied by a translation thereof in the national language.[35]

Up to the year 2010, the cases dealing with the wrong use of language in courts went both ways; ie either it was seen as a serious irregularity or else seen as a curable irregularity. Examples of cases that viewed language as a serious irregularity include *Calex-HLK Ltd lwn Nordin bin Abdul Hamid & Yang lain*[36] and *Zainun bte Hj Dahan lwn Rakyat Merchant Bankers Bhd & Satu lagi*.[37] In both these cases which originated from the High Court in Malaya, documents that were filed in court only in the English language without any translation into the national language, were held to be a nullity as they were in breach of Section 8 of the National Language Acts 1963/1967. It is interesting to note that the same Judge presided and decided in both these cases, ie Nik Hashim, Judicial Commissioner (as he then was).

On the other hand, an example of a case that viewed language as a curable irregularity was *Yomeishu Seizo Co Ltd & Ors v Sinma Medical Products (M) Sdn Bhd*.[38] In this case, the High Court held that Section 8 of the Act gives the court a discretionary power which should be exercised judicially. Even if neither party to the action applies to have the proviso invoked, the court on its own motion may invoke it. The paramount consideration is the interests of justice, not generally but in respect of the proceedings at hand.[39] This dictum was followed by the High Court in *Re Tioh Ngee Heng; ex p Yap Kiu Lian @ Norhashimah Yap (Adminstratrix*

[33] See National Language (Amendment and Extension) Act 1983 (A555/84).

[34] Rules of Court 2012, o 92 r 1; Rules of the Court of Appeal 1994, r 101(1); Rules of the Federal Court 1995, r 133(1).

[35] Rules of Court 2012, o 92 r 2; Rules of the Court of Appeal 1994, r 101(2); Rules of the Federal Court 1995, r 133(2).

[36] [1997] 5 MLJ 589.

[37] [1998] 1 MLJ 532.

[38] [1996] 2 MLJ 334.

[39] ibid 345–346.

of the estate of Mohamad Shariff bin Haji Hussain).[40] In this case, the debtor attempted to cast doubt on the validity of the bankruptcy notice on the ground that it was filed in the English language as opposed to being filed in Bahasa Malaysia. In interpreting Section 8 of the National Language Acts 1963/1967, the court held that this provision clearly allowed the use of the English language in court proceedings in certain circumstances, the paramount consideration being 'the attainment of truth and in the interest of justice'.[41] It was further held that since the bankruptcy notice had been accepted and sealed by the court registry, it was 'clothed with the authority of the court' and therefore, there was a presumption of regularity.[42]

The above cases were all decided by different branches of the High Court in Malaya whose decisions are not binding on other branches of the High Court in Malaya. In 2010, the Court of Appeal had occasion to consider this issue in the case of *Dato' Seri Anwar Ibrahim v Tun Dr Mahathir Mohamad*.[43] In this case, the appellant had sued the respondent for alleged defamation. The respondent applied to strike out the appellant's writ of summons and statement of claim and this was allowed by the High Court. The appellant appealed to the Court of Appeal against the High Court's decision. The respondent applied for the appellant's record of appeal to be struck out and/or set aside on the ground, among others, that the memorandum of appeal was filed only in English. It was held by the Court of Appeal that Article 152 of the Federal Constitution read together with Section 8 of the National Language Acts 1963/1967 are mandatory provisions which must be adhered to. Thus, the absence of the memorandum of appeal in the national language rendered the record of appeal incurably defective. Consequently, the appeal was dismissed.

It is interesting to note that the Court of Appeal in the *Dato' Seri Anwar Ibrahim* case relied on the case of *Zainun bte Hj Dahan*, but made no mention of *Yomeishu Seizo Co Ltd* or *Re Tioh Ngee Heng*. It is also interesting to note that the case of *Zainun bte Hj Dahan* was a decision of the High Court, and therefore the Court of Appeal was not bound to follow it. It would appear, therefore, that in wishing to dismiss the appeal, the Court of Appeal had given favour to a more rigid and inflexible interpretation of Article 152 of the Federal Constitution, Section 8 of the National Language Acts 1963/1967 and the rules of court. Perhaps political motivation may also have been a contributing factor in the Court of Appeal's decision in this case.

