SINGAPORE ACADEMY OF LAW ANNUAL LECTURE 2011 – "THE COMMON LAW OF MALAYSIA IN THE 21ST CENTURY"

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I. INTRODUCTION

1 First and foremost I say thank you and express my appreciation to the Right Honorable Chief Justice Chan Sek Keong for inviting me to deliver a talk at this prestigious series of lectures. I must also publicly express my appreciation to the Academy for having arranged my visits to the various places during my stay here.

2 I believe that during the years when I was the Chief Justice, the relationship between the Judiciary and the Bar of Singapore and Malaysia had never been better. To this I must say thank you to Chief Justice Chan Sek Keong. On his suggestion, we formed the annual joint judicial conference which for next year will include Brunei as well. Singapore has also graciously accepted our invitation to attend training and conferences in Malaysia. Likewise Malaysia has done the same in respect of conferences and meetings in Singapore. I am confident that my successor will continue to foster this close relationship and exchanges.

3 When I was asked by Chief Justice Chan Sek Keong to speak on the Common Law of Malaysia in the 21st century, I responded positively without a second thought, thinking it was a straightforward subject. In the course of carrying out my research however, I found out how wrong I had been. In truth, the development of the common law in our jurisdictions is an extensive subject with a multitude of facets. I found the most complex part of writing this lecture, was the portion that attempts to map out the future development of the common law in our jurisdictions. The prospect of looking into a crystal ball and prophesying on the progress of the law into the far reaches of the 21st century is a daunting and hazardous task, littered with the prospect of uncertainty and miscalculation. It became more difficult when I had to limit this talk to only about 45 minutes. You will however forgive me if I expend the better part of this lecture on the common law in Malaysia, perhaps touching a bit on Singapore.

II. THE COMMON LAW

4 The term "common law" has a myriad of meanings. It requires precise definition for it assumes different connotations arising from the context in which it is utilised. For the purpose of the lecture I am limiting the definition of common law as denoting a system based on the English legal system.

5 A common law legal system which employs an adversarial fact finding process, where the rules of natural justice and the rule of law prevail and where trial by jury is significant. This definition comes into play when applied in the context of a State, in that it denotes a system based on the English legal system. In the context of the common law as imported and received in Malaysia from the British, it refers to the customary judge made law of these nations.

6 In this paper, I shall be touching on the ways in which "common law" is utilised, primarily in the context of the influence of English common law or judge made law.

A. A history of the reception of English common law in Malaysia and Singapore

7 To trace the evolution of the common law in Malaysia and Singapore it is relevant to examine the traditional sources of law in these jurisdictions which subsisted prior to the reception and utilisation of English common law, as well as the subsequent reception and utilisation of English law.

B. Traditional sources of law

8 Historical sources suggest that this geographical region, displayed an excellent example of a land of pluralism where diverse cultures subsisted symbiotically in all spheres of life, in terms of religion, law, culture and society. The system then in place, acknowledged, accepted and allowed diversity to flourish. This appears to have extended to the law. In Winstedt's *The Malays – A Cultural History*,[1] he describes the Malay legal systems as including laws from all races of the Malay Archipelago and these include:[2]

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1 Richard Olaf Winstedt, *The Malays – A Cultural History* (Lowe and Brydone Ltd, 3rd Ed, 1953).

2 Richard Olaf Winstedt, *The Malays – A Cultural History* (Lowe and Brydone Ltd, 3rd Ed, 1953) at pp 91–92:

> The digests of law collected from all the races of the Malay Archipelago fill many large printed volumes. In the Malay Peninsula they are of four main types:

(*cont'd on the next page*)

(a) digest and tribal sayings that embody the Adat Perpateh practised by the Minangkabaus of Sumatra and Negeri Sembilan;

(b) Malay indigenous patriarchal law *mixed with Hindu and Muslim law* called Adat Temenggung;

(c) Digest of Maritime Law compiled for the last Sultan of Malacca after consultation with the sailors of Bugis and Makassar; and

(d) the Muslim law of the Shafie sect.

