

ESSAYS IN
MALAYSIAN
LAW

R.H. HICKLING

PELANDUK PUBLICATIONS



ESSAYS IN MALAYSIAN LAW is a collection of legal essays, treating law not as a dry subject and an end in itself, but set against the colourful backdrop of Malaysia's history. It serves to remind us of the universal principles that animate a society and why some of our laws have come to be what they are today.

The variety of subjects treated are of perennial interest and should appeal not only to lawyers and law students, but also others who take an intelligent interest in the legal, judicial, constitutional and political developments in Malaysia; the origins of the Malaysian Bench; the historical background to the Malaysian Constitution; its legal history; the influence of the Chinese upon legislative history; and the reception of the English Divorce Law in Malaysia. Legal history has been a subject still atrociously neglected. Without some knowledge of history one can never hope to understand law.

Certain principles are universal and transcend national frontiers. In a democracy such as Malaysia, these principles are the supremacy of the constitution and the separation of powers so that no single person holds all the legislative, executive and judicial powers.

ISBN 967 978 385 5







ESSAYS IN MALAYSIAN LAW





ESSAYS IN MALAYSIAN LAW

R.H. Hickling

CMG QC (Gibraltar) LLB PhD (London)

JMN (Hon)

Professor of Law



PUSTAKA PERDANA



1010013

*To those law students in Singapore and Kuala Lumpur
without whom these essays would not
have been written.*

Published by
Pelanduk Publications (M) Sdn. Bhd.
24, Jalan 20/16A, 46300 Petaling Jaya,
Selangor Darul Ehsan,
Malaysia.

All Rights Reserved.

Text Copyright © 1991 R.H. Hickling
Cover Art Copyright © 1991 Pelanduk Publications.
This book may not be reproduced in whole, or in part,
by mimeograph or any other means,
without permission from the Publisher.

Perpustakaan Negara Malaysia
Data-Mengkatalog-dalam-Perpustakaan
Essays in Malaysian Law/R.H. Hickling
ISBN 967-978-385-5

1. Law – Malaysia – History and Criticism.
2. Malaysia – Constitutional Law.
3. Malaysia – Constitutional History.
I. Title
349.595

Printed in Malaysia by
Eagle Trading Sdn. Bhd.
81, Jalan SS25/32, 47301 Petaling Jaya,
Selangor Darul Ehsan, Malaysia.



R.H. Hickling

The writer has had a varied legal career. After practice in London, he went to Sarawak in 1950 as the Assistant Attorney General, and in 1956, became the Legal Advisor of Johor. Later, in Kuala Lumpur, he became the first Parliamentary Draftsman and Commissioner of Law Revision. After leaving Malaya in 1962, he has spent time in legal work in South Arabia, Thailand, Sri Lanka, Gibraltar, Yemen and Fiji, and as well as in teaching law at the University of Singapore, the School of Oriental and African Studies in London, the University of Malaya, and, since these essays were collected, at the National University of Malaysia.





Foreword

This book by Professor Hickling is most welcome.

The author who has spent most of his working life in this part of the world is an unusual lawyer. After service in the British Navy during World War II, he practised law in England, and then in 1950 went to Sarawak as Assistant Attorney-General and shortly thereafter came over to the peninsula as Legal Adviser to the State of Johore and then in the Attorney-General's Chambers in Kuala Lumpur. There his gift for succinct and lucid writing attracted attention and he was given the unenviable task of writing laws for the federal Parliament and revising our laws, some of them obsolete and many of them overlapping because they dated from times when each State was virtually sovereign and made its own laws.

After leaving Malaya in 1962 the author has worked in Aden, Saudi, Thailand, Sri Lanka, Gibraltar.

He has taught at university here and in Singapore and in London.

He has worked for and with natives of very high and high ranks such as Prime Ministers, Chief Justices, Attorneys-General, and senior civil servants; and also for and with natives of middle and lowly ranks. His warmth and humorous scepticism brought him in touch with VIPs and the man in the

street in addition to idealistic students whom he inspired. He is very much aware of what is possible for governments to do and what is not, in particular in newly independent countries where most leaders are inexperienced. He is very much in sympathy with those of us whom he got to like and know. Unlike other academics his approach is both theoretical and practical.

This book is the first of its kind in Malaysia - treating of the law not as a dry subject as an end in itself, but set against the background of our history. Much of that history is recent and excited great interest and no little controversy at the time. But much of it has been largely forgotten. This book serves to remind us of what we recently saw and heard so that we do not forget the reasons why some of our laws are what they are today.

The variety of the matters treated should appeal not only to lawyers and law students but also others here and elsewhere such as doctors, accountants, engineers, architects, businessmen, civil servants, politicians and the like — people who take an intelligent interest in legal and judicial, constitutional and political developments in Malaysia. Lawyers choose their words carefully but the author goes further: he writes gracefully and elegantly, unusual for one who has spent years writing mainly legal opinions and drafting laws for Parliament. But the author has amused himself in his spare time writing and publishing the occasional novel.