Unfortunately, this is not the end of the matter. It must be remembered that the rules of court provide that in Sabah and Sarawak, any documents required for use in pursuance of the rules are to be filed in the English language and may be accompanied by a translation in the national language. Hence, it can be summarised that the position is reversed in Sabah and Sarawak, ie any documents required for use in court are to be filed in the English language and may be accompanied by a translation in the national language.

[40] [2000] 6 MLJ 155.

[41] ibid 159.

[42] ibid 159–160.

[43] [2010] 1 CLJ 444.

In *Ali Noruddin Bin Boying v Badan Pencegah Rasuah*,[44] the accused was charged in the High Court at Kuching with a corruption offence allegedly committed in Kuching, Sarawak. The accused argued that the charges were a nullity and should be quashed because they were drafted in the national language, which was contrary to, among others, Articles 161 and 152 of the Federal Constitution and the National Language Acts 1963/1967. The High Court in this case held that the charge was not defective. This is because since there was no suggestion that the accused did not understand the charge, no failure of justice had been occasioned, and such an irregularity is capable of being cured. In coming to his decision, none of the earlier cases on the language of the courts were relied on by the learned Judicial Commissioner.

In *Wong Leh Yin v Public Prosecutor*,[45] the issue was almost identical to the *Dato' Seri Anwar Ibrahim* case. The appellant raised a preliminary objection to the petition of appeal filed by the public prosecutor in the High Court at Sibu on the ground that the petition was written in the national language and was therefore defective and ought to be struck out. Surprisingly, the Court of Appeal dismissed the preliminary objection on the basis that there was 'no miscarriage of justice'.[46] It was also held that the entire objection was that the petition of appeal was filed in the High Court in Bahasa Malaysia, and not that because of the use of the national language, the appellant had been denied an opportunity to understand the grounds of appeal for him to adequately defend himself.[47] It would be remembered that in the *Dato' Seri Anwar Ibrahim* case, no such averment was also made by the respondent, and yet the memorandum of appeal was held to be a nullity based solely on the fact that it was filed in English. The Court of Appeal also distinguished the case of *Dato' Seri Anwar Ibrahim* by stating that language was not the sole reason for the dismissal of the appeal; there were other factors that contributed to the defect of the appeal, such as the failure to file a chronology of events and a proper index.[48]

Another area of concern involves grounds of judgments. According to the definition of 'proceeding',[49] it includes any proceeding, whether civil or criminal, and includes an application at any stage of the proceeding. A plain reading of this section would suggest that the grounds of judgements are part of the 'proceedings'. However, in the two Federal Court cases of *Dato' Seri Anwar Ibrahim v Tun Dr Mahathir Mohamad*[50] and *Harcharan Singh a/l Piara Singh v Public Prosecutor*,[51] the court held that while a judgment or order forms part of a court proceeding, the grounds of judgment do not and therefore, it is not mandatory for grounds of judgments to be in the national language.

[44] [2010] MLJU 230.

[45] [2013] 5 MLJ 820.

[46] ibid 826 para [21].

[47] ibid.

[48] ibid 825–826 para [20].

[49] Courts of Judicature Act 1964, s 3.

[50] [2011] 1 CLJ 1.

[51] [2011] 6 MLJ 145.

From the literature produced herein, a few peculiarities may be noted. In West Malaysia, anything not filed in the national language is seen as a breach of the language provisions and therefore a nullity. However, in Sabah and Sarawak, anything not filed in the English language is seen as a mere technicality capable of being cured. When the issue concerns the court's own document such as the grounds of judgment, the court again seems to take a more liberal view of the language provisions and allow grounds of judgment to be either in the national language or the English language.

