

HAKEMLI MAKALE / PEER REVIEWED ARTICLE

ISLAM, NATION-STATE AND THE LEGAL SYSTEM OF MALAYSIA

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ABSTRACT

The arrival of the British intervention in the territories now known as Malaysia did not replace the territorial law which is Islamic law and custom. However, through the office of the British Residency, legislation modelled after English law was enacted and British judges who were brought to preside the new court system brought with them English common law. This saw the indirect introduction of English law in Malaysia which causes the marginalisation of Islamic law and custom. The independence of Malaysia in 1957 provides an opportunity to articulate the position of Islam in the Malaysian legal system. The main vehicle of this articulation is the Federal Constitution which was enacted in 1957 simultaneously with the declaration of the independence of Malaysia. The Federal Constitution favours continuity of law and the legal system that exist before the independence. The Federal Constitution at the same time asserts the special position of Islam in the nation and the legal system. Among the implication of this constitutional approach is the continuity of the application of Islamic law in Malaysia and the existence of a plural court system. The article seeks to elaborate on

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the above issues on the Malaysian legal system and the interplay with the position of Islamic law.

Key words: *Malaysia, common law, Malaysian legal system, Islamic law.*

İSLAM, ULUS DEVLET VE MALEZYA'NIN HUKUKİ SİSTEMİ

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ÖZET

İngiliz müdahalesinin bugün Malezya olarak adlandırılan topraklara gelmesi ile bu bölgede uygulanan İslam hukuk ve geleneği değişmemiştir. Fakat yine de, İngiliz Yönetiminin başa geçmesi ile birlikte İngiliz hukuk sistemini esas alan kanunlar çıkarılmış ve İngiliz hakimlerin gelişi ile müşterek hukuk (common law) etkisinde yeni bir mahkeme sistemi kurulmuştur. Bu da Malezya'da İngiliz Hukukunun uygulanmaya başlanması ve İslam hukuku ve geleneklerinin dışlanması sonucunu doğurmuştur. Malezya'nın 1957'te bağımsızlık ilan etmesi, İslam'ın Malezya hukukundaki yerinin yeniden güçlenmesi için bir fırsat oluşturmuştur. Bu fırsatın değerlendirilmesi Malezya'nın bağımsızlık ilanı ve Federal Anayasası'nın 1957'deki ilanı ile olmuştur. Federal Anayasa, bağımsızlıktan önceki hukukun ve hukuki sistemin devamını öngörse de aynı zamanda İslam'ın ulusal hukuktaki özel önemini vurgulamıştır. Federal Anayasa'nın bu yaklaşımın bir sonucu da Malezya'daki İslam hukuku uygulamasının ve çoklu mahkeme sisteminin devam etmiş olmasıdır. Bu makale de Malezya hukuk sistemi ve İslam hukuku'nun bu sistem ile etkileşimi ile ilgili yukarıda bahsedilen konular detaylı şekilde incelenecektir.

Anahtar Kelimeler: *Malezya, müşterek hukuk, Malezya Hukuk Sistemi, İslam Hukuku.*

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INTRODUCTION

Malaysia is an interesting example of a modern nation state that takes modernity and development seriously and at the same time incessantly constructing and holding on to the Islamic identity.¹ Such fused national and religious identities are products of historical, political and social journey of the nation. These overlapped identities are also shared by the Turkish.² The universalist perspective of Islam has to be reconciled with the idea of nationalism. The socio-economic development promised by the nation-state when viewed together with the religious identity requires such development to be aligned with and rooted in Islam. The discussion of modernity and development in Malaysia includes the modernity and development of its legal system. The fused identity requires such a legal system to take cognizance of the status of Islamic law.

I. MALAYSIA IN BRIEF

Malaysia – situated in the Southeast Asia - is a federation of 14 territories consisting of 9 Malay Sultanates, 2 former British Crown Colony (the State of Penang and the State of Melaka), 2 territories from Borneo (the State of Sabah and the State of Sarawak) and the Federal Territories. The Federation of Malaya (consisting of the 9 Malay Sultanates and the 2 British Crown Colonies) proclaimed its independence on 31st August 1957. These territories situated in the Malay Peninsula. Before the independence, these territories were referred to as the British Malaya. On 16th September 1963 the State of Sabah and the State of Sarawak from the island of

¹ See Shamsul AB, "Identity Construction, Nation Formation, and Islamic Revivalism in Malaysia", in Robert Hefner & Patricia Horvatich (eds.), *Islam in an Era of Nation-States: Politics and Religious Renewal in Muslim Southeast Asia*, Honolulu: University of Hawai'i Press, 1997.

² See Ozay Mehmet, *Islamic Identity and Development: Studies of the Islamic Periphery*, New York: Routledge, 1990.

Borneo joined the federation and the federation transformed into Malaysia. In their agreement to join the federation, the 2 States managed to obtain further concession on their autonomous powers, including the power to control immigration into their States.³ The Federal Territories were carved out from the State of Selangor and the State of Sabah from their territories and handed over to the federal government.⁴ The federal set up of the nation is material in the section discussing the distribution of legislative, executive and judicial powers, particularly on matters relating to Islam.

These 14 territories constitute a multi-ethnic and multi-religious society of estimated 31.7 million people in 2016. Of this population, 68.6 per cent are ethnic Bumiputra (consisting of Malay and the native of Sabah and Sarawak), Chinese 23.4 per cent, Indian 7 per cent and others 1 per cent. In 2010, the religious demography of the nation is Muslims 61.3 per cent, Buddhists 19.8 per cent, Christians 9.2 per cent and Hindus 6.3 per cent. Religious pluralism is everywhere to be seen in Malaysia where places of worships such as mosques, churches and temples could be found all over the places. People of different faith interact with one another in offices, schools and shopping centres.

II. MALAYSIAN LEGAL HISTORY

The early kingdoms in the Malay Archipelago – constituting the present Malaysia, Indonesia, Brunei, Philippines, Thailand and others - were influenced by Hinduism and Buddhism. Islam arrived in the Malay Archipelago in the 14th century and transforms the kingdoms to Sultanates.⁵ The transformation as witnessed in

³ JV Allen, AJ Stockwell & LR Wright (eds.), *A Collection of Treaties and Other Documents Affecting the States of Malaysia 1761-1963*, New York: Oceana Publications Inc.

⁴ The Federal Territories are Kuala Lumpur, Putrajaya and Labuan.

⁵ SQ Fatimi, *Islam Comes to Malaysia*, Singapore: Malaysian Sociological Research Institute Ltd, 1963.

Malaysia, Indonesia, Brunei and Philippines was not confined to the belief system but extended to the legal system.⁶ In Peninsular Malaysia, the Melaka Sultanate was a prominent port that controlled the strategic Strait of Melaka produced 2 legal digests – *Hukum Kanun Melaka* and *Melaka Maritime Laws* – being the applicable laws before Melaka was conquered by the Portuguese in 1511. Those legal digests contain provisions based on Islamic law and custom.⁷ The mixed nature of the digests shows that the Sultanate and its legal system were undergoing a gradual process of Islamization when the process was unceremoniously interrupted by the western colonial intervention.⁸

Other Malay Sultanates, although were not as abruptly interrupted as in Melaka by violent conquest – were similarly interfered with. The British who used a different tact in controlling the Malay Sultanates decided to indirectly control the Sultanates by entering into treaties with the Sultans and retaining them as the Head of States. To this end, the British inserted into the treaties – such as the *Treaty of Pangkor 1874* – provisions that require the Sultanates to accept a British adviser whose advice “should be asked and acted upon”. These arrangements retained the *de jure* sovereignty of the Sultans but formed the *de facto* reign of the British in the Malay Sultanates.⁹

Working in the Sultanates where the territorial laws were Islamic law and custom, the British advisers introduced new court systems, legislations and court officers that were modelled after and trained under English law. Being the dominant

⁶ On the Sultanates in Indonesia and its connection with the Ottoman, see Ismail Hakki Goksoy, “Ottoman-Aceh Relations as Documented in Turkish Sources”, in Michael Feener, Patrick Daly & Anthony Reid, *Mapping the Acehnese Past*, Leiden: KITLV Press, 2011.