Certain principles are universal transcending national frontiers. In a democracy, these principles are the supremacy of the constitution if there is a written one, separation of powers so that no single person has all the powers — legislative, executive and judicial — the role of Parliament to act as check and balance against misuse of power by the executive and as a forum for ventilating public grievances, the independence of certain institutions such as the judiciary, the Bar, the Elections Commission, the rule of law, the importance of the rules of natural justice, the importance of a free press, freedom after speech not only freedom of speech, and so on and so forth.

Some of these principles have been jettisoned in some countries and others are in danger of following suit. Usually the danger comes from those in power. In the old days civil servants were thought to be permanent and politicians temporary. Nowadays politicians are the people who are permanent. When they retire or lose office in their lifetime they are immensely wealthy and enjoy a pension beyond the dreams of a civil servant. The appearance of this book if it succeeds in reminding us of universal principles that animate or should animate a democracy will indeed have served a useful purpose.

I am happy to commend it to the public.

*Kuala Lumpur.
23 September 1991.*

Tun Mohd Suffian



Preface

In February 1950 I arrived in Sarawak by means of an elderly Dakota aircraft which, taking off from Kallang in Singapore, laboured mightily across the South China Sea and, at last observing a clearing dominated by an attap hut, landed at what proved to be Kuching airport. Times have changed, grass and attap have given way to concrete and glass. Such is progress.

I was met by the Attorney himself, Arthur Grattan-Bellew, a veteran of Malaya (he appears for the prosecution in the well-known case of *P.P. v D.J. White alias Abdul Rahman* [1940] MLJ 214) who took my wife and I in his black Vauxhall car to the old, graceful Rest House. From there, it was but a short walk past the Sylvia Cinema to the Secretariat itself, now transformed into an air-conditioned court complex, within which were the Attorney General's Chambers. At that time these chambers, like all government offices, were open to the world: for did not one of the Cardinal Principles of the Rajah's Constitution Order of 1941 provide that "The Rajah and every public servant shall be freely accessible to the public"? The British administration continued practising this powerful and wise principle, one well-known throughout the territory, and nipping much corruption in the bud. It is a pity that it has not been generally adopted by those civil services which now tend to forget (to quote the Rajah's Cardinal Principles again) that

“public servants shall ever remember that they are but the servants of the people on whose goodwill and cooperation they are entirely dependent.”

At that time the Attorney General was the only law officer of the Government. On my arrival as the Assistant Attorney General the establishment was doubled: but for the better part of my time in Sarawak I found myself acting as the Attorney General, all by myself in chambers – apart from the invaluable Edmund Law and Chua Ah Bah, who held everything together. An Australian lawyer, Mark Morrison, had set up practice in India Street, Kuching, and for some time was the only private practitioner in the country. This created a state of affairs so embarrassing to the Government that at one time there was talk (inspired by K.H. Digby, a worthy Circuit Judge) of creating the office of a Public Defender whose authority would extend to civil litigation. Legal aid was a novel concept in those days. Only the arrival of other private practitioners prevented a crisis.

Work was hard, long and varied. It was asking much for one man to act as the government legal adviser, draftsman, prosecutor and general dogsbody: indeed, negotiations with the oil company which then had a powerful interest in Sarawak would alone have required the full-time services of a lawyer specialising in mining and mineral rights. But thrift was the order of the day, and the Financial Secretary concerned himself with everything financial; if a police constable claimed for a bundle of domestic assets lost in river rapids on a transfer of post, the Financial Secretary had to approve any settlement personally. Shortly before I left, however, the chambers were fortified by the arrival of the Crown Counsel, Peter Mooney, now a Dato and Vice-President of the Malaysian Bar Council, and the Attorney General's chambers began to take their due place within the administrative hierarchy.

Kuching was then one of the happiest of places, with no political parties dividing society, no radio, no television. We had one excellent newspaper, the *Sarawak Tribune*, run by Dennis Law and giving us all the news that mattered; there was the monthly *Sarawak Gazette*, a treasury of out-station news

and odd, entertaining items likely to be published nowhere else in the world; and Francis Tan at the Rex Bookstore provided much of the rest of our reading. Peace and the hope of an ever-increasing prosperity reigned. Young officers like myself were naturally anxious to change this deplorable state of affairs. Wedded to that curious illusion known as democracy, we were in fact more anxious than the inhabitants, to see independence thrust upon a reluctant electorate. After all, we had been taught that our success would lie in doing ourselves out of our jobs. And if we forgot our democratic training, there was another Cardinal Principle of the Rajah, dating from 1941, to remind us "that the goal of self-government shall always be kept in mind, that the people of Sarawak shall be entrusted in due course with the governance of themselves."

For many of my colleagues and I – at least, those of my own age and background – having been brainwashed by the Left Book Club, the Fabian Society, the *New Statesman* and all the rest of those no doubt well-intentioned institutions, thought of ourselves as radical. And, what followed, from that? "[A] systematic hostility to the owners of landed property, and a disposition to grant much of the same representative institutions to all portions of the Empire, quite irrespectively of their circumstances and characters, are the directions in which the ordinary Radical naturally moves." So wrote the thoughtful Lecky in 1896.¹ "To destroy some institution, or to injure some class, is very commonly his first and last idea in constitutional policy." This description may fit some of the early guardians of Sarawak, whose inhabitants may now meditate upon their deeds and misdeeds. