CHAPTER 09

CURRENT APPLICATION OF ENGLISH LAW: SECTIONS 3, 5 AND 6 OF THE CIVIL LAW ACT 1956[1]

9.1 INTRODUCTION

Malaysia is a common law country with a distinct common law-based legal system. The Malaysian legal system comprises various sources such as: Federal and State Constitutions, Legislations, Judicial decisions, English law, Islamic law, and Customary law. English law includes English common law, rules of equity and certain legislations. Although the English law, which is entrenched in Malaysian legislations and judicial decisions, is a predominant source of Malaysian law, other sources of law, such as, Islamic law and Customary laws, have also played a significant role in shaping the Malaysian legal system to be what it is today. There was a time when English and Islamic laws conflicted especially during the British occupation.[2] The conflict of laws is less evident today due to active legislative interventions and strict judicial observance of jurisdictional boundaries.[3] However, the conflict between the laws has not been eliminated and it occasionally occurs before the Civil and Syariah courts of the country.[4]

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1 This chapter is contributed by Tun Abdul Hamid Mohamad and Dr. Adnan Trakic.

2 See for example, the case of *In the Goods of Abdullah* [1835] 2 Ky Ec 8; *R v. Willans* [1858] 3 Ky 16; and *Fatimah v. Logan* [1871] 1 Ky 255.

3 Article 121(1A) of the Federal Constitution provides: 'The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.' This constitutional amendment was made in order to stop the Civil courts from interfering in the matters which are under the jurisdiction of Syariah courts.

4 The latest example is the case of S. Deepa in which the husband who converted to Islam obtained custodial rights over two children in the Syariah court while the non-Muslim wife obtained a custodial right in the civil High Court. This case immobilised the police to act on the 'abduction' indictment alleged by the wife as the husband took the son into custody by force. The police called for Parliament to act as they could not do much when two conflicting orders given by both courts were valid and enforceable. See newspaper comment by Balan Moses, 'Dewan Rakyat Should address custody issue fast', the Sundaily, Monday, 13 April 2014. http://www.thesundaily.my/news/1015486 viewed 14 April 2013.

Malaysian legislation has explicitly recognised English law as being part of Malaysian law. The country's highest law, the Federal Constitution (FC), includes the 'Common law' in the definition of 'law'.[5] 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,[6] rules of equity[7] and certain statutes. Further the application of English commercial law is allowed pursuant to s. 5 of the Civil Law Act 1956. It is noted that in Penang, Malacca, Sabah and Sarawak the reception of English commercial law is continuous while in other parts of Peninsular Malaysia the reception is at the coming into force of the Civil Law Act 1956 namely, on 7 April 1956. However, this does not mean that all three components of English law mentioned above can be freely used and referred to without any limitations in Malaysia. The extent to which English law is applicable in Malaysia will be dealt with in detail later in the chapter. In addition, the authors will also discuss the prospects of the development of Malaysian common law within the existing legal framework. The authors will make suggestions as to how to improve the existing legal framework in view of fostering the development of the Malaysian common law.

Therefore, it would be timely, at this stage, to look into the most important provisions dealing with the reception of English law into Malaysia.

5 The Federal Constitution, art. 160.

6 Common law refers to the uncodified law which has been developed through the judicial decisions of the courts. Hence, it is fairly flexible in comparison to the codified laws passed by the Legislature.

7 Equity refers to the laws which were initially developed by the Lord Chancellor who was appointed by the King of England. However, later by the end of the 15th century, claims in equity were heard by the Court of Chancery. It is worth noting that the rules of equity were never meant to operate on their own but rather they were developed in order to compliment the common law and to bring fairness and justice to the parties when common law failed to do so.

9.2 CIVIL LAW ACT 1956 (ACT 67)

In essence, the Civil Law Act 1956 provides for general application of English law as per s. 3; specific application of English law as per s. 5; and non-application of English law as per s. 6. Each one of these sections will be explained below.

9.2.1 Section 3 of the Civil Law Act 1956 – General Application of English Law

Section 3 provides:

> **Application of U.K. common law, rules of equity and certain statutes**
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> **3.** (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall –
>
> (a) in Peninsular Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956;
>
> (b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 1 December 1951;
>
> (c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 12 December 1949, subject however to subparagraph (3)(ii):
>
> 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.
>
> (2) Subject to the express provisions of this Act or any other written law in force in Malaysia or any part thereof, in the event of conflict or variance between the common law and the rules of equity with reference to the same matter, the rules of equity shall prevail.
>
> (3) Without prejudice to the generality of paragraphs (1)(b) and (c) and notwithstanding paragraph (1)(c) –