9 There was therefore a system of laws and enforcement in place in the territories of the former Malaya and Singapore long before the common law was introduced by the British.

10 Indian influence in the Malayan archipelago was also evident for about a millennium or more. The British found, on arrival, a small Indian community who practised and were equipped with knowledge of Hindu law from India. The influence of Hindu law is also seen, for example, in the Pahang Digest of 1596, where Winstedt records that "the rule that interest may not exceed 100 per cent follows Hindu law".[3]

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(1) There are digests and tribal sayings that embody the mild indigenous matriarchal law of agricultural clans, the 'adat perpateh' or law of Ministers, cherished by the Minangkabaus of Sumatra and their colonists in Negeri Sembilan;

(2) There are digests, containing traces of Malay indigenous patriarchal law, but mixed with relics of Hindu law and overlaid with Muslim Law. This patriarchal law is called 'adat Temenggong' or law of the Minister for War and Police. Evolved for the mixed population of ports, it was introduced largely from India along with commerce by traders and adventurers, at first Hindu and later Muslim. For our knowledge of this composite patriarchal law we are indebted especially to the Malacca digest of c 1450 AD, the Pahang digest of 1596 with a later supplement and to a Kedah digest dated 1650 and containing port rules adopted by countries like Acheh and Kedah from regulations of the kind India knew from the days of Chandra Gupta and embodied in the Mogul Tarikh – Tahiri. Even the 18th century Ninety-Nine Laws of Perak belongs to this composite class, although compiled by Sayids and exhibiting Shi'ite influence. The Johor digest is mainly based on that of Malacca, and in a MS known to de Hollander is dated 'about 1789';

(3) There are digests of maritime law, the earliest compiled for the last Sultan of Malacca in consultation with sea captains for Bugis and Macassar tradingships;

(4) Lastly there are Malay translations of orthodox Muslim works of the school of Shafi'i, especially treatises on the law of marriage, divorce and the legitimacy of children, the only branch of Muslim canon law that Malays have adopted practically unchanged.

3 See Reginald Hugh Hickling, *Malaysian Law* (Kuala Lumpur, Malaysia: Professional (Law) Books Publishers, 1987) ch 8, at p 89.

11 As far as the Chinese are concerned, it is recorded that there was contact with the Malayan Archipelago as early as the 5th century AD although the greater influx of Chinese to Malaysia is recorded as having occurred in the early 19th century, tin mining being a particular attraction. Indeed it is recorded that the governments of the time grew rich with the increased revenue from tin. The Chinese in Malaya governed themselves largely through the *Kapitan Cina* system which probably originated in Portuguese Malacca.[4] The *Kapitan Cina* exercised administrative, judicial and other functions and provided for a minimum of conflict.

12 While it is not possible to cite with certainty the precise nature of legal systems prior to British entry into Malaya, it is clear that there were some form of legal systems long before the common law arrived in the Straits Settlements between 1876 and 1824. With this backdrop in place, I turn now to consider the introduction of English common law in the Malay Archipelago which included Singapore.

C. English law

13 The English first arrived under the auspices of the East India Company in 1786 when Captain Francis Light took possession of Penang on behalf of the Company. At that stage it brought no formal legal system. This period was described as one of "legal chaos" by Dickens J in *Palangee v Tye Ang*[5] and *In the goods of Ethergee decd*.[6] During this period "each class of the population received full recognition and protection, according to its own laws and usages – in other instances the law of nature practically superseding any other".[7] While the English considered this to be a period of "legal chaos" it might well be viewed differently today in the post-modern era, as several sets of legal orders subsisted and operated successfully within society. In 1807 the First Charter of Justice introduced the English law into Penang without expressly saying that it is to be the *lex loci* of Penang.

14 Notwithstanding this, with the arrival of British lawyers in the region, the law of the land then practised in Penang was overlooked. In *Rodyk v Williamson*, cited in *In the Goods of Abdullah*,[8] judges such as Malkin affirmed that the Charter introduced English law. In the

4 See Reginald Hugh Hickling, *Malaysian Law* (Kuala Lumpur, Malaysia: Professional (Law) Books Publishers, 1987) ch 8, at p 108 and N J Ryan, *The Cultural Heritage of Malaya* (Longman Malaysia, 2nd Ed, 1971) at p 19.

5 (1803) 1 Ky xix.

6 (1803) 1 Ky xixx at xx.

7 See Reginald Hugh Hickling, *Malaysian Law* (Kuala Lumpur, Malaysia: Professional (Law) Books Publishers, 1987) ch 8, at p 113.

8 (1835) 2 Ky 8 at 9.

renowned *Regina v Willans Esquire*,[9] Sir Peter Benson Maxwell acknowledged that there was no specific invocation of English law in the First Charter.

15 Thomas Braddell sought valiantly to argue in *Fatimah v D Logan*[10] that the *lex loci* of Penang was Muslim law, premised on the fact that Penang was part of Kedah on its cession in 1786 and the Raja of Kedah was a Muslim prince and the law continued in force after cession unless an alteration was effected by a competent authority which had not been done. However the contention was dismissed outright by Hackett J.[11]

16 The existence of established local customary laws amongst the pluralist society which had subsisted for some centuries prior to this was therefore simply ignored, or at best, overlooked.

17 In 1819 Sir Stamford Raffles, also of the East India Company negotiated with the Sultan of Johore to have Singapore ceded to the Company. Singapore was established as a Factory subordinate to the Settlement or Presidency of Fort Marlborough at Bencoolen in Sumatra. In 1823/1824, Singapore became, under a reshsuffle, a Factory subordinate to the Presidency of Fort William in Bengal. In the interim, Malacca which had been ceded by the Dutch to the British, was transferred to the Company in 1825. In 1826 Penang, Malacca and Singapore were made into a separate Presidency of the Straits Settlement. In that year the Second Charter of Justice was promulgated, marking the introduction of English law, (again not without dispute) in Malacca and Singapore, although I am aware that this is an area of considerable dispute and research in Singapore. However it is widely accepted that Singapore legal history seems to be regarded as beginning in 1826 with the reception of English law.

18 In any event English law then took root in Malaysia and Singapore and if analogies are to be drawn then, as R H Hickling puts it:[12]

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9 [1808–84] 3 Ky 16.

10 [1808–84] 1 Ky 255.

11 *Fatimah v D Logan* [1808–84] 1 Ky 255 at 259, *per* Hackett J:

> Here we have the fact that an island virtually uninhabited, is occupied and settled by British subjects in the name of the King of England. The case therefore would seem to fall within the general rule laid down in our law books and which Lord Kingsdon thus expresses in a recent case: 'When Englishmen establish themselves in an uninhabited or barbarous country, they carry with them not only the laws, but the sovereignty of their own State; and those who live amongst them and become members of their community, become also partakers of and subject to the same laws'.

12 See Reginald Hugh Hickling, *Malaysian Law* (Kuala Lumpur, Malaysia: Professional (Law) Books Publishers, 1987) at pp 114–115.

> English law came into Malaysia as a tide, at first a gentle movement in a few places and then as a powerful surge challenging the entire coast and its estuaries.

19 The position of Islam and Malay custom was to some extent left unaffected by the British, paving the way for a parallel court system to develop. Today the Malaysian Constitution provids for non-interference of civil court on Islamic family issues[13]. To some this is controversial.

