Towards Malaysian Common Law: Convergence between Indigenous Norms and Common Law Methods

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ABSTRACT

The predecessors of the Civil Law Act 1956, namely the various Ordinances and enactments, had served well the British imperialist in Malaya and Borneo. They provide a semblance of legitimacy to things the British had done and continue to do, namely imposing their law on the colony. They also have served well a newly independent Malaya and Malaysia in providing continuity and stability to her fragile legal system that suffered the onslaught of imperialist law and political might. The purpose of this research is to examine whether English common law should continue to dominate the development of Malaysian law. Secondly, the work seeks to examine the scheme in which the English common law methods could be employed to develop Malaysian common law. This research found that the inapt position of English law in a land rich in her own culture and heritage, and the impracticality of keeping up with the mercantile law of a foreign land, suggests a need to wean off the law of mother England. 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 with English law. Malaysian common law may be developed by considering Malaysian indigenous law which refers to laws, customs and norms of the Malaysian to nurture a truly Malaysian common law. In this way, the interaction between the English legal system and the Malaysian legal system will not be a matter of domination but of convergence.

Keywords: *Malaysian common law; English common law; indigenous law; substantive autonomy; convergence.*

ABSTRAK

Undang-undang terdahulu kepada Akta Undang-Undang Sivil 1956, iaitu pelbagai Ordinan dan Enakmen, telah memberi sumbangan baik terhadap kuasa empayar British di Tanah Melayu dan Borneo. Ia memberikan gambaran keabsahan atas perkara yang kuasa empayar lakukan dan terus lakukan, iaitu menyogok undang-undangnya kepada negara jajahan. Pendekatan ini mungkin telah membantu negara Malaysia yang baru Merdeka dengan memberikan kesinambungan dan kestabilan kepada sistem perundangannya yang telah mengalami asakan undang-undang empayar dan kuasa politik empayar. Objektif kajian ini adalah untuk memeriksa sama ada Common Law Inggeris patut terus mendominasi perkembangan undang-undang Malaysia. Kedua, kajian ini memeriksa cara bagaimana kaedah Common Law Inggeris boleh digunakan untuk memperkembangkan

Common Law Malaysia. Kajian ini mendapati kedudukan undang-undang Inggeris yang tidak sesuai dalam sebuah negara yang kaya dengan kebudayaan dan warisannya sendiri, serta keadaan yang tidak praktikal untuk mengejar undang-undang perdagangan negara asing menunjukkan keperluan untuk memutuskan pergantungan kepada negara asal England. Autonomi fizikal kehakiman yang dicapai dengan memutuskan rayuan kepada Jawatankuasa Kehakiman Majlis Privy perlu dituruti dengan autonomi substantif dengan menamatkan pergantungan terhadap undang-undang Inggeris. Common Law Malaysia boleh dikembangkan dengan mengambil kira undang-undang peribumi Malaysia yang merujuk kepada undang-undang, adat dan norma Malaysia untuk mengembangkan Common Law Malaysia yang tulen. Berdasarkan cara ini, interaksi antara sistem perundangan Inggeris dan sistem perundangan Malaysia tidak akan menjadi satu persoalan penguasaan tetapi pertemuan.

Katakunci: *Common Law Malaysia; Common Law Inggeris; undang-undang tempatan; autonomi substantif; pertemuan.*

INTRODUCTION

The onslaught of English law to the Malaysian legal system beginning with the British intervention in Penang in 1876 continues even after the independence of Malaya in 1957. British officers have brought with them English law and English legal tradition. English common law has been transplanted to the Malaysian legal system by the British colonial judges. Maintaining English common law in Malaysia is an attractive idea to some since it provides a semblance of neutrality for the contested nature of law and culture among various ethnic groups and religious adherents in Malaysia. However, should noT Malaysian go beyond this simple remedy and try to construct a Malaysian common law, to sow and to reap from the rich system of belief and tradition of Malaysian.

ENGLISH COMMON LAW AND INDIGENOUS LAW

English common law has variety of meaning depending on its context. Common law may be use in contradistinction with civil law. In this context, common law refers to common law legal system as practice in England in contrast to civil legal system as found in continental European countries such as France and German.