The difference in the language provisions between East and West Malaysia, though by themselves appear to be clear, will nevertheless inevitably give rise to different interpretations by different judges. Even within West Malaysia where the language provisions ought to be consistently applied, there is inconsistent application arising from different interpretations by different judges. The point here really is that the provisions as they are give room for inconsistent application of the law, as evidenced by the cases cited in the paragraphs above. In some cases, this even leads to grave injustice to the litigants as their entire case may be thrown out just because a document was filed in the 'wrong' language. All this only serves to create chaos and confusion. This is not only contrary to the rule of law, but also not a healthy condition for a developing nation.

4. The Legal Profession

Article 161B of the Federal Constitution restricts the extension to non-residents of the right to practise before the courts in the States of Sabah and Sarawak unless adopted in the state in question by an enactment of the legislature.[52] Article 161B applies to the right to practise before the Federal Court or the Court of Appeal when sitting in the States of Sabah and Sarawak and entertaining proceedings on appeal from the High Court in Sabah and Sarawak or proceedings under Article 128(2) for the determination of a question which has arisen in proceedings before the High Court in Sabah and Sarawak or a subordinate court in the State of Sabah or Sarawak.[53]

The Legal Profession Act 1976 was intended to consolidate the law relating to the legal profession in Malaysia.[54] The Act came into force in West Malaysia on 1 June 1977[55] but has not been extended to Sabah and Sarawak.

Generally, the Malaysian Bar and the Bar Council of West Malaysia are in favour of a unified Bar, having raised the issue with the Attorney-General's Chambers as well as the Ministry of International Trade and Industry that East Malaysia to consider 'a gradual process of liberalization with limited or restricted areas of practice'.[56] However, East

[52] Federal Constitution, art 161B(1).

[53] Federal Constitution, art 161B(2).

[54] See the Long Title and Preamble to the Legal Profession Act 1976.

[55] Vide PU(B) 327/77.

[56] 'Sabah and Sarawak Told to Open up Their Legal Services to Peninsular Lawyers' *Bar News* (14 August 2005) <http://www.malaysianbar.org.my/bar_news/berita_badan_peguam/sabah_and_sarawak_told_to_open_up_th

Malaysian lawyers have generally been opposing this move quite strenuously.[57] They have always been in favour of separate bars for East Malaysia and West Malaysia, their main fear being the influx of lawyers from West Malaysia to East Malaysia may adversely affect the job opportunities and economic advancement of East Malaysian lawyers.[58]

At present, advocates and solicitors practise exclusively in West Malaysia, Sabah and Sarawak respectively. Section 35(1) of the Legal Profession Act 1976 provides that any advocate and solicitor has the exclusive right to appear and plead in all Courts of Justice in Malaysia according to the law in force in those Courts; and as between themselves shall have the same rights and privileges without differentiation. In *Yomeishu Seizo Co Ltd & Ors v Sinma Medical Products (M) Sdn Bhd*,[59] the High Court interpreted Section 35(1) to mean that litigants are entitled to choose as counsel any member of the Bar who has a current practising certificate.[60]

In *Abdul Karim Abdul Ghani v Legislative Assembly of Sabah*,[61] the applicant sought declaratory relief that the respondent was not empowered to enact the Constitution (Amendment) Enactment 1986 which amended Article 18 of the State Constitution of Sabah. The respondent raised a preliminary objection on the qualification of Mohamed Shafee Abdullah, an advocate and solicitor of the High Court in Malaya to appear on behalf of the applicant. The objection was based on Section 8(1) of the Advocates Ordinance of Sabah which provides that:

> Subject to subsection (2) and to section 9, advocates shall have the exclusive right to practise in Sabah and to appear and plead in the Federal Court in Sabah and in the High Court and in all courts in Sabah subordinate thereto in which advocates may appear, and as between themselves shall have the same rights and privileges without differentiation …

The Supreme Court held that since the question before the Court was a constitutional issue before a judge of the Supreme Court, the seat of the Supreme Court was in Kuala Lumpur and the hearing was in Kuala Lumpur, therefore Section 8 of the Advocates Ordinance of Sabah did not apply, and Mohamed Shafee Abdullah was qualified to appear in the proceedings.[62]

However, a diametrically opposite view was taken 21 years later in the case of *Datuk Hj Mohammad Tufail Mahmud & Ors v Dato' Ting Check Sii.*[63] In this case, there were two issues

eir_legal_services_to_peninsular_lawyers.html>.

[57] See for example 'Proposed Amendments to Sabah Advocates Ordinance for P'ment Soon' *Daily Express* (9 October 2016) <https://www.dailyexpress.com.my/news.cfm?NewsID=113287>.

[58] ibid.

[59] [1996] 2 MLJ 334.

[60] ibid 346–347.

[61] [1988] 1 MLJ 171.

[62] ibid 172.

[63] [2009] 4 CLJ 449.

before the Federal Court: (i) whether an advocate and solicitor from Peninsula Malaysia is entitled to appear as counsel in an appeal to be heard in Putrajaya arising from a matter originating from the High Court in Sabah and Sarawak at Kuching; and (ii) whether an advocate from Sarawak is entitled to appear as counsel in an appeal to be heard in Putrajaya arising from the High Court in Sabah and Sarawak at Kuching. The original matters in the High Court in Sabah and Sarawak at Kuching were an oppression petition and a winding-up petition. Both petitions were dismissed by the High Court. At the Court of Appeal, the respondent was represented by Tommy Thomas, an advocate and solicitor of the High Court in Malaya, leading other advocates from Sarawak. The appellant objected to Tommy Thomas representing the respondent. The Court of Appeal unanimously held that Tommy Thomas had the right to appear at the Court of Appeal when it sits in Putrajaya. The appellants obtained leave to appeal to the Federal Court.

One of the important legislation to be interpreted by the Federal Court was Section 8(1) of the Advocates Ordinance of Sarawak which provides that:

> Subject to subsection (2) and to section 9, advocates shall have the exclusive right to practise in Sarawak and to appear and plead in the Federal Court in Sarawak and the High Court, and in all courts in Sarawak subordinate thereto in which advocates may appear, and, as between themselves, shall have the same rights and privileges without differentiation …

The Federal Court was of the view that although the phrase 'Federal Court in Sarawak' appearing in Section 8(1) of the Advocates Ordinance of Sarawak limited the practice of Sarawak lawyers to the geographical borders of that state, ie that Sarawak lawyers may only appear in courts situated within the state of Sarawak, the Federal Court did observe that:

> … In our opinion, it would have been more appropriate to use the words "in respect of matters arising in Sarawak". That is how we perceive it to be. Probably the Attorney-General's Chambers would take heed and make the necessary legislative recommendations for Sabah and Sarawak, which could eventually strengthen the position we are embarking upon now.[64]

The Federal Court also ruled that since the Legal Profession Act 1976 had not been extended to Sabah and Sarawak, Section 35 thereof had no application in the present case. Therefore, the Federal Court ruled that (i) an advocate and solicitor from West Malaysia is not entitled to appear as counsel in an appeal to be heard in Putrajaya arising from a matter originating from the High Court in Sabah and Sarawak; and (ii) an advocate from Sarawak is entitled to appear as counsel in an appeal to be heard in Putrajaya arising from a matter originating from the High Court in Sabah and Sarawak.

This case presents several disparities. Firstly, the phrase 'Federal Court in Sarawak' appearing in the Advocates Ordinance of Sarawak is in line with Article 161B of the Federal Constitution which confers the right on residents of Sarawak to practise before the Federal

[64] ibid 461 para [43].

Court or the Court of Appeal '*when sitting in the States of Sabah and Sarawak*' (emphasis added). Thus, the intention of the legislature appears to be that advocates in Sabah and Sarawak have the exclusive right of audience before the Court of Appeal and the Federal Court only when sitting in the States of Sabah and Sarawak. Secondly, Article 121(1B) of the Federal Constitution established the Court of Appeal which shall have its principal registry at such place as the Yang di-Pertuan Agong may determine, whilst Article 121(2) of the Federal Constitution established the Federal Court which shall have its principal registry at such place as the Yang di-Pertuan Agong may determine. It is clear that there is only one Court of Appeal and one Federal Court in Malaysia, but they may sit at different places. In such a situation, it defies logic to confine the right of advocates and solicitors to appear in appeals in the Court of Appeal or the Federal Court to the geographic location of where the appeal originated from. Thirdly, Section 8(2) of the Advocates Ordinance of Sabah and of Sarawak provide, among others, that an advocate and solicitor of the High Court in Malaya may appear and plead before the Federal Court when sitting in Sabah or Sarawak if he is representing a person who is normally resident in West Malaysia[65] or if the cause of action which forms the subject matter of the appeal was tried in West Malaysia.[66] There is no corresponding provision in the Legal Profession Act 1976. It should also be noted that Section 8 of the Advocates Ordinance of Sarawak makes no mention of the Court of Appeal. Fourthly, the interpretation of the Federal Court in the *Datuk Hj Mohammad Tufail Mahmud* case appears to limit a litigant's right to choose a counsel of his or her choice. Fifthly, no reference was ever made to the earlier Supreme Court decision of *Abdul Karim Abdul Ghani v Legislative Assembly of Sabah.*[67]

In the case of *Hu Chang Pee (also known as Hii Chang Pee) v Tan Sri Datuk Paduka (Dr) Ting Pek Khiing*,[68] the Court of Appeal chose to follow the dictum in the Datuk Hj Mohammad Tufail Mahmud case. No attempt was made by the Court of Appeal to distinguish or explain the *Abdul Karim Abdul Ghani* case. The Court of Appeal merely stated that the later decision of the Federal Court prevails over an earlier decision. With this case, the current position in Malaysia is that an advocate and solicitor from West Malaysia is not entitled to appear as counsel in an appeal to be heard by the Court of Appeal or Federal Court when sitting in Putrajaya and hearing a matter originating from the courts in Sabah and Sarawak.

In 2017, the Advocates Ordinance of Sabah was extensively amended.[69] One of the amendments was to Section 8(1), which now provides, among others, that advocates shall have the exclusive right to practise in Sabah and to appear and plead in all courts in Sabah. This includes the Federal Court or Court of Appeal when sitting in Sabah or when sitting in

[65] Advocates Ordinances of Sabah and of Sarawak, s 8(2)(a)(iv).

[66] Advocates Ordinances of Sabah and Sarawak, s 8(2)(b)(iii). However, a West Malaysian lawyer must still obtain a Permit or Pass pursuant to Section 66(1) of the Immigration Act 1959/1963 before appearing in the Court of Appeal or the Federal Court sitting in Sabah or Sarawak.

[67] [1988] 1 MLJ 171.

[68] [2010] 3 MLJ 1.

[69] Act A1528 which came into force on 1 July 2017.

any other part of Malaysia hearing a cause or matter originating from the High Court or any subordinate court in Sabah. Therefore, at least for Sabah, there is now no doubt that when a matter originates from Sabah, only a lawyer from Sabah can appear in the appeal from that matter to the Court of Appeal and the Federal Court, regardless of where the appellate courts are physically sitting. In Sarawak, although the words are still ambiguous, there is the Federal Court case of *Datuk Hj Mohammad Tufail bin Mahmud & Ors v Dato' Ting Check Sii*[70] which makes the situation similar to the position in Sabah as it stands now.

Another discrepancy in the legal profession between East and West Malaysia is the right of foreign counsel to appear in arbitration proceedings. In *Zublin Muhibbah Joint Venture v Government of Malaysia*,[71] Eusoff Chin J (as he then was) held that the Legal Profession Act 1976 does not prohibit foreign lawyers from representing parties to arbitration proceedings in West Malaysia.[72] Whereas in the Federal Court case of *Samsuri Baharuddin & Ors v Mohamed Azahari Matiasin & Another Appeal*,[73] it was held that foreign lawyers who are not advocates within the meaning of the Advocates Ordinance of Sabah are prohibited from representing parties to arbitration proceedings in Sabah.[74] In so holding, the Federal Court held that the provisions of the Legal Profession Act 1976 and the Advocates Ordinance of Sabah are different.[75]

Further, in order to appear in the High Court in Sabah and Sarawak, a West Malaysian lawyer not only has to apply for an order for ad-hoc admission, but also for a work permit pursuant to Section 66(1) of the Immigration Act 1959/1963. However, East Malaysian lawyers may appear in the High Court in Malaya via an ad-hoc admission but without any need to have a work permit, and they can also be admitted as advocates and solicitors of the High Court in Malaya without any residence qualifications. Although these safeguards were put in place as a compromise for Sabah and Sarawak joining the Federation of Malaysia, it still amounts to unequal treatment of lawyers in Malaysia.

5. Other Legislation Related to Legal Practice

There are other legislation affecting legal practice pertaining to the same subject matter but are unfortunately governed by different legislation between West Malaysia, Sabah and Sarawak. The following Table provides a summary of the different legislation existing in West Malaysia, Sabah and Sarawak on the same subject matter.

[70] [2009] 4 CLJ 449, 455 para 14.

[71] [1990] 3 CLJ (Rep) 371.

[72] ibid 373.

[73] [2017] 3 CLJ 287.

[74] ibid 296–297 para [35].

[75] ibid 295 para [29].

The Different Legislation Relating to Legal Practice in West Malaysia, Sabah and Sarawak on the Same Subject Matter

Subject matter	West Malaysia	Sabah	Sarawak
Legal profession	Legal Profession Act 1976	Advocates Ordinance 1953	Advocates Ordinance 1953
English law	Civil Law Act 1956	Application of Laws Ordinance 1951	Application of Laws Ordinance 1949
Limitation	Limitation Act 1953	Limitation Ordinance	Limitation Ordinance
Interpretation	Interpretation Acts 1948/1967	(i) Interpretation and General Clauses Enactment, 1963 (ii) Interpretation (Definition of Native) Ordinance 1952 (Sabah Cap. 64)	Interpretation Ordinance, 2005
Revision of laws	Revision of Laws Act 1968	(i) Revised Edition of Laws Ordinance 1951 (ii) Revised Edition of the Laws (Supplementary Volume) Ordinance 1955 (iii) Revised Edition of the Laws (Annual Volume) Ordinance 1955 (iv) Reprint of Laws Enactment 1967	(i) Revision of Laws Ordinance, 1992 (ii) Written Law (Simplified Publication) Ordinance 1953 (Revised 2000)

The existence of various different statutes on the same subject matter may potentially lead to confusion and inconsistencies in the judicial and legal system in Malaysia, and hardship and injustice to litigants. For example, the Limitation Act 1953 only applies to West Malaysia, whereas the Limitation Ordinances in Sabah and Sarawak apply to all suits instituted in Sabah[76] and Sarawak[77] respectively, notwithstanding that a contract may have been entered into outside these states.[78] If a suit was instituted in Sabah because the cause of action and facts of the case arose in Sabah, the pleadings would have contained parts of the

[76] Limitation Ordinance of Sabah, s 10(1).

[77] Limitation Ordinance of Sarawak, s 10(1).

[78] Limitation Ordinances of Sabah and Sarawak, s 10(2).

Limitation Ordinance of Sabah. However, if for *forum non conveniens* reasons (for example, if all the defendants and witnesses reside in Kuala Lumpur) the case is dismissed and a new suit is to be instituted in the High Court in Malaya (due to the non-transferability issue), the entire pleadings would have to be changed to now refer to the Limitation Act 1953. This is notwithstanding that the cause of action and facts of the case arose in Sabah. In such a situation, the brief may have to also be transferred to an advocate and solicitor from West Malaysia, if the original advocate from Sabah is not an advocate and solicitor of the High Court in Malaya.

It should be noted that all these laws may not be confusing in themselves, but the confusion comes more from the inconsistent application of these laws. With the exception of the legal profession, there is no justifiable reason not to consolidate these other laws relating to legal practice, as they only relate to practice and procedure, and most importantly, they do not affect the special privileges of the people of Sabah and Sarawak. Having similar legislation dealing with practice and procedure between East and West Malaysia would pave the way for a more effective administration of justice, and would also contribute to consistency in the law and equality before the law.

6. Appointment of Judicial Commissioners

Another issue that has arisen as a result of there being two High Courts concerns the question of appointment of Judicial Commissioners under Article 122AB of the Federal Constitution and the Judicial Appointments Commission Act 2009. Before the amendment to Article 122A of the Federal Constitution,[79] Articles 122A(3) and (4) provided that the Yang di-Pertua Negeri of either Sabah or Sarawak (as the case may be), with the advice of the Chief Justice of the court, may by order appoint a judicial commissioner. The new Article 122AB of the Federal Constitution provides that the Yang di-Pertuan Agong acting on the advice of the Prime Minister, after consulting the Chief Justice of the Federal Court, may by order appoint a judicial commissioner.

In *The Government of Malaysia v Robert Linggi,*[80] the respondent argued, among others, that the amendments to Article 122A(3) and (4) of the Federal Constitution, and the new Article 122AB of the Federal Constitution are null and void in so far as they concern the removal of the power of the respective Yang di-Pertua Negeri of Sabah and Sarawak to appoint judicial commissioners. In particular, the respondent argued that the amendments were contrary to Article 161E(2)(b) of the Federal Constitution which provides that the concurrence of the Yang di-Pertua Negeri of Sabah and Sarawak is required when any amendment to the Federal Constitution affects the constitution and jurisdiction of the High Court in Sabah and Sarawak and the appointment, removal and suspension of judges of that court. In allowing the appeal, the Court of Appeal held that the appointment of judicial

[79] See Constitution (Amendment) Act 1994, ss 15 and 16.

[80] [2015] 1 LNS 1515.

commissioners does not amount to the appointment of 'judges of that Court' within the meaning of Article 161E(2)(b) of the Federal Constitution.

The effect of Article 122AB of the Federal Constitution is that the appointment of judicial commissioners to the High Court in Sabah and Sarawak is now no longer within the purview of the Yang di-Pertua Negeri of Sabah and Sarawak. Instead, the appointment of judicial commissioners is now vested in the Yang Di-Pertuan Agong acting on the advice of the Prime Minister, and is within the purview of the Judicial Appointments Commission established under the Judicial Appointments Commission Act 2009, a Federal Act that applies throughout Malaysia. This appears to be an abrogation of the power of the Yang di-Pertua Negeri of Sabah and Sarawak to appoint judicial commissioners. Further, the amendment itself appears to have been made without the concurrence of the Yang di-Pertua Negeri of Sabah and Sarawak as required under Article 161B(2)(b) of the Federal Constitution, but has been condoned by the Court of Appeal in the *Robert Linggi* case.

7. Conclusion

At first glance at the judicial and legal system in Malaysia, particularly the judiciary with its system of two High Courts, the use of language in those courts and the legal profession, it would almost appear as if Malaysia was a patchwork of three individual entities, ie West Malaysia, Sabah and Sarawak, and not one congruent country. In a pluralistic society such as Malaysia where there is a myriad of races not only in West Malaysia, but also in East Malaysia, having two High Courts of co-ordinate jurisdiction serves only to enhance these differences. In order to give effect to the rule of law and the doctrine of *stare decisis*, and therefore move towards becoming an ideal judicial and legal system, the laws promulgated by Parliament must be consistently applied throughout Malaysia in order to reduce if not eradicate any inequalities or differences in the application of the laws to all citizens of Malaysia regardless of race, ethnicity, class, gender, geographic location, or any other attributes. As can be seen from the legal issues identified in this article, this is presently far from the case.

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