⁷ Liaw Yock Fang, *Undang-Undang Melaka*, The Hague: Martinus Nijhoff, 1976.

⁸ See Syed Naguib Al-Attas, *Preliminary Statement on a General Theory of the Islamization of the Malay-Indonesian Archipelago*, Kuala Lumpur: Dewan Bahasa dan Pustaka, 1969.

⁹ For cases on this point, see for instance *Duff Development Ltd v Government of Kelantan & Anor* (1924) AC 797.

political and military forces in the Malay States, the British Residents encountered minor resistance in imposing English law – be it for instance penal law, contract law and torts - indirectly into the Malay States, edging the existing Islamic law and custom – albeit remaining as the territorial law - to the periphery of the legal system.

III. THE CREATION OF A NATION-STATE

From the conquest of Melaka in 1511 by the Portuguese, the cession of the Island of Penang in 1786 to the British and the introduction of the British adviser in the *Treaty of Pangkor 1874*; apart from the objective of spreading the Gospel, the primary objective of the colonial enterprise is to control the trade from the East and later to plunder the natural resources.¹⁰ The colonial enterprise of the British in the territories now constituting Malaysia in particular coincides with the industrial revolution in Britain. The discovery of the tin mines and the opening of rubber plantations enable exports of these raw materials to assuage the need of the industry in Britain. To streamline administration of the 9 Malay Sultanates that would make it easier to exploit the natural resources and to conduct trade, the British created the Federated Malay States consists of four Malay states and the Unfederated Malay States consists of the other 5 states.¹¹ It was observed that an “efficient legal and administrative framework” is valuable to private industry in mining and agricultural industry.¹² The centralising of the powers from the 9 Malay States culminates with the creation of the much opposed Malayan Union in 1946 which was replaced by the Federation of Malaya in 1948.

¹⁰ See for instance David Armitage (ed.), *Theories of Empire 1450-1800*, Oxford: Routledge, 1998.

¹¹ Perak, Selangor, Negeri Sembilan and Pahang are under the Federated Malay States; Perlis, Kedah, Johor, Kelantan and Terengganu are under the Unfederated Malay States.

¹² PJ Drake, “The Economic Development of British Malaya to 1914: An Essay in Historiography with Some Questions for Historians” (1979) 10:2 *Journal of Southeast Asian Studies* 262-290.

The rapid growth of the mining and agricultural industry in British Malaya led to the massive immigration of Chinese and Indian labourers from China and India. The population in Peninsula Malaya of Chinese and Indian combined in 1884 was 29.4 per cent and in 1957 it increased to 48.5 per cent.¹³ The indigenous Malays (who are Muslims) who understandably would want to be the master in their own land, have to consider this new demographic reality in working towards independence of Malaya.¹⁴ The Chinese and Indians, who are mostly non-Muslims, had taken root in Peninsula Malaya and some had made Malaya their new home. The British also did not want to be saddled with a large number of non-Europeans, who they have brought into Peninsula Malaya to work, asking for British citizenship. Negotiations of the different communities have produced a political compromise. This compromise or sometime referred to as “the social contract” - could be seen in the provisions of the constitution of the independent Federation of Malaya.¹⁵ This inter-communal bargain entails that citizenship to the non-Malays are given under the *jus soli* principle (citizenship by birth) rather than the more restrictive, but commonly applied *jus sanguinis* principle (citizenship by the nationality of the parents),¹⁶ freedom of religion to all;¹⁷ special position of the Malays;¹⁸ and the primary and dominant position of Islam as the Religion of the Federation and preservation of the Sultanates.¹⁹ Together with the passing of the Federal Constitution, the Federation of Malaya was born on the 31st August 1957.

¹³ Leon Comber, *13 May 1969*, Singapore: Marshall Cavendish, 2009.

¹⁴ See for instance William R Roff, *The Origins of Malay Nationalism*, 2nd Ed., Kuala Lumpur: Oxford University Press, 1994.

¹⁵ Joseph M Fernando, *The Making of the Malayan Constitution*, Kuala Lumpur: The Malaysian Branch of the Royal Asiatic Society, 2002. See also Mohd Rizal Yaakop & Shamrahayu A Aziz, *Kontrak Sosial Perlembagaan Persekutuan 1957*, Kuala Lumpur: ITBM, 2014.

¹⁶ See for instance Leo Suryadinata (ed.), *Ethnic Chinese as Southeast Asians*, Singapore: Institute of Southeast Asian Studies, 1997.

¹⁷ Article 11 of the Federal Constitution.

¹⁸ Article 153 of the Federal Constitution.

¹⁹ Articles 3 and 181 of the Federal Constitution.

IV. THE FEDERAL SYSTEM OF GOVERNMENT

The British in Peninsula Malaya worked towards centralising the administration of the states leading to the short-lived Malayan Union. This was continued on the road towards independence where one of the terms of reference in drafting the constitution is to have a strong central government. In spite of that, the existence of the Malay Sultanates in 9 states ensures the continuation of autonomous existence of the states under a federal system of government. The Westminster system of government is followed by having the King as the Head of State and the Prime Minister as the Head of Government. The King is elected every 5 years by the 9 Malay Sultans from among them. The Prime Minister is appointed by the King from among members of the House of Representative who were elected in the general election. At the state level, the Sultan, or for the state not having a Sultan, the Governor, is the Head of State and the Chief Minister is the Head of Government. The Chief Minister is appointed by the Sultan or the Governor from among members of the State Legislative Assembly.

The Sultans are constitutional monarch in the sense that their powers are limited by the Federal Constitution and the State Constitution. However, one of the areas that their powers are retained is their position as the Head of Religion of Islam in their own state.

V. ISLAM IN THE CONSTITUTION

The Federal Constitution as a foundation of a newly independent nation prescribes for a primacy and dominant legal position of Islam. The early part of the Constitution starts with the proclamation that Islam is the religion of the Federation. The wording of the provision is very general and it is not clear what it means for Islam to be the religion of the federation. Regarding what the provision means, the

courts have given the answer in a negative form, by saying that Islam as the religion of the federation does not mean that Islam is the supreme law and every law should be consistent with Islam.²⁰ On the other hand, the court did not say that Islamic law could not be applied in Malaysia since there is no provision in the constitution that bars the application of Islamic law and Islamic law is the indigenous law. To the contrary, the Federal Constitution contains many provisions giving the exalted position to Islam, including the content in the oath of the King for him to protect Islam.²¹

In contrast to non-Islamic institutions, the Constitution expressly allows for the government to provide allocation to establish and to maintain Islamic institutions.²² The federal government and the state governments have established various Islamic institutions such as the Department of Islamic Development Malaysia, the Pilgrim Fund Board, the Department of Syariah Judiciary Malaysia and the International Islamic University Malaysia. In practice, the government also spends money for non-Islamic religious institutions. Although this practice seems to be contrary to the wording of the constitution, no legal challenge has been brought against it.

The exalted position of Islam does not mean non-Muslims are prevented against practising their religion. The Federal Constitution guarantees the right of Muslims and non-Muslims to profess and to practise their religion.²³

Consistent with the exalted position of Islam under the constitution, the Federal Constitution allows for restrictions to be imposed on propagation of other religions among Muslims.

²⁰ *Che Omar Che Soh v Public Prosecutor* [1988] 2 MLJ 55.

²¹ 4th Schedule of the Federal Constitution.

²² Article 12 of the Federal Constitution.

²³ Article 11 of the Federal Constitution.

In respect of powers to legislate on Islamic matters, the Federal Constitution took cognizance the traditional place of the religion of Islam which is under the protection of the Sultans. Because of the intertwined nature of Islam, Malays and the Sultans, the legislative competency to make law relating to Islam is put under the states.²⁴ Since Islamic law is the indigenous law and has been applied since the arrival of Islam in the 14th century in the Peninsula Malaysia, the Federal Constitution reaffirms the competency of states to establish its own Shariah courts.²⁵ Thus, each state legislates its own law on Islamic matters and establishes its own Shariah court system in a multi court system in Malaysia.