(i) it is hereby declared that proceedings of a nature such as in England are taken on the Crown side of the Queen's Bench Division of the High Court by way of *habeas corpus* or for an order of *mandamus*, an order of prohibition, an order of *certiorari* or for an injunction restraining any person who acts in an office in which he is not entitled to act, shall be available in Sabah to the same extent and for the like objects and purposes as they are available in England;

(ii) the Acts of Parliament of the United Kingdom applied to Sarawak under sections 3 and 4 of the Application of Laws Ordinance of (Sarawak) 1949 and specified in the Second Schedule of this Act shall, to the extent specified in the second column of the said Schedule, continue in force in Sarawak with such formal alterations and amendments as may be necessary to make the same applicable to the circumstances of Sarawak and, in particular, subject to the modifications set out in the third column of the said Schedule.

The effects of the provision with respect to Peninsular Malaysia are as follows:

1. The court shall apply the common law of England and the rules of equity;
2. As administered in England on 7 April 1956;
3. In so far as provisions have not been made (at that point of time) by any written law in force in Malaysia;
4. Provided that the said common law and rules of equity shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit;
5. And subject to such qualifications as local circumstances render necessary.

The effects of the provision with respect to Sabah are as follows:

1. Points (1) to (5) above apply to Sabah with two differences:
   (a) The cut-off date is 1 December 1951;
   (b) Besides the common law of England and the rules of equity, statutes of general application are also applicable.

2. Proceedings by way of *habeas corpus* or for an order of *mandamus*, an order of prohibition, an order of *certiorari* or for an injunction shall be available in Sabah in the same way as they are available in England;

The effects of the provision with respect to Sarawak are as follows:

1. Points (1) to (5) above apply to Sarawak with two differences:
   (a) The cut-off date is 12 December 1949.
   (b) Besides the common law of England and the rules of equity, statutes of general application are also applicable.
2. There is a special provision regarding the Acts of Parliament of the United Kingdom applicable to Sarawak under ss. 3 and 4 of the Application of Laws Ordinance of Sarawak [Cap. 2].

It should be remembered that the Act was made in 1956 ie. one year before the independence was achieved by Malaya. Looking at the Act, we do not know the real reasons for it. Hence, we will not speculate. However, we think that at that time, there was a case for having a general provision for the court to apply the common law of England and the rules of equity subject to necessary conditions. The legal and judicial system established by the British was the English system. Common law and rules of equity form an important part of the law applicable by the courts. Malaya then did not even have a Parliament yet. Written laws, as existed then, were perhaps inadequate. The written laws which had been made were common law-based. In areas where no written law had been made, the courts applied the common law of England and the rules of equity. Indeed, in our view, with or without the provisions, the lawyers would have resorted to English law and the courts would have applied the same, without any guidance. Where else would they look to? They were all trained as common law lawyers in England at that time. In the circumstances, it was natural for the applicability of the common law of England and the rules of equity to be spelled out clearly by law.

The following table briefly explains the application of English law in the absence of local statute.

No.	*Case*	*Subject Matter*	*English law followed*	*Reasons for the application, if any.*
1	*Nepline Sdn Bhd v. Jones Lang Wootton* [1995] 1 CLJ 865	Tort	Negligent misrepresentation	Absence of local statute
2	*Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283, FC	Contract	Estoppel	Absence of local statute
3	*Sri Inai (Pulau Pinang) Sdn Bhd v. Yong Yit Swee & Ors* [1998] 3 CLJ 893	Tort	Negligence	Absence of local statute
4	*Curvet Transport SA & Anor v. Shapadu Trans-System Sdn Bhd* [1999] 1 LNS 126	Contract	Estoppel	Absence of local statute
5	*Liew Choy Hung v. Fork Kian Seng* [2000] 1 CLJ 369	Trust	Resulting trust	Absence of local statute
6	*Saad Marwi v. Chan Hwan Hua & Anor* [2001] 3 CLJ 98	Contract	Doctrine of unconscionable contract	Absence of local statute
7	*Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1	Tort	Negligence	Absence of local statute
8	*The Co-operative Central Bank Ltd v. KGV & Associates Sdn Bhd* [2008] 2 CLJ 545	Tort	Negligent misrepresentation	Absence of local statute
9	*Datuk Bandar Kuala Lumpur v. PPKA Sdn Bhd* [2012] 3 CLJ 181	Contract	Estoppel	Absence of local statute
10	*Loh Chiak Eong & Anor v. Lok Kok Beng & Ors* [2012] 9 CLJ 699	Tort	Negligence	Absence of local statute

11	*Zurich Insurance Malaysia Bhd v. Am Trustee Bhd & Anor; Meridian Asset Management Sdn Bhd (Third Party) and Another Case* [2014] 1 CLJ 397	Tort	Negligence	Absence of local statute

Do we still need such a Provision?