The phrase common law use in this paper refers to laws made by judges in deciding cases in contrast to statutory law. Among the features of common law rules are its fluidity since it is not promulgated by one source of authority but rather by different judges and different courts. Secondly, the courts create common law rules simultaneously with the application of the rules in given cases. There is no legislature passing a law, and then the law is applied by the courts later in different cases. Thirdly, common law rules are not only made when there is no law. The rules are made interstitial involving modifying and replacing previous rules.[1]

[1] See further Frederick Schauer, "Is the Common Law Law?" (1989) 77 Cal LR 455.

These features show the flexibility of common law in changing its rules. It als shows the function of judges as law-makers. Perhaps judges are not law-makers equal to law-makers in legislative bodies. Judges are subjected to judicial legal method in developing and replacing common law rules. Nevertheless, it is pass the time when judges could pretend that they are not law-makers.

Common law develops in England base on the customs of the population. Looking at history of English common law, one could say that "common" is the operative word of the phrase. Common law was historically developed by circuit judges hearing cases from various districts in England. The various districts have different customs. However, when you have same judges hearing cases at different districts, law common to England developed. Law which is common to the whole England developed in contrast to customs specific to particular localities. This process was brought by the judges, not legislators.

Common law in England developed through acceptance of population, not imposition. The people chose the royal courts – which were the common courts in England - to adjudicate upon their disputes, rather than other form of courts or adjudicating body formed locally.[2] The royal courts also did not disregard local customs as the local customs is moulded to become the common law.

In Malaysia, English common law was brought by British expatriates manning the new court system introduced by the British in Malaysia. When the British were conferred territories in Penang and Singapore through treaties with the Malay Sultanates beginning at the end 18th century, or when they were involved in the administration of the Malay Sultanates through the office of British Residents and Advisors beginning in the 19th century, they introduced a new court system modelled after the English court system. Although the British presiding officers supposed to apply the indigenous law - being untrained in local law and employed by a colonial enterprise - they referred to English common law rules and principles in deciding cases.

Were there laws in existence in Malaysia before the British introduced the new court system and with it the English common law? Such a question seems to be unwarranted since the Malay Sultanates governed the Malay Peninsula and Borneo. With such governments in existence, there should be no question that there were rules to regulate the society.

A legitimate question that may be asked is what was the law in operation during that time. In other words, in the context of juxtaposition of the law with English law as an imposed law, what was the indigenous law? Territories in Malay Peninsula and Borneo were governed by different Malay Sultanates such as the Malay Sultanate of Perak, the Malay Sultanate of Kedah and the Malay Sultanate of Johor-Riau. In Borneo we have the Malay Sultanates of Brunei and to some extent the Sultanate of Sulu. These Malay Sultanates have accepted Islam at that time. The process of Islamisation has gone to the extent of adoption of Islamic law in constitutional law, commercial law, penal law and personal law.[3]

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[2] HP Glenn, On Common Law, Oxford: Oxford University Press, 2005, at 31.

[3] Farid Sufian Shuaib, Powers and Jurisdiction of Syariah Courts in Malaysia, 2nd Edn., Petaling Jaya: LexisNexis, 2008, at 14-16.

Under constitutional law, the concept of sultanates was practised. Sultans and the fountain of justice were assisted by ministers. The sultans' powers are subjected to the acceptance of the chieftains. As the centre of international trade, some of the cities such as Melaka possessed rules regulating maritime and trades involving peoples from different continents. Details on criminal law and family law also could be found in legal digests such as Undang-Undang Melaka.[4]

Writers on Malaysian legal history have concentrated much on the written law available. Undang-Undang Melaka – a legal digest produced from the 15th century[5] - aptly provides the show case of applicable law in Malaysia. It is a convenient reference to a codified law. Although some may put doubt as to its real implementation,[6] others have no hesitation in finding it as the applicable law.[7] Apart from codified law, one should remember the nature of Islamic law being developed by scholar jurists rather than legislators. Thus, the corpus of Islamic law is not confined to the codified law. This point is important later in discussing the position of Islamic law as one of the sources of Malaysian common law.

Adat or custom refers to manners, proper conduct, the natural order and law.[8] Thus, the word custom itself in some context is regarded as law. Customs applicable in Malaysia are wide range. The Native of Sabah and Sarawak for instance posses their own custom. Most writers divided Malay customs into *Adat Temenggong* and *Adat Perpatih*. Customs of the Chinese and the Indians regarding matrimonial law are practically irrelevant with the passing of the Law Reform (Marriage and Divorce) Act 1976. The aborigines or *Orang Asli* customs are multi faceted including areas of matrimonies, offences and community governance.

ENGLISH COMMON LAW AS AN IMPOSED LAW

Judges in the new court system brought by the British did not attempt to use indigenous law as the applicable law. This is a miss opportunity for the English judicial method to be used to develop indigenous law. Rather than developing indigenous law, judges of the new court system marginalised the law and pay homage to English law. This probably was inevitable since the judges were part of the imperial outfit in a colonised land. Thus, even though the British presiding officers acknowledged the entrenched position of Islamic law in Malaya,[9] they still applied English common law.

When faced with issue of private disputes and private wrongs for instance, the courts referred to English common law rules (in contrast to mere methods) rather than indigenous law. Facing with a claim for damages for causing silt to be deposited on an adjoining land, a court in the State of Perak immediately grabbed the all familiar principle to one trained under English law, namely the rule in *Ryland v Fletcher*.[10] There was no attempt to find out the Islamic law or custom applicable in such instance.[11]

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[4] See Liaw Yock Fang, Undang-undang Melaka, The Hague: Martinus Nijhoff, 1976.

[5] Liaw Yock Fang, Undang-undang Melaka, The Hague: Martinus Nijhoff, 1976, at 32.

[6] R J Wilkinson, "Malay Law" in M B Hooker (Ed.), *Readings in Malay Adat Laws*, Singapore: Singapore University Press, 1970, at 33-34.

[7] Liaw Yock Fang, *Undang-undang Melaka*, The Hague: Martinus Nijhoff, 1976, at 35.

[8] MB Hooker, *The Personal Laws of Malaysia*, Kuala Lumpur: Oxford University Press, 1976, at 101.

[9] *Ramah binti Taat v Laton binti Malim Sutan* (1927) 6 FMSLR 128.

[10] *Government of Perak vAR Adams* [1914] 2 FMSLR 144.

[11] Reference may be made for instance to Chapter III of the *Mejelle* produced in the 19th century. The *Mejelle* is a codification of rules of transactions.

The application of English law in Malay States was without any legal basis. The courts in Malay States, either manned by expatriates or locals, should have applied local law, not foreign law. English law in Malay States is a foreign law. However, the dominant political power at that time was the British imperialist power. Thus, it has been suggested that what the expatriates judges had done were but an extension of imperial design.[12]

Later, laws were passed to legitimise what the expatriates judges had done illegitimately. Various ordinances and enactment were passed to lend legitimacy to the courts to do what they had imperiously done.[13] The predecessors of the Civil Law Act 1956 - the various Ordinances and enactment - had served well the British imperialist in Malaya and Borneo.[14] It provides a semblance of legitimacy of things she had done and continue to do, namely imposing her law on the colony.

To a large extent, the same system and practice is continued after Malaysia achieved her independence in year 1957. It may also have served well a newly independent Malaya and Malaysia in providing continuity and stability of her fragile legal system suffered on the onslaught of imperialist law and political might. However, the inapt position of English law in a land rich in her own culture and heritage, and the impracticality of keeping up with the mercantile law of a foreign land, suggests a need to wean off the law of mother England. After 50 years of independence and numerous achievement 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.

WHY MALASYIAN COMMON LAW

The question why we need to consider Malaysian common law ought to be posed so that we are clear in our objective.[15] By enumerating the ebb and flow of the Malaysian legal system and the colonial intervention in politics of Malaysia, this task seem to be connected of the idea of righting the history. In a narrower context, Ahmad Ibrahim speaks about restoring laws that the community have been deprived of.[16] By focusing the need to abide and develop indigenous law in contrast to foreign law, this task may be connected to ideas of national pride and idealism. LC Green writes about the issue of "national prestige" when a country have to resort to "alien" system.[17]

There are many reasons for reform. The important things is how we want to progress as a nation. We always has been labelled as consumers rather than producers; copiers rather than inventors. Could we achieve our full potential as a nation if we continue to be those things? Probably the impetus for reform is for correcting history or solidifying national identity. However, the final objective is for the betterment of Malaysia using her own heritage and by learning from heritage of others.

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[12] DN Prit, *Law and Politics and Law in the Colonies*, London: Lawrence and Wishart, 1971; Ahmad Ibrahim, *Towards a History of Law in Malaysia and Singapore*, Kuala Lumpur: Dewan Bahasa dan Pustaka, 1992.

[13] See Yong Joo Lin v Fung Poi Fong [1941] MLJ 54, at 55.

[14] Civil Law Enactment 1937 (No.3 of 1937) (Federated Malay States); Civil Law (Extension) Ordinance 1951 (No. 49 of 1951) (Unfederated Malay States).

[15] Another writer posed the same question in Mohammed Imam, "Malaysian Common Law: Reality and Feasibility" [1997] 1 CLJ cv, at cxiv.

[16] Ahmad Ibrahim, "Towards an Islamic Law for Muslims in Malaysia" (1985) 12 JMCL 37, at 52.

[17] LC Green, "Filling Lacunae in the Law" [1963] MLJ xxviii, at xxx.

The idea of Malaysian common law does not mean total exclusion of other legal tradition. It is unnecessary to completely divorce ourselves from the English common law heritage. It is a repository of knowledge that we always could tap. However, what need to be done is to tap first Malaysian indigenous repository of knowledge and wisdom.

DEPARTING FROM ENGLISH COMMON LAW

We may now consider the development of Malaysian common law in the context of developing our own law. It is a moot point whether the Malaysian courts could develop our own common law.[18] English common law is supposed to be fluid in its interaction with local law.[19] It is capable of adaptation.

Some argued that perhaps it is better – in developing Malaysian law – if the term "common law" is dropped since common law is always associated with English common law.[20] The simple phrase of Malaysian law is suggested rather than Malaysian common law. However, common law in the context of this paper refers to development of law through judicial decision. Thus, it is beyond the context of the present discussion to include the development of Malaysian law through legislative means. In a way, it is easier to develop Malaysian law common to all through legislative means because the legislature is free to depart from any law, be it written law or unwritten law. In contrast, judges – according to common law methods – could only develop the law incrementally.

Admittedly, we are in the age of legislation where the legislature is churning out statutes at unprecedented rates. It may be argued that there would be not much left for judges to "make law" through judicial decisions. This argument, in the Malaysian context at least, is not quite true. Although the legislature does produce a lot of legislations, the Acts – in most of the time – do not replace common law. Most of the Acts relates to regulatory frameworks and information communication technology. Law of torts such as defamation still govern by common law. Moreover, the courts need to resort to principles beyond legislation in the process of interpretation.

Cases have shown that the courts are ready to depart and to develop Malaysian common law. Some cases seem to say that the Malaysian courts are stuck with decisions prior to the cut-off dates under the Civil Law Act 1956. *Lee Kee Chong*[21] and *Manjeet Singh Dhillon*[22] for instance held that "subsequent march in English authority is not embodied" in common law applicable in Malaysia.[23] However, the point is not whether English common law is binding on Malaysia, but whether the Malaysian courts could develop Malaysian common law by taking into account, among others, the subsequent development of English common law. Thus, later development of English common law could be used as one of the reference in developing Malaysian common law.[24]

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[18] Here, the phrase common law is used in contradiction with statute law.

[19] HP Glenn, *On Common Laws*, Oxford: Oxford University Press, 34-35.

[20] Abdul Aziz Bari, *Perlembagaan Malaysia: Asas dan Masalah*, Kuala Lumpur: Dewan Bahasa dan Pustaka, 2006, at 142.

[21] *Lee Kee Choong v Empat Nombor Ekor (NS) Sdn Bhd & Anor* [1976] 2 MLJ 93, PC.

[22] *Attorney-General, Malaysia v Manjeet Singh Dhillon* [1991] 1 CLJ 216, SC.

[23] *Lee Kee Choong v Empat Nombor Ekor (NS) Sdn Bhd & Anor* [1976] 2 MLJ 93, PC.

[24] *Jamil bin Harun v Yang Kamsiah & Anor* [1984] 1 MLJ 217, PC; *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356, at 361; *Sri Inai (Pulau Pinang) Sdn Bhd v Yong Yit Swee* [2003] 1 MLJ 273 at 285.

Development of the Malaysian common law does not require any amendment to the Civil Law Act 1956. The proviso that requires regard to be given to local circumstances in applying English law enables us to create Malaysian common law. This is because the language of the Act was never intended for us to apply wholesale the English law.[25]

Thus, the first step in creating Malaysian common law is by applying English common law in the Malaysian mould. The courts may exclude the liability of a municipal council for a collapsed building in contrast to the position in England because of the tight purse hold by our municipal council contrary to deep pocket of councils in England.[26] Whether or not the relative different in depth of the pocket between the councils is indeed true is arguable but the interesting aspect of the decision is the readiness of the court to differentiate our position with the English.[27]

Judges also have considered whether principles of English common law inconsistent with Islamic law should be introduced. For instance, the merged legal personality of husband and wife under the English common law is the opposite of the position under Islamic law which retain the separate legal entity of the wife.[28] Similarly, the courts considered the position of religious teaching of Malaysian such as Islam, Christian, Hindu and Buddhism which are against gambling in considering public policy on recovery of gambling debt. Since gambling is contrary to religious teaching, it is against public policy to assist in enforcing foreign judgment for recovery of gambling debt.[29] Although the issue in the case was public policy, it provides an indication for exploring religious teaching in developing common law.

The opportunity to develop indigenous law, suited to the Malaysian legal framework, presented itself in Islamic banking cases. Setting aside the question of jurisdiction, it is a miss opportunity if civil courts in deciding Islamic banking cases still humbug by rules derived from English law. Islamic banking business need to be understood and operates within the boundaries of Islamic law. This is the statutory requirement under the relevant statutes.[30] Unfortunately, in resisting to determine Islamic banking cases base on Islamic law, the court simply denied the relevant of Islamic law. The Court simply said that "[s]ince the question before the court is the interpretation and application of the terms of the contractual documents between the parties and of the decisions of the courts ... [determination of this case] ... [i]s not a question of Syariah law".[31] Fortunately, later decisions have not shied away from finding answers from Islamic teachings.[32]

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[25] *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Attorney General Malaysia)* [2004] 2 MLJ 257.

[26] *Majlis Perbandaran Ampang Jaya vSteven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389, FC.

[27] See also *M Sentivelu a/l R Marimuthu v Public Services Commission Malaysia & Anor* [2005] 5 MLJ 393, CA, where the Court consider the different socio-economic condition between Malaysia and England in rejecting English cases in constitutional cases.

[28] *Murugasan Kuppusamy & Anor v Chiew Eng Chai* [2000] 1 CLJ 42, 46.

[29] *The Ritz Hotel Casino Ltd & Anor v Datuk Seri Osu Haji Sukam* [2005] 6 MLJ 760.

[30] The Islamic Banking Act 1983 (Act 276), sections 2-3; the Takaful Act 1984 (Act 312), section 8.

[31] *Affin Bank Bhd v Zulkifli bin Abdullah* [2006] 3 MLJ 67, at 75. See also *Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corporation Sdn Bhd* [2003] 2 MLJ 408, at 411.

[32] See for instance *Malayan Banking Bhd v Ya'kup bin Oje & Anor* [2007] 6 MLJ 389 where Hamid Sultan JC emphasised to ensure Islamic banking business is in line with the teaching of Islam.

The culture and habits of Malaysian is also use to justify departure from English common law.[33] The public attitude in resisting paying local authorities taxes, littering and vandalism were referred to show the supposed contradiction between England and Malaysia. These justified different rules to be applied in making local authorities responsible for economic loss.

The above discussion looks at the different basis to evade or to remould English common law and English cases. At the same time, it provides basis to develop Malaysian common law.

BASIC FOR JUDGE-MADE LAW

English common law development is influence by the belief, culture and society of the British. Western legal tradition has its root in Christian teaching.[34] Malaysian common law, if we want to develop one, should be shaped by the same influences. To digress, the very basis of the English common law shows us the glaring unacceptability to continue to apply a foreign law. Perhaps we should be bold enough to develop Malaysian common law as done in other Commonwealth jurisdiction. The Australian courts have described Australian common law of not merely being a historical successor of English common law but an organic development of the law.[35] The Malaysian courts should not be a follower of decisions in other jurisdiction. Judges should be brave enough to look at English common law with critical eyes and develop the law to serve Malaysian and not to sit as a judge in England.

What is suggested here is to retain the judicial method of developing law by judges according to the English common law system. However, the content of substantive law of the English common should be replaced by Malaysian indigenous law, customs and belief system. Since this process retains English common law as the vessel, the interstitial nature of common law development is continued. This is grafting Malaysian law over existing English common law as applied in Malaysia. The main body of the applied law still exist. Additionally, since the judicial method of developing law is still retained, the common law method continues. It is also impossible to replace English common law in one sitting of any judgment. Thus, this is a continuous process of flourishing indigenous law to put it back at the centre stage of Malaysian law.

IN THE HANDS OF JUDGES

Calls for Malaysians to indigenise common law have been heard repeatedly from scholars, judges and lawyers. However, concerted and continuous efforts by the courts or others seem to be missing. A Lord President, a title of the highest judicial office at one time, had called for the development of a Malaysian common law.[36] A scholar of the highest repute made the same call.[37] A minister in charge with the law created a committee to look into this question.[38] Arguably, all come to naught.

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[33] *Majlis Perbandaran Ampang Jaya vSteven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389, FC, at 423-424.

[34] Harold J Berman, *Law and Revolution: The Formation of Western Legal Tradition*, Cambridge: Harvard University Press, 1983, at 195-197.

[35] *Mabo v Queensland* (No 2) 175 CLR 1, at 29.

[36] Abdul Hamid Omar, "Common Law: Mitos atau Realiti?" [1990] 2:2 KANUN 1.

[37] Ahmad Ibrahim, "The Civil Law Ordinance in Malaysia" (1971) 2 MLJ lviii.

[38] "Legal experts to work out forum's terms of reference", New Straits Times, 13 March 1995.

A former Chief Justice made a bold call in 2007 for Islamic law to replace English common law in developing Malaysian law.[39] This was regarded as preposterous by some, even regarded as an economic suicide for Malaysia.[40] With regard to comment on economic suicide, one may ponder to the basis of the colonisers in replacing local law with colonial law, namely to assist the trade of the colonisers. Others, including the Attorney General, seem agreed with the call.[41] As said earlier, the current law allows for development of Malaysian common law. This common law could take into account the different belief systems. Thus, looking at the proposal positively, Malaysian common law could be developed by taking into account beliefs and culture of Malaysian.

What is necessary is the intellectual courage of judges to take the road less travel. It is easy – as it is on the face of it allowed by law – to just rely on English common law without making any effort to indigenise it. However, to pose a question whether such a law should be adapted, changed or rejected requires more than mere lip-service to the task of applying the law. Counsels, as officer of the courts, should at the same time assist the courts in indigenising Malaysian judge-made law. This enterprise would be painstakingly slow without the support of counsels.

We have seen some of this intellectual courage shown by judges. However, the result to the development of the law have been mixed. Consider for instance the case of *Manjeet Singh Dhillon* and *Murray Hiebert* where the courts refused to follow the liberal attitude of English courts in contempt of court cases.[42] The judges could be said to be self-serving by choosing the harsh treatment of contempt power in punishing "scandalous" accusation against them.

On the other hand, Tun Abdul Hamid Mohamad, the Chief Justice, have asked judges not to follow blindly judgment from afar.[43] Judicial colonisation should not continue after the end of political colonisation. Principles from other jurisdiction should be read together with Malaysian local circumstances, public policy and public morality.