VI. MULTI-COURT SYSTEMS

Malaysia has a multi-court system consisting of the civil court, the Shariah court and the Native court systems. The court systems are established by different laws and under different legislative mandates. The civil court system as the main court system, which applies laws of general application over all parties irrespective of race and religion, has its own hierarchy with the Federal Court as the apex court and followed by the Court of Appeal and the High Court under the superior court category. Under the subordinate court category, one could find the Sessions Courts and the Magistrate's Courts. Matters like penal sanctions, banking and finance including Islamic finance, contracts, torts and international affairs fall under the jurisdiction of the civil court system.

The Shariah court system is established by states and has narrower jurisdiction which is generally over Muslim parties and applies Islamic law. The 13 states establish their own Shariah court systems and the federal government

²⁴ Article 74 of the Federal Constitution.

²⁵ The State List under the 9th Schedule of the Federal Constitution.

establishes the Shariah court system for the 3 Federal Territories.²⁶ Under each of the Shariah court system it has the Shariah Appeal Court as the apex court and followed by the Shariah High Court and the Shariah Subordinate Court. Islamic law matters adjudicate under the Shariah court system includes marriage, divorce, custody of children, *waqf*, *hibah* (gift), *faraid* (law of succession), *aqidah* (faith) and limited Shariah offences.²⁷

The states of Sabah and Sarawak which is situated in Borneo bordering with Brunei and Kalimantan of Indonesia have more than 60 ethnic groups such as Malays, Melanaus, Ibans, Bidayus, Kadazan-Dusun, Bajau and Murut. The right of the indigenous communities to live by their customs are recognised by allowing the establishment of the Native court system.²⁸ The native as defined by relevant laws in Sabah and Sarawak generally could opt to be governed by native law and adjudicate by the native courts. Most of the subject matters that fall under the jurisdiction of the native courts are family law, land and limited offences under native customs. Sabah and Sarawak have each their own native court system with its own hierarchy.²⁹

These three court systems generally operate in parallel to one another, in particular between the civil court system and the Shariah court system. Appeals from one court system are heard by a higher court under the same court system and each court system has its own apex court. There is no combined apex court that hears appeals from the different court systems.

²⁶ The 3 Federal Territories are Kuala Lumpur, Labuan and Putrajaya.

²⁷ For details of the powers and jurisdiction of Shariah courts, see for instance Farid Sufian Shuaib, *Powers and Jurisdiction of Syariah Courts in Malaysia*, 2nd Ed., Petaling Jaya: LexisNexis, 2008.

²⁸ List IIA – Supplement to State List for States of Sabah and Sarawak under Ninth Schedule of the Federal Constitution.

²⁹ Native Courts Enactment 1992 (Sabah); Native Courts Ordinance 1992 (Sarawak).

VII. SOURCES OF LAW

Islamic law remains as the territorial law of Malaysia even after the colonial British intervention in the nineteenth century.³⁰ However, the prominence of the state apparatus after the creation of nation-state including the creation of legislative bodies such as the federal legislature in the form of Parliament ensures the primacy of legislation over unwritten law which uncodified Islamic law and custom belong to. This produces situation where a clear rule under Islamic law is trampled upon by the statutes. The case of *Ainan bin Mahamud v Syed Abu Bakar bin Habib Yusof* exemplifies this scenario where the Evidence Enactment that prescribes a child born during a marriage is a conclusive proof of legitimacy prevails over the Islamic rule regarding legitimacy of children born less than 6 months of a marriage.³¹ Although the court acknowledges the legal position that Islamic law is the local law, the court was of the view that the Evidence Enactment applies to everybody including on Muslims in matters of their personal law. This absurd denial of the application of Islamic law over Muslims in matters of personal law was however stopped with the amendment in the Federal Constitution that requires matters under the jurisdiction of Shariah courts – which clearly Islamic law is - to be excluded from the civil courts.

The creation of the Federation with a written constitution warrants the adoption of the principle of the supremacy of the Federal Constitution to entrench the fruits of the inter-communal bargaining successfully included in the Constitution.³² The Constitution not only creates organs of government, such as the Parliament, the Cabinet and the courts, it guarantees the fundamental liberties of

³⁰ *Ramah binti Ta'at v Laton binti Malim Sutan* (1927) FMSLR 128.

³¹ *Ainan bin Mahamud v Syed Abu Bakar bin Habib Yusof* [1939] 1 MLJ 209; section 112 of the Evidence Enactment (Cap 10).