Without going into details, do we still need such a provision? This is a question that has been debated for many years by Malaysian scholars and practitioners. There are a considerable number of renowned academics and judges who argue that this provision should be repealed or even abolished all together with the Civil Law Act 1956.[8] They argue that Malaysia should free itself from the colonial common law shackles and instead develop its own Malaysian common law. They would normally question why would the Malaysian Federal Court, which is presented with an issue that has not been provided for by the local legislation, subdue its role and prestige by referring to the solutions which have been pronounced by English courts some half a century ago? In addition, they ask "are we saying that the Malaysian judges are less qualified to find a just solution to the problem so that they have to ask their counterparts in England?"

One of the strongest voices advocating the repeal of s. 3 of the Civil Law Act 1956 was the late Professor Ahmad Ibrahim. He argued that, in the case of a lacuna, Malaysian courts should not refer to English common law, but rather, they ought to search for local solutions within Malaysian laws and court decisions which would inevitably prioritise the local conditions and people.[9] He further argued that from the

8 Amongst the academics, see for example, Ahmad Ibrahim, 'The Civil Law Ordinance in Malaysia', [1971] 2 MLJ lviii; Syed Ahmad Alsagoff, *Principles of the Law of Contract in Malaysia* (3rd Edn) (LexisNexis, Kuala Lumpur, 2010), pp. 22–27. This view has been shared by some judges such as, Tun Abdul Hamid Omar, 'Common Law: Mitos atau Realiti?' [1990] 2:2 KANUN 1; and Tun Ahmad Fairuz Sheikh Abdul Halim's opening speech at IKIM's seminar titled *'Ahmad Ibrahim: His Intellectual Thought and Contributions'* (see an article written by Dr Wan Azhar Wan Ahmad at http://www.ikim.gov.my/index.php/ms/the-star/7587-malaysian-common-law (viewed 20 May 2014).

9 Ahmad Ibrahim, 'The Civil Law Ordinance in Malaysia', [1971] 2 MLJ lviii.

proviso to s. 3(1) which states: '*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*', it can be concluded that even the drafters of the Act expected the Malaysian courts to develop a Malaysian common law. They have intentionally subdued the application of English law to the local circumstances of Malaysia and its people. In other words, in case of a lacuna in law, the Malaysian courts are free to develop the Malaysian common law that will suit local circumstances and people.

There are many contemporary Malaysian scholars who, concurring with the views expressed by Professor Ahmad Ibrahim, argue that what is needed is neither the complete abolishment of the Civil Law Act 1956 nor the complete revamp of the existing system but rather a change in the attitude of judges, counsel as well as academics. For example, Farid Sufian Shuaib, argues that the judges in particular, should be more proactive in 'indigenising' the English law. In order to do that, the Civil Law Act 1956 may have to be amended to allow the courts to, in addition to English sources, refer to other sources such as religions and customs of Malaysians.[10] He said the following: "After 50 years of independence and numerous achievements proclaimed, Malaysia should feel strong enough to develop its own law by looking within herself first. Physical judicial autonomy obtained by severance of appeal to the Judicial Committee of the Privy Council should be followed by substantive autonomy by severing the umbilical cord to English law."[11]

However, there are some prominent contemporary Malaysian scholars who have been even more critical of Malaysia's reliance on English law and have called on the complete abolition of the Civil Law

10 See Farid Sufian Shuaib, 'Towards Malaysian Common Law: Convergence between Indigenous Norms and Common Law Methods', *Jurnal Undang-Undang dan Masyarakat*, 13, p. 167.

11 *Ibid*, p. 162.

Act 1956. For instance, Syed Ahmad Alsagoff contends the following: "It is about time the Civil Law Act 1956 be abolished, releasing Malaysia from the last remaining vestige of colonial rule. The Civil Law Act 1956 may have served its purpose in providing Malaysia with a supplementary English common law or equity in its fledging years after independence. But times have changed. It is diabolical and indignified that whenever there is a novel case before the Malaysian courts, unprovided for by written law, they have first to determine what was the law in England 50 years ago!"[12]

The call for a departure from the Common law either through the repeal or abolition of s. 3 or the Act as a whole was strongly opposed by the Malaysian Bar Council.[13] The Bar Council pointed out that Malaysia should be proud of its Common law system which is without doubt one of the most respected legal systems in the world. It even forms the basis of public international law. The Bar Council argued that the application of English common law in Malaysia should not be viewed as a weakness but rather a strength. It projects security and certainty to investors and businesses operating in Malaysia. Malaysia's steady economic development for the past few decades has been by and large enabled and fostered by, among other things, its Common law-based legal system. In addition, the Bar Council argued that Malaysia's link to the Common law via s. 3 does not prevent Malaysian courts from developing the Malaysian common law. English cases that have been accepted by the Malaysian courts automatically become part of the Malaysian common law. As a matter of fact, this is what has been done for the past few decades where Malaysian court decisions

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

13 See, for example, Ambiga Sreenevasan, 'Common Law', The Malaysian Bar, 23 August 2007. http://www.malaysianbar.org.my/press_statements/press_release_common_law.html (viewed 20 May 2014); Ambiga Sreenevasan, 'Leave the Common Law Alone', The Malaysian Bar, 24 August 2007 http://www.malaysianbar.org.my/press_statements/press_release_leave_the_common_law_alone.html (viewed 20 May 2014); Param Cumaraswamy, 'Dropping English Law may Leave Nation Isolated', The Malaysian Bar, 27 August 2007. http://www.malaysianbar.org.my/members_opinions_and_comments/dropping_english_common_law_may_leave_nation_isolated.html (viewed 20 May 2014).

are reported in Malaysian law reports that then become precedents for future cases. At the same time, the court is allowed to reject either in toto or partially, any English law that in the opinion of the court, would not be in accordance with the local circumstances and inhabitants.

Before we give our views on s. 3 of the Civil Law Act, the burning question that needs to be answered is whether the existing legal framework (ie. s. 3 of the Civil Law Act 1956) allows for the development of the Malaysian common law?

Can Judges develop Malaysian Common Law within the existing legal framework?

Many judges have emphasised the need for Malaysian courts to start developing the Malaysian common law like some other common law countries have done since they obtained their independence. For example, in the High Court case of *Syarikat Batu Sinar Sdn Bhd & Ors v. UMBC Finance Bhd & Ors*,[14] the learned Peh Swee Chin J, reminded the Malaysian judges of the need to develop the Malaysian common law by saying: "We have to develop our own common law just like what Australia has been doing, by directing our minds to the 'local circumstances' or 'local inhabitants'."[15]

The danger of blindly following English or other Commonwealth judicial decisions without having any regard to the local circumstances and inhabitants was also highlighted by Gopal Sri Ram JCA (as he then was) in *Tengku Abdullah ibni Sultan Abu Bakar & Ors v. Mohd Latiff bin Shah Mohd & Ors & Other Appeals*.[16] Since the purported issue in the case was in relation to undue influence, the learned judge observed that the courts must apply statutory law (ie. s. 16(1) of the Contracts Act 1950) and since the statutory definition of undue

14 [1990] 1 LNS 80.

15 *Ibid*, p. 474. This statement was later upheld by the Federal Court in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1, FC.

16 [1997] 2 CLJ 607, CA.

influence is not different from the English doctrine of undue influence then the English and Commonwealth judicial decisions could be a very useful guide on how the Malaysian court ought to interpret s. 16. However, as the learned judge pointed out, decisions in Malaysian cases should never be made solely by reference to English or Commonwealth judicial decisions without taking into consideration the local circumstances and inhabitants. This is what he said:

> ... We are of the view that our courts, when faced with a case of undue influence in the sphere of the law of contract, must primarily hearken to the words which Parliament has used to introduce the doctrine into our jurisprudence. While we may refer to the decisions of courts of those jurisdictions where the law is akin to our own, we must therefore ultimately have regard to the words of our own statute. In our judgment, it would be quite wrong, and indeed wholly out of place, to decide a Malaysian case *solely* by reference to English or other Commonwealth decisions. Indeed, the more recent decisions of the English courts demonstrate that their concept of the doctrine and the relationships to which it may be extended do not accord to the standards of our society ... Our society, on the other hand, has an entirely different set of moral standards. It would therefore be quite wrong to blindly follow all foreign decisions if the result would facilitate moral decadence within our social structure.[17]

Everyone agrees that there is a dire need for Malaysian common law but the disagreement is on the question as to how to develop it. We argue, and many would share our views, that the existing legal framework already allows for the development of the Malaysian common law. In fact, the Malaysian courts have been developing Malaysian common law in the past and are continuing to do so. Any English law that has been accepted by the Malaysian court in toto or in part crystalises into Malaysian common law. There is nothing wrong in accepting the English law in toto but that has to be done in compliance with s. 3(1) of the Civil Law Act 1956. If there is lacuna in the Malaysian law, then the court may apply English law in toto provided the hurdles in s. 3(1) are all satisfied. In this way, the English

17 *Ibid*, p. 309.

law crystalises into a Malaysian common law through the statutory doors of s. 3(1). This was done by judges in many cases in the past. For instance, in 2001, Gopal Sri Ram JCA, in the Court of Appeal case of *Saad Marwi v. Chan Hwan Hua & Anor*,[18] applied the English law doctrine of 'unequal bargaining power' in toto in the absence of any other written law on unfair contract terms in Malaysia at that time.[19] The judge observed the following:

> This section applies because no other provision of written law has been enacted upon the subject of inequality of bargaining power in contracts. Section 16 of the Contracts Act to which I have already referred deals with quite a different and much narrower doctrine. I do not therefore see any difficulty in receiving the well-established English doctrine of unconscionable bargains into our jurisprudence through the statutory doors of s. 3(1)(a).[20]

It is worth mentioning that the liberal interpretation of s. 3(1) and use of the English doctrine of unequal bargaining power in *Saad's* case caught the attention of the Court of Appeal one year later in the case of *American International Assurance Co Ltd v. Koh Yen Bee*.[21] The Court of Appeal expressed doubts as to whether the doctrine had passed all the hurdles in s. 3(1) in order to become part of Malaysian law. In addition, to allow judges to arbitrary apply the doctrine whenever they felt appropriate may lead to uncertainty in the law. The Court of Appeal judge, Abdul Hamid Mohamad JCA (as he then was) said the following:

> We do not wish to enter into an argument whether the doctrine of inequality of bargaining power or unconscionable contract may be imported to be part of our law. However, we must say that we have some doubts about it for the following reasons. First is the specific

18 [2001] 3 CLJ 98.

19 This is not the case anymore as in 2010, the Consumer Protection Act 1999 (Act 599) was amended with the Consumer Protection (Amendment) Act 2010 (Act A1381) adding to it a new Part IIIA entitled 'Unfair Contract Terms'.

20 [2001] 3 CLJ 98, p. 115.

21 [2002] 4 CLJ 49, CA.

> provision of s. 14 of the Contracts Act 1950 which only recognises coercion, undue influence, fraud, misrepresentation and mistake as factors that affect free consent. Secondly, the restrictive wording of s. 3(1) of the Civil Law Act 1956, in particular, the opening words of that subsection, the cut-off date and the proviso thereto. Thirdly, the fact that the court by introducing such principles is in effect 'legislating' on substantive law with retrospective effect. Fourthly, the uncertainty of the law that it may cause.[22]

Be that as it may, it can be surely said that the Malaysian courts are empowered by s. 3(1) to develop the Malaysian common law. In fact, it has been argued that the Federal Court as the highest court in the country has the responsibility to develop the Malaysian common law by taking into consideration local circumstances and inhabitants.[23] Hence, the development of the Malaysian common law must be done in the manner prescribed by s. 3. Section 3 is a complex section which provides the concrete methodology that ought to be followed by the courts when faced with a lacuna in the law. The correct methodology has been explained by Dato' Abdul Hamid Mohamed J in the High Court case of *Nepline Sdn Bhd v. Jones Lang Wootton*,[24] where his Honour said:

> In my view the approach that the Court should take is first to determine whether there is any written law in force in Malaysia. If there is, the Court need not look anywhere else. If there is none, then the Court should determine what is the common law of, and the rules of equity as administered in England on 7 April 1956. Having done that the Court should consider whether 'local circumstances' and 'local inhabitants' permit its application, as such. If it is 'permissible' the Court should apply it. If not, I am of the view that, the Court is free to reject it totally or adopt any part which is 'permissible', with or without qualification. Where the Court rejects it totally or in part, then there being no written law in force in Malaysia, the Court is free to formulate Malaysia's own common law. In so doing, the Court is at liberty to look at any source of

22 *Ibid*, p. 319.

23 See Syed Ahmad Alsagoff, *Principles of the Law of Contract in Malaysia* (3rd Edn) (LexisNexis, Kuala Lumpur, 2010), p. 26.

24 [1995] 1 CLJ 865.

> law, local or otherwise, be it common law of, or the rules of equity as administered in England after 7 April 1956, principles of common law in other countries, Islamic law of common application or common customs of the people of Malaysia. Under the provision of s. 3 of the Civil Law Act, 1956, I think, that it is the way the Malaysian common law should develop.[25]

Therefore, in case of a lacuna in the law, it becomes mandatory for the court to refer to English law which needs to pass through three statutory hurdles as per s. 3 before it can be applied in Malaysia, namely: 'cut-off dates', 'local circumstances', and 'local inhabitants'. If the English law passes these three hurdles, then it shall be applied by the court. However, if it fails to comply with any of these hurdles, then the court may either adopt part of it with or without qualification or completely reject it. In either situation (ie. whether the court rejects English law completely or in part and there being no written law in Malaysia), the court is allowed to develop the Malaysian common law. Dato' Abdul Hamid J in *Nepline's* case went further and said that in developing the Malaysian common law the court then is free to refer to *'any source of law, local or otherwise, be it England after 7 April 1956, principles of common law in other countries, Islamic law of common application or common customs of the people of Malaysia.*'[26]

All in all, the answer to the question as to, 'whether Malaysian courts can develop a Malaysian common law within the legal framework propounded by s. 3 of the Civil Law Act 1956?,' is definitely yes. Section 3 in its current form is not an obstacle for the development of the Malaysian common law. On the contrary, it can be argued that s. 3 encourages the development of the Malaysian common law through the proviso that states: *'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.*' This proviso shows that the drafters

25 *Ibid*, p. 871.