D. Merdeka – Pre-independence – 1956 – Post-independence

20 English common law and the rules of equity were incorporated and introduced into this region through the Civil Law Ordinance, the first one being in 1878. A year prior to Independence the final version of the Civil Law Ordinance was introduced, which in Malaysia, remains intact save for a revision in 1972 when it was renamed the Civil Law Act 1956[14]. Section 3 and 5 of the Act[15] require the adjudicator to ascertain to what extent the local populace and indigenous customs allow such importation and reception. In other words the phrase invokes a clear restriction in the application of English law. In practice and reality however, the result was somewhat different. Judges and barristers were largely trained in the United Kingdom and the most expedient course to undertake was to simply apply English principles and case-law. In *Yong Joo Lin, Yong Shook Lin and Yong Yoo Lin v Fung Poi Pong*,[16] Terrell Ag CJ stated:[17] "As the Common law of England has been in effect followed in the Federated Malay States since a Supreme Court was established and now has statutory recognition" and the CJ went on to say:[18] "Principles of English law have for many years been accepted in the Federated Malay States where no other provisions have been made by statute". You may not realise that the name of one of the parties Yong Shook Lin is most probably the father of your last Chief Justice Yong Pung How. He was the one who founded Shook Lin & Bok.

21 The qualification that principles of English law were accepted only where no other provision had been made by statutes took root from similar qualifications imposed by the British in treaties with the Malay Rulers. The words quite unequivocally restrain or abjure the wholesale adoption of English law, but it must be said that the attitude

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13 Federal Constitution of Malaysia (164/2009) Art 121 (1A).

14 See ss 3 and 5 Civil Law Act 1956 (Act 67) which provides expressly that the common law and rules of equity "shall be applied in so far as the circumstances of the States of Malaysia and their respective local inhabitants permit and subject to such qualifications as local circumstances render necessary".

15 Civil Law Act 1956 (Act 67).

16 [1941] MLJ 63.

17 [1941] MLJ 63 at 72.

18 [1941] MLJ 63 at 64.

continued and to some extent is prevalent even today, although considerably less so. To date the provisions of the Civil Law Act 1956[19] remain intact to this day, although in Singapore the equivalent provision has been repealed.

22 Apart from the Civil Law Ordinance,[20] law such as the Evidence Act,[21] Penal Code[22] and the Criminal Procedure Code[23] and the Contract Act[24] were copied from India. These statutes are in fact codified principles of English common law.

23 Upon attaining independence of Malaya in 1957, the main principles of what is today referred to as the basic human rights were incorporated into the Federal Constitution. Unlike the United Kingdom where Parliament is supreme, Malaysia like all other common law countries has as its supreme law its constitution. The Constitution was premised on entrenched English common law principles and followed closely the form of the Indian Constitution.

E. Religion

24 The British recognised that the Muslim religion or Islam was most important since the Rulers of the then States of Malaya were and are all Muslims. Hence Islam became one of the fundamental bases in the development of the Malaysian laws. It therefore gave Islam a special position, creating the Shariah courts to deal with Islamic family laws. As early as 1941, Gordon-Smith Jin *Re Timah binti Abdullah, deceased*[25] recognised this.[26] This position remains until today.[27]

25 Even in interpreting the Federal Constitution, the courts look to the common law.[28]

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19 Act 67 of 1956.
20 Now the Civil Law Act 1956 (Act 67).
21 Evidence Act 1950 (Act 56).
22 Penal Code 2006 (Act 574, Rev Ed).
23 Criminal Procedure Code (Act 593, Rev Ed).
24 Contracts Act 1950 (Act 136).
25 [1941] MLJ 51.
26 [1941] MLJ 51 at 52:

> The Muhammadan Law is part of the law in force in Pahang and one might say that in effect, it is the law of the land as regards Muhammadans. As such, it is not foreign law to be proved by expert evidence but is law of which the Court must take judicial notice and it is for the Court to declare what the law is … In attempting to ascertain what that law is the court may have recourse to appropriate books of reference.

27 See *Che Omar bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55.
28 See *Ong Ah Chuan v Public Prosecutor* [1981] AC 638 and *Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64.