CHANGING THE COMMON LAW METHOD

The call for the development of Malaysian common law generally is the call to replace or to develop common law as "norms". In other words, it refers to the substantive law. As indicated above, this will not necessarily replace common law as "attitudes and habits of thought".[44] Adoption of English common law has also imparted common law method. This methodology of common law – or ways of handling precedents, codification and legal problems – is intrinsic in common law.

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[39] "Mansuh Common Law -- Ketua Hakim Negara mahu perundangan lapuk Inggeris diganti", *Utusan Malaysia*, 22 Ogos 2007.

[40] "Call to replace common law 'baseless'", *The Star*, 23 August 2007.

[41] "Undang-undang syariah terbaik – Gani", *Utusan Malaysia*, 23 August 2007.

[42] *Attorney-General, Malaysia v Manjeet Singh Dhillon* [1991] 1 CLJ 216, SC; *Murray Hiebert v Chandra Sri Ram* [1999] 4 MLJ 321, CA.

[43] "Don't follow blindly, judges told", *New Straits Times*, 27 June 2008.

[44] G W Bartholomew, "Developing Law in Developing Countries" (1979) 1 Lawasia 1, at 15.

As true to the nature of common law where the law evolve, the common law methods also evolve. It evolves by judges' decisions or by legislative and quasi-legislative means. For instance, the principles of judicial precedents where initially even the highest court in England could not depart from its earlier decisions were altered when judges themselves decided to free themselves from this shackle.[45] If we go further back in history, the doctrine of judicial precedent only began in 19th century in England.[46] Thus, as in substantive law, judges should be able also to reconsider common law methods to suit local needs and local circumstances.

The adversarial nature of handling cases under English common law for instance may be out of synch with Malaysian culture and Malaysian needs. The principle of mediation is more in line with dispute settlement character of Malaysian.[47] If this is the case, the courts have to develop – in its judgment and its rules – courts proceedings which are less adversarial. Indeed, the Malaysian courts have incorporated case management and court mandated mediation. However, most of the time, these changes were made by way of importing it from other jurisdiction. We have failed to unearth our own culture to develop our system and we have to wait for others to initiate reform for us to follow suit.

AMENDING THE CIVIL LAW ACT

The suggestion posed earlier is for judges to develop Malaysian common law within the existing framework. Another approach in developing Malaysian law is by amending the Civil Law Act 1956. As it stands, the Act only allows the courts to refer to English Thus, the Act may be amended to provide specifically reference to other sources. The religions and customs of Malaysians may be included in this additional reference. Additionally, laws from other countries may be consulted.[48]

The advantage of this approach to make it clearer that religions, customs and cultures of Malaysian may be referred to in developing judges made Malaysian law. Malaysian indigenous elements are not put under exceptions but as the main reference.

However, such an ammendment may be not forthcoming. The legislature may not be ready to tinker with a basic provision regarding common law. Suited with the nature of judges mad law, the developement of Malaysia Common should be taken up by judges. The existing framework should not be regarded, and has not been treated as, obstacles in developing Malaysian common law. If judges have no problem of importing foreign law-namely English law-in the absence of any enabling statutes,[49] the converse should be true in developing Malaysian common law using indigenious sources.

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[45] Practice Statement [1966] 1 WLR 1234.

[46] J Evans, "Change in the Doctrine of Precedent during the Nineteenth Century" in L Goldstein (Ed.), *Precedent in Law*, Oxford: Clarendon Press, 1987, at 68.

[47] See Sharifah Zaleha Syed Hassan & Sven Caderroth, *Managin Marital Disputes in Malaysia: Islamic Mediators and Conflict Resolution in the Syariah Courts*, RoutledgeCurzon, 1996, at 100. *Farid Sufian Shuaib et al., Pentadbiran Keadilan: Artikel Terpilih*, Kuala Lumpur: Dewan Bahasa dan Pustaka, 2007, at 78.

[48] Ahmad Ibrahim suggested that the following provision to be enacted to expand our source of references in developing our own common law:

a) common law in Malaysia as administered by the Malaysian courts; or
b) religions, customs and laws commonly followed and practised in Malaysia; or
c) general principles of law.

See Ahmad Ibrahim, "Common Law di Malaysia" (1989) 1:1 KANUN 3.

[49] See Re the Will of *Yap Kim Seng* (1924) 4 FMSLR 313, at 316-317; *Motor Emporium v Arumugam* (1933) MLJ 276, at 278; *Panicker v Public Prosecutor* (1915) 1 FMSLR 169, at 183. *See further Ahmad Ibrahim, Towards a History of Law in Malaysia and Singapore*, Kuala Lumpur: Dewan Bahasa dan Pustaka, 1992, at 105-110.

APPROACH

Justice Abdul Hamid Mohamed, a former Chief Justice, has spoken in many instances, on the bench and off the bench, topics on Malaysian common law. He had provided point-to-point steps in applying the English common law through the Civil Law Act 1956 and at the same time developing the Malaysian common law in *Nepline*.[50]

In *Nepline*,[51] according to Justice Abdul Hamid Mohamed, the primary source is written law, the existence of which negates the reference to English common law (including principles of equity). If there is no written law on the issue, the court should identify the common law as administered in England – for West Malaysia – on 7th April 1956. After determining the common law, the court must consider whether "local circumstances" and "local inhabitants" permit the application of it. The court may reject partly or totally the common law depending on its compatibility with local circumstances. If the court rejected it totally or in part, the court then is free to develop its own law – a judge-made law – which may be described as the Malaysian common law. In developing Malaysian common law, the court may refer to "principles of common law in other countries, Islamic law of common application or customs of the people of Malaysia".

One may hard to offer a more accurate approach in applying the Civil Law Act. The Court in the above approach has stayed true to the literal prescription of the Act. However, in the context of developing Malaysian common law, we should consider Malaysian heritage – namely "Islamic law of common application or customs of the people of Malaysia" as the starting point in developing a judge-made law rather than the English common law. English common law, or any other law for that matter may be referred to enrich our external references in developing our law. However, English common law "as administered in England" in year 1956 should not be our primary source of judge-made law.

Apart from question of imperial design, it was difficult for British judges to have indigenous law as the primary source of judge-made law because they were not trained in Malaysian indigenous law. The result is the haphazard and arbitrary application and rejection of indigenous law. If we want to have indigenous law and custom to be the primary source, have the situation changed? Have our judges, lawyers and academics trained in the Malaysian indigenous law? This will take us back to the comment by Wan Suleiman J that "a curious anomaly has arisen from the fact that this duty to propound the law proved in practice too inconvenient for those who had served their apprenticeship under a different system of laws".[52] Have we corrected the anomaly? It is imperative for all – judges, lawyers and academics – to unearth and to enrich accessible corpus of indigenous law and custom.

In working toward unearthing and enriching indigenous law, research efforts should be pooled together, streamlined and optimised. Institution of higher learning and research centres could be the catalyst in this effort.[53]

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[50] Nepline Sdn Bhd v Jones Lang Wootton [1995] 1 CLJ 865.

[51] Nepline Sdn Bhd v Jones Lang Wootton [1995] 1 CLJ 865.

[52] *Tengku Mariam v Commissioner for Religious Affairs* (1969) 1 MLJ 112.

[53] Consider for instance the Harmonization Unit in Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia.

CONCLUSION

The British have left a lasting impression on the Malaysian legal system. This is the state of affairs in former protected states of the British if we care to look at former British colonies. Legal fraternities, businessmen, and even some sections of the public could not imagine other than the existing system and laws to regulate this multi-ethnic and multi-religious society.

What is proposed in this paper is not a complete revamp of the system. The courts, the judges, and the judicial method to a large extent is still intact. What is proposed is more effort from judges in particular, assisted by counsels and academics to develop judge-made law in the Malaysian mould.

This matter has been repeatedly discussed and ventured upon. This paper seeks to remind again the necessity of developing Malaysian common law and to add to piles of suggestion to achieve the objective. With the development of Malaysian common law, there will be a convergence of the legal systems rather than domination by one over another.

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