26 *Ibid*.

of s. 3 never expected Malaysian courts to accept all English laws in toto irrespective of local circumstances and inhabitants. The proviso enables the creation of a Malaysian common law by requiring the court to adjust the English law to local circumstances and inhabitants.[27]

Should s. 3 of the Civil Law Act 1956 be abolished?

Since s. 3 in its current form allows for the development of the Malaysian common law why should it be abolished? There are numerous reasons why s. 3 should not be abolished but the most compelling are as follows:

1. We may still need to refer to the common law of England, particularly in the law of tort. In the same way we may still need to refer to the rules of equity, particularly in the law of trust.

2. Such provisions remove any doubt regarding the Court's jurisdiction to apply such laws. Bear in mind the provision of art. 121(1) of the Federal Constitution which, *inter alia*, states that the Courts 'shall have such jurisdiction and powers 'as may be conferred by or under federal law.'[28]

3. It provides guidance to the Court in applying such rules leading to greater consistency.

Will the abolition of s. 3 divorce Malaysia completely from the English common law system? We should not forget that the Common law has been accorded official recognition as part of Malaysian law by the Federal Constitution.[29] To exclude Common law from the definition of law in the Malaysian context would require, in addition to the abolition of s. 3, the amendment of the Federal Constitution. But why

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27 *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 1 CLJ 701, FC. See also Farid Sufian Shuaib, 'Towards Malaysian Common Law: Convergence between Indigenous Norms and Common Law Methods', *Jurnal Undang-Undang dan Masyarakat*, 13, p. 164.

28 See art. 121(1) of the Federal Constitution of Malaysia.

29 See art. 160 of the Federal Constitution.

would we want to alienate ourselves from the English common law in the first place? We often hear calls for it to be replaced, but replaced with what? What would happen with all those common law based judicial decisions which have been painstakingly developed and delivered by the Malaysian judiciary for the past 50 years or so? We should not want change just for the sake of change but rather we should work on what we have and develop it further, possibly by 'indigenising' English law whenever the circumstances require.

We are not advocating that English law should be used liberally as if it was the main or only law of the country. On the contrary, its use should be restricted to the manner prescribed by s. 3. In fact, s. 3 limits the application of English law and promotes the development of the Malaysian common law. But the problem is that this section is often being treated as if it does not exist at all. It tends to be often omitted by lawyers in their submissions and judges in their judgments, or misinterpreted. Often lawyers would cite the English law devoid of s. 3 as if English law applies in Malaysia automatically without any hurdles. They find it burdensome to strictly follow the methodology propounded by s. 3 and instead opt for an easy way of presenting to the court the latest English law on the matter without considering any of the hurdles in s. 3. Likewise, the judges who rely on those decisions for their judgments transform them into Malaysian law without considering the hurdles in s. 3. A large number of recent English judgments have in this manner found their way into becoming part of Malaysian law.

This happens because the judges who decide the cases allow this to happen. They do not pay enough attention to s. 3. This particular problem was articulated by Dato' Abdul Hamid Mohamad J (as he then was) in *Nepline Sdn Bhd v. Jones Lang Wootton*,[30] when he said: "However, the provision [ie. s. 3(1)] remains in our statute book though rarely referred to by lawyers or judges in their submissions of judgments, respectively. More often than not, and this case is a good example, Counsel refer to English authorities as if the common law of

30 [1995] 1 CLJ 865.

England applies in toto in Malaysia."[31] He concluded by saying: "My humble view is that the provision of s. 3 of the Civil Law Act 1956 as it stands today, is the law of Malaysia. Courts in Malaysia have no choice but to apply it."[32]

Three years later, in the case of *Sri Inai (Pulau Pinang) Sdn Bhd v. Yong Yit Swee*,[33] the learned judge Abdul Hamid Mohamad J voiced his concerns again on the passive attitude of the courts when it comes to s. 3. He said: "This provision (s. 3 of the Civil Law Act 1956) always gives me problems. On the one hand it is the law of this country. It has to be complied. On the other hand, courts in this country, except on very rare occasions, do not seem to pay any attention to this provision. Instead the courts appear to apply the Common Law of England, irrespective of the date of the decision as if that provision does not exist at all."[34]

Amendments to s. 3 of the Civil Law Act 1956

Even though we have argued that s. 3 should not be abolished, we opine that the time has come for the provision to be amended and improved. This paper proposes the following amendments:

1. The reference to the common law and the rules of equity should not be confined to that of England but also to that of other Commonwealth countries.

2. Even with conditions stipulated, the provision should not be mandatory on the court. The word 'shall' should be substituted with the word 'may'. That would give to the court discretion on whether to apply the said principles or not.

3. There should be no cut-off dates. Common law and the rules of equity grow through judgments of courts to cope with time. There is no basis whatsoever to impose the cut-off date around 1950's (or any other date for that matter) unless we want to live by an archaic law which may no

31 *Ibid*, p. 869. Emphasis added.

32 *Ibid*, p. 871.

33 [1998] 3 CLJ 893.

34 *Ibid*, p. 903. Emphasis added.

longer be suitable even in England. Besides, it is difficult to determine the common law or rules of equity on a matter at a particular cut-off date. A case decided after the cut-off date may draw the principle from earlier judgments. There is not a judgment that does not refer to earlier precedents. *Hedley Byrne & Co Ltd v. Heller & Partners Ltd*[35] is a good example.

4. The provision that such common law and the rules of equity should only be applicable in so far as provisions have not been made (at that point of time) by any written law in force in Malaysia should remain, subject to improved drafting, if any. This is obvious. Once the Malaysian Parliament enacts a law on the subject, it is that law that should be applied. No lawyer should be heard to argue and no judge should be heard to say that common law rights or equitable remedy continue to run parallel with the written law enacted by Parliament. The introduction of the principle of equitable estoppel to contracts made under the Control of Rent Act 1966 (which has now been repealed) had caused great injustice to affected house owners and had caused the houses to deteriorate.

5. The proviso that *'the said common law and rules of equity 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'* should remain, subject to improved drafting, if any.

6. With regard to Sabah and Sarawak, the provisions regarding the application of statutes of general application should be removed. Even if there were some justifications six decades ago, they do not exist anymore. If it is not necessary to apply English statutes in Peninsular Malaysia, why should it be necessary for Sabah and Sarawak? Besides it may lead to an unnecessary disparity in the laws of Peninsular Malaysia and the two states. Everything should be done to standardise the law applicable to the whole country.

7. There should be a new addition. The principles of Islamic law should be included too. We realise that due to ignorance and prejudice the mention of 'Islamic law' would straight away raise a controversy. However, we must remember that, we are not dealing with the introduction of the Islamic criminal law or laws relating to *ibadah*. We are dealing with civil

35 [1964] AC 465, HL.

law and the scope is very limited. Consider this example. There is no equivalent of *caveat emptore* in Islamic law. Islamic law insists fairness and honesty on both parties in their dealings. The common law on disclosure of material information (eg. as in *Hedley Byrne*) does not go so far as the Islamic law principle that 'a seller must disclose the defects of the good he is selling'.[36]

8. With regard to Sabah, s. 3(3)(i) regarding *habeas corpus*, *mandamus*, prohibition, *certiorari* or injunction should be repealed. *Habeas corpus* involves criminal procedure. The laws on the subject applicable to Peninsular Malaysia should be extended to Sabah (and Sarawak) where necessary to provide for standardisation.

9. Our comment in point 8 should apply equally to Sarawak in respect of s. 3(3)(ii).

Section 5 and 6 of the Civil Law Act 1956

Section 5 of the Civil Law Act provides:

> **Application of English law in commercial matters**
>
> 5. (1) In all questions or issues which arise or which have to be decided in the States of Peninsular Malaysia other than Malacca and Penang with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case at the date of the coming into force of this Act, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.

36 Please see discussion in *Nepline's* case. Indeed in that case the court went further than the common law of England and indeed drew an inspiration from the Islamic law position, without saying so. (We know because Tun Abdul Hamid Mohamad, co-author of this paper, decided the case.) The Court of Appeal confirmed the judgment, perhaps without even knowing where the idea came from. Unfortunately, there is no written judgment of the Court of Appeal. We have not come across any criticism of the judgment. We hope there will not be any even after this 'disclosure'! The point we are making is that there might be some principles of Islamic law which could be applicable. Due to ignorance and prejudice, many people do not realise the similarities between Islamic law and common law.

> (2) In all questions or issues which arise or which have to be decided in the States of Malacca, Penang, Sabah and Sarawak with respect to the law concerning any of the matters referred to in subsection (1), the law to be administered shall be the same as would be administered in England in the like case at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.

Section 5 is the statutory authority for the reception of English law specifically in commercial matters. In essence, s. 5(1) provides that in the absence of any local written law, English commercial law shall be applicable in Peninsular Malaysia with the exception of Penang and Malacca, as administered in England on 7 April 1956. On the other hand, as per s. 5(2), in the states of Penang, Malacca, Sabah and Sarawak the English commercial law applicable will be the same as that administered in England in the like case at the corresponding period, in the absence of any local written law. In the latter subsection, the cut-off date has been removed in order to streamline the decisions of the courts in the Strait Settlements with that of the English courts. It can also be observed that s. 5 uses the expression *'the law to be administered'* which allows the application of the whole of English commercial law and in that way it is much broader then s. 3 which points to the specific sources of English law that may be used.

Nevertheless, s. 5, like s. 3, allows for the application of English commercial law only in the absence of any written law passed by the Malaysian Parliament. Therefore, the reliance on this section has been significantly reduced since the Malaysian Parliament has passed laws on most of the commercial matters enlisted in the section.[37] In that way, it can be said that s. 5 will continue to be less and less relevant till one day it becomes extinct. Although the 'local circumstances' and 'local inhabitants' proviso stated in s. 3 is not to be found in s. 5, in practice, s. 5 is interpreted and read by the courts as if the proviso

37 See Partnership Act 1961 (Act 135); Companies Act 1965 (Act 125); Financial Services Act 2013 (Act 758); Islamic Financial Services Act 2013 (Act 759); Contracts Act 1950 (Act 136); Hire Purchase Act 1967 (Act 212); Bankruptcy Act 1967 (Act 360) etc.

exists.[38] Therefore, it needs to be observed that the methodology by which English commercial law is to be applied by the Malaysian courts as per s. 5 is the same as that applicable to s. 3. Hence, Dato' Abdul Hamid Mohamed J's earlier explanation of the methodology in the context of s. 3 in the Court of Appeal case of *Nepline Sdn Bhd v. Jones Lang Wootton*[39] is relevant to s. 5 as well.

Section 6 of the Civil Law Act 1956 states:

> **Immovable property**
>
> **6.** Nothing in this Part shall be taken to introduce into Malaysia or any of the States comprised therein any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein.

This section has been passed to prevent the application of English law to land matters. Hence, the English land laws relating *to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein* do not apply to Malaysia. Malaysia follows the Torrens system which is modeled upon the Australian system of land administration. The central theme of the Torrens system is the registration of land titles which is perceived as more superior to the English deeds system. The Torrens system has been applied in all states of Malaysia, except Sabah, via the National Land Code.[40]

38 See Wan Arfah Hamzah, op. cit., p. 136.

39 [1995] 1 CLJ 865, p. 871.

9.3 CONCLUSION

In conclusion, the debate on whether we need to sustain our strong links with English law is likely to continue. Irrespective of which side of the argument one may take, the truth is that, our links with English law have contributed tremendously towards the development of the plural Malaysian legal system which is highly regarded in the region. We argue that the abolition of s. 3 of the Civil Law Act 1956, or the Act as a whole, as some propose, is not necessary. The argument that the Act stifles the development of the Malaysian common law is flawed. The existing framework within the Act allows, if not promotes, the development of the Malaysian common law. In doing so, the judges are allowed to refer to other sources of law, including Islamic law, provided that the prescribed procedure under s. 3 is followed. In fact, we do suggest certain amendments to s. 3 which would enable smoother reference to Islamic law principles in civil matters. The judges are not only allowed but, in fact, they are encouraged to draw an inspiration from the wide spectrum of Islamic civil laws to fill in the lacunas in the law whenever the need arises. This was done by Tun Abdul Hamid Mohamad in *Nepline's* case as discussed earlier. In fact, we are of the opinion that any law that is not unIslamic is Islamic. Having said this, there are many common law rules which are very similar to Islamic laws. One would be astonished to find how similar these two systems are, in many ways. The prominent scholar, Professor John, A. Makdisi, in his well-known article 'The Islamic Origins of Common Law' suggests that the origins of Common law may be found in Islamic law.[41] This is an article that we would suggest be read by all skeptics as to the link between the two systems of law which seem to have much more in common than one may initially think.

40 Penang and Malacca – National Land Code (Penang and Malaka Titles) Act 1963 (Act 518), the rest of Peninsular Malaysia – National Land Code 1965 (Act 56), and Sarawak – Sarawak Land Code (Cap 81). Sabah does not use the Torrens system and is instead governed by the Land Ordinance (Cap 68).

41 See John, A. Makdidi, 'The Islamic Origins of Common Law', *North Carolina Law Review*, June 1999, 77(5), pp. 1635–1739.