F. What does the future hold for the common law?

26 Now I come to the real answer posed by the topic of this lecture.

27 The common law system is one of the greatest, if not the greatest, contributor to Malaysian jurisprudence today, or for that matter in all the common law countries. It developed from the 12th century with much trial and error. However as with everything it has been, is and will continue to be subject to considerable change.

28 Let me now consider what I foresee for the future of Malaysian jurisprudence in terms of the common law.

29 The first characteristic is that of centralisation[29] of the court system. That is a feature that is embedded in the Malaysian civil system of law and is unlikely, in my view to change considerably. There will, no doubt in time, be devolution of legal services to tribunals and other courts, perhaps technical and construction courts, financial services courts *etc* to meet the more specialised needs of the mercantile community. This will not however, in the context of the civil court system dismantle the hierarchy of courts. Judges sitting in the various courts may sit in more than one place but they are judges of the same civil courts and they administer the same law. The highest court in the land continues to decree the final word on appeal in any adjudicated matter. This cardinal feature is unlikely to be altered substantively.

30 Although the Malaysian judges and perhaps the Singaporean judges too, have received criticisms particularly regarding their independence, the office of a judge in our society still commands a considerable degree of respect and honour, and I do not see that changing irrevocably in the future. The protection of judicial independence as enshrined in the Constitution coupled with the need for a check and balance against excessive or unbridled executive power provides an effective safeguard. The appointment and promotion of a judge has to go through many levels of filtering. In Malaysia, after being nominated by the Chief Justice, his name has to be agreed to by the Judicial Appointments Commission and then the Prime Minister and then the Conference of Rulers comprising of hereditary Rulers and finally the King. He has to go through five layers of vetting not forgetting the nine Rulers whose objections are likely to be a ground for removing that judge's name from the list.

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29 The features of the English Common law system are taken from Lord Bingham's book on "The Future of the Common Law" in *The Business of Judging: Selected Essays and Speeches* (Oxford University Press, 2000).

G. Mode of trial

31 The jury system which is a key feature of the common law system and imported by way of the Charter of Justice of 1807 has been abolished. The fact finding function of juries has been replaced by the judge or judicial officer as the sole adjudicator of fact in this jurisdiction. Even in the United Kingdon the use of a jury in trials is in my opinion reducing in its popularity. Less cases are being tried by jury unlike the United States. Some civil countries however are looking into introducing the jury system. A group of Taiwanese judges visited us to seek our views on the jury system. To my mind, as far as Malaysia is concerned, I do not foresee any likelihood of the system being reintroduced.

32 In the 21st century it is likely that there will be greater emphasis on modifying the procedural aspects of the mode of conduct of cases so as to achieve greater efficiency in less time. It is to be borne in mind that the basis for the complex rules of procedure and particularly evidence that were integrated into the adversarial system of adjudication a few centuries ago was in some measure to accommodate juries who comprised the main adjudicators of fact. The evidence in respect of each dispute had to be laid out in a manner which could be comprehended by that audience. Coupled with this was the need for the evidence to be produced in the course of one continuous sitting.

33 To this end, I foresee that in the course of the 21st century, there may well be substantive reviews and/or amendments to the mode of conduct of trials. The need for prolonged oral testimony may not be necessary in all cases. Rules of evidence are likely to be reviewed to simplify the adducing and receipt of evidence. Time is likely to become a more precious commodity requiring a comprehensive and condensed approach to trials, thereby allowing for a greater portion of the population to have access to, and ventilate their grievances in a court setting. With a saving of time, costs and a simplification of procedures, it is hoped that a greater portion of the population will have access to justice. In Malaysia we have introduced pre-prepared witness statements and written submissions. Oral examination-in-chief and oral submission are discouraged and these practices will be incorporated into the new Rules of the High Court.

34 In keeping with this overall objective of greater access to justice for a greater proportion of the population, this millennium will also see a surge, in my view, of alternative methods of resolving disputes, which is more in keeping with the "Eastern" concept of dealing with differences. Conciliation and mediation, which remain at the heart of Eastern philosophy, has seen a huge resurgence in jurisdictions across the world and that will eventually take full effect in Malaysia. At the

heart of our culture resides the sentiment that disputes, particularly between individuals, are best settled without violence or considerable acrimony. Harmony is a key objective in the cultural ethos of the Malays, Chinese, Indians, Ibans, Dayaks *etc*, the main racial groups reflecting the Malaysian population profile. Considerable emphasis is likely to be placed on alternative methods of resolving disputes which will achieve a saving in costs and time. This may well be achieved by the introduction of statutory reforms such as specific legislation, as well as reforms to court procedures to accommodate these modes of resolution, making them mandatory.

35 Mediation is nothing new in Malaysia. The principle of "sulh" or mediation has well been established and practiced in most of the Shariah courts nationwide. Mediation is encouraged by Islam based on Quranic verses as well as *hadith* by Prophet Muhammad SAW.[30] In Shariah Courts, there are some types of cases that must be mediated before they are heard before a judge.[31]

36 Business people are also looking at other means of alternative dispute resolution. Arbitration had been a popular practice since late 19th century in England but of late, the judges in the United Kingdom and now the Malaysian and Singaporean judges do not wish to interfere when parties to a business deal have agreed to refer their disputes to arbitration.[32]

37 The last, but arguably the most distinctive feature of the English common law system inherited by us, is the importance of judge made law as a source of law. In Malaysia, after the early reception of the common law to be modified to suit our local conditions, the greatest source of law has been vide statutes. A significant portion of the common law has been imported into this jurisdiction by codification in legislation. Statutory law is dominant in areas such as company law, tax law, social security, labour law and family law. The volume of statute law is so voluminous as to warrant its characterisation as dominant. Even fundamental common law subjects like contract and many aspects of commercial law are codified. To this end, the scope for judges to actively adjudicate is somewhat narrowed as the statute sets out the law comprehensively. The position is somewhat different than in the United Kingdom where many areas of the common law are not codified for example, contract and tort. Notwithstanding this, in the Malaysian climate the ingenuity and adjudicatory skills of judges are routinely called upon to decipher the sometimes "impenetrable" statutory

30 Al-Hujurat: 9, An-Nisa': 128.

31 Syariah Civil Procedure (Federal Territories) Act 1998, Selangor Shariah Court Civil Procedure Enactment.

32 See *Inokom Sdn Bhd v Renault SA* (2011) Federal Court of Malaysia, unreported.

material that they have to construe. Judges have often expressed aggravation or confusion at parliamentary draftmanship. Yet their judicial role making is necessary to enable a harmonious construction of statutes that comprise the dominant source of law in the land. This is more so with the advent of new technology and trade. Recently the promulgation of the Data Protection Act[33] and the Competition Act[34] provide examples of "new age" statutes which will no doubt require judicial interpretation.

38 There are instances when a statute is drafted broadly warranting a series of decisions on its construction which contributes considerably to jurisprudence. Such construction requires the highest judicial qualities, and the need for such judicial duties will increase in correlation to the increase in legislation. Therefore, despite the dominance of statute law, Malaysian case law continues to grow at a rapid rate and is heavily relied upon in our courts on a day to day basis. This aspect of the common law has been retained and it is likely to continue to blossom through the millennium. Judge made law will continue to be an important source of law.

39 What has evolved in relation to Malaysian case law or common law, and which will continue to do so, is that it has, over the years, continuously widened and deepened, and given rise to many smaller channels; if I may draw an analogy with rivers. Over time it has become conspicuously "variegated" in its approach, absorbing and encompassing case law from many jurisdictions other than just the United Kingdom. This ability to transform, absorb and adapt is itself characteristic of the common law. I quote the Privy Council decision in relation to English common law in dismissing an appeal from the New Zealand Court of Appeal:[35]

> The ability of the common law to adapt itself to the differing circumstances of the countries, in which it has taken root, is not a weakness, but one of its great strengths. Were it not so, the common law would not have flourished as it has, with all the common law countries learning from each other.

40 In like manner I foresee that the future development of Malaysian jurisprudence in terms of case law will continue to be variegated. It has already, over the past decades since independence, taken on its own colour and form and this pattern is likely to evolve with input from an infinitely greater number of sources than before. To explain this better I need to look back a little in time to review how our judges since independence have dealt with the development of the law.

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33 Personal Data Protection Act 2010 (Act 709).

34 Competition Act 2010 (Act 712).

35 *Invercargill City Council v Hamilton* [1996] AC 624 at 640.

41 One cannot "lose sight", as described by Andrew Harding and HP Lee in their Constitutional Landmarks in Malaysia:[36]

> … of the grand vision espoused by Tunku Abdul Rahman when, on 31 August 1957 in Merdeka Stadium at Kuala Lumpur, he stood up and proclaimed that the Federation of Malaya 'shall be forever a sovereign democratic and independent State founded upon the principle of liberty and justice and ever seeking the welfare and happiness of its people and the maintenance of a just peace among all nations'.

In the period immediately following upon independence, flush from the success of having achieved so great a goal, the judges of that period absorbed the prevailing spirit of hope and vitality and the magic air of independence and the ideals espoused by Tunku. This is evident from their judgments which are replete with noble pronouncements, particularly in relation to matters involving the construction of the Constitution. The dignity of the language used and the values propounded, coupled with clear reasoning, comprise the hallmark of at least the first few decades of wholly Malaysian jurisprudence. The underlying social, economic and political conditions then prevailing were geared primarily towards nation building and it is that pioneering spirit of hope, optimism and freedom that is reflected in those judgments. I have touched on some of them in the course of this lecture particularly in relation to constitutional issues.

42 The advent of the 1980s saw a different "breed" or type of judge. These judges, having grown as "career" judges from the Judicial and Legal Services Commission, were less tied to the English system of law. Their approach was considerably more rules and procedure based than before. Adherence to the procedural aspects of the law, and compliance with the same assumed greater significance. However the lure of the vast scholarship of English law remained omnipresent. Despite this regard for technicality and adherence to rules and procedure, there were no great strides in developing an independent approach to the resolution of Malaysian cases. The development of Malaysian case law during this period therefore, while premised largely on Malaysian cases, still sought and often adopted the reasoning of the English common law, save in specific areas where there is no equivalent, for example in relation to preventive detention *etc*.

43 Academics complain that there is insufficient attempt made to move away from the English common law to establish a foundation of Malaysian common law. I myself have on many occasions encouraged judges to look at laws from other jurisdictions, even those practicing

36 See *Constitutional Landmarks in Malaysia: The First 50 Years 1957–2007* (Andrew Harding & H P Lee eds) (Singapore, 1st Ed, 2007).

civil law system. Even the United Kingdom consciously or otherwise has incorporated a lot from the civil law system since it became a member of the European community. A perusal of cases in the last ten years will in fact show the adoption of case law from various Commonwealth jurisdictions, rather than simply the United Kingdom, touched with adaptation to local conditions, thereby, in my view giving rise to a "variegated" form of law which is Malaysian in nature. No longer do the court rooms resound with solely English cases, premised on, *inter alia*, the common law. While they continue to feature, it is far more dominant in the courts of today to find reference being made to decisions of the Singapore courts, Australian courts and other Commonwealth jurisdictions. The result must therefore be adjudication which is rich and diverse and allows for a broad perspective on the issue in question prior to a decision being delivered. This ought in fact to provide for a wholly balanced and reasoned view on any subject and I hope that this will be so for Malaysian judges. With the backlog having been cleared, it is now open to the Malaysian courts to develop its own inimical brand of case law, which has its roots in the common law but which has grown widely with channels and tributaries to traverse, encompass and reflect the needs of its pluralistic society.

44 The importance of maintaining, reconciling and accommodating more than one system of law is particularly important in a nation state such as Malaysia where diversity and pluralism is a fact of life. In particular some principles within the Shariah system may infiltrate into the common law system. Indirectly this is already shown in Islamic financing. Our laws however, need to be managed carefully in order to preclude our rich multicultural diversity from deteriorating into a segregated mode of life with outbreaks of racism. The reality of divisive pluralism remains a threat that needs to be recognised and kept at bay. The reconciliation of jurisdictional difficulties in the two systems of law is a small problem in a far larger social canvas which requires management. Plurality in the legal system will go a long way towards addressing this. Perhaps the answer lies in establishing a mechanism for the resolution of differences or conflicts arising in the two systems. This may well take the form of a final adjudicatory body with a mixed composition of members, to arrive at a solution that attempts to achieve a compromise suitable to meet the facts of a particular case. It may well be that the answer lies in legislation engineered specifically to meet the needs of the country. These will be issues that have to be considered and dealt with in the coming decades.

45 Moving away from the domestic front briefly, pluralism is significant because it is also assuming force on the international level. Today a wide range of international courts interpret, apply and develop a significant *corpus* of international law. An international pluralist legal system accepts a range of different and equally legitimate choices by

governments and international institutions, generally within a context of a "universal" system. The value of diversity in choice and tradition is accepted. An international pluralist legal system is premised on diversity. It is likely that nation states will face differing sets of obligations which are interpreted differently by various tribunals which may well conflict. What I spoke of in Malaysia as a conflict reflects a microcosm of the conflicts that are likely to emerge through the growing use of international tribunals that span countries and their populations, giving rise to hybrid procedures, rules and courts. This will however be held together by some form of inter-judicial dialogue which constructively seeks to maintain some coherence in the whole structure, perhaps by moving towards a "universal code of standards". This acceptance, and respect for divergent and diverse systems of law is likely to give rise to hybrid tribunals which will be acceptable to a greater proportion of the world's population, encompassing, as it does, legal systems from various jurisdictions. This is likely to enhance compliance. To my mind therefore, it is important that we, as members of the international community, conceive of the legal system as being pluralist and co-operate in the process of crafting rules, developing procedures and building institutions that provide for a coherent and universal system which allows for global interconnection. By striving to find uniformity in the very diversity that is inherent, we can contribute towards a legitimate international legal system.

46 I end by concluding that there is no one or simple answer to the development of the law in the course of the next hundred years. On an international level Malaysia seeks to be amalgamated together with the leading nations of the world in creating a fairer world order and in participating to formulate a coherent system that works in the pluralist international legal system that is developing today. That indicates how far the world has moved from a simple monistic theory of law founded, in this jurisdiction at least, on the common law.

47 Permit me to pause here and depart from the subject of the lecture. I cannot pretend that I have prepared this lecture all by myself. It would not have been possible without the help of research and editing by Justice Nallini Patmanathan, High Court judge at the Commercial Division, Kuala Lumpur as well as my officer Mohd Aizuddin Zolkeply. I, of course, am responsible for any errors and omissions found in this lecture.

48 I would like again to say thank you to Chief Justice Chan Sek Keong for inviting me to speak at this prestigious series of annual lecture organised by the Singapore Academy of Law.

Now back to the subject of the lecture. These are my concluding remarks on the subject.

49 You will agree with me if I say that there is in fact no last word on the future of common law in our countries. The story continues. What is clear is that there are a multitude of questions and problems that have to, and can only be answered in the course of time. History has shown us that there can never be one "true answer". Life, as with the law, is cyclical, and there will always be questions which need to be answered. Malaysia is slowly returning, after a few centuries of colonial rule, to recognise the significance of pluralism, and is coping to encompass it within its system of law at a domestic level. As a nation we have come full circle. Perhaps there is some truth in the saying that there is no end: the end is just the beginning.