³² Article 4 of the Federal Constitution.

citizens and others. The Federal Constitution also recognises Islam, customs and laws in existence before the Independence Day as sources of law in the Federation.³³

As intimated in the above paragraphs, another source of law is legislations in the form of federal law and state law. The primary position of legislations because of the predilection towards written law as oppose to unwritten law had in some instances edges aside Islamic law and custom. Be that as it may, legislations have been used as tools to undertake reforms such as in the economic, healthcare and communication arenas.³⁴

English law, albeit a foreign law, applies in limited ways in Malaysia. It is the vestige of the colonial British from its intervention in this part of the world by imprinting the convenient parts of her legal system on the legal system of the colony. The legislature of the former colony allows for the foreign law to be applied in situations where there is a gap in the local law.³⁵ Commentators raised the question why the gap of local law should only be filled by the former imperial's law and suggested that indigenous common law could be developed by referring to the indigenous norms.³⁶

VIII. CONFLICT OF LAWS

The plural court system and the plural sources of law show the pluralism of the legal system in Malaysia. The recognition of the state for different laws applicable

³³ Articles 160 and 162 of the Federal Constitution.

³⁴ For a reform in the economic sector see for instance the Competition Act 2010; in the healthcare sector see for instance Private Healthcare Facilities and Services Act 1998; in the communication sector see for instance Communications and Multimedia Act 1998.

³⁵ Civil Law Act 1956.

³⁶ Farid Sufian Shuaib, "Towards Malaysian Common Law: Convergence between Indigenous Norms and Common Law Methods" (2009) 13 *Journal of Law Malaysia* 158.

for different groups in the nation produces legal pluralism. This recognition accommodates the different cultures, beliefs and group's interests. The application of this pluralism sometime produces conflict of laws and conflict of forums. The earlier example of *Ainan bin Mahamud v Syed Abu Bakar bin Habib Yusof* shows the conflict of laws between a general statute on evidence and the personal law of Muslims.³⁷ *Public Prosecutor v White* is an example of contradiction between a new personal law of a new Muslim convert which allows for polygyny with the general penal law which criminalise bigamy.³⁸

Conflict also occurs as to which court system – either the civil court system or the Shariah court system – have the jurisdiction to determine whether a person is still a Muslim or has converted to Islam; or to determine issues relating to *hibah* (gift).³⁹ Resolution on jurisdiction most of the time provides resolution of conflict of laws where conferment of jurisdiction to Shariah courts to determine faith of a person will cause the application of Islamic law in making such determination.⁴⁰

The constitutional remedy introduced through a constitutional amendment in 1988 which is a restatement of the plurality of the court systems in Malaysia provides that the civil court systems are excluded from hearing a case which is under the jurisdiction of Shariah courts.⁴¹ Thus, the Federal Constitution proscribes civil courts from interfering with Shariah courts. Although the constitutional remedy does

³⁷ *Ainan bin Mahamud v Syed Abu Bakar bin Habib Yusof* [1939] 1 MLJ 209.

³⁸ *Public Prosecutor v White* (1940) MLJ 170.

³⁹ *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489; *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101.

⁴⁰ *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489.

⁴¹ Article 121(1A) of the Federal Constitution.

not end completely the polemic of jurisdictional conflicts,⁴² it has made clear the parallel position of the civil court system and the Shariah court system.

CONCLUDING REMARKS

The creation of Malaysia as a federation does not abrogate the autonomous power of the different states, particularly in the realm of Islamic law. This indigenous law continues to be the law of the land, albeit suffering neglect and edged to the periphery of the legal system during the British intervention. The changes in the demographic reality of the territories with the influx of immigrants brought in by the British were aligned with the legal, social and political reality under a inter-communal bargaining for a new nation state to be created in the form of the independent Federation of Malaya. The social contract entrenches the primary position of Islam along with securing safe abode for those who wants to make the Federation their new home. It is important in understanding the position of Islam in Malaysia to be conscious of the tumultuous journey in the formation of the nation.

⁴² See for instance *Indira Ghandi a/p Mutho v Ketua Polis Negara* [2016] 3 MLJ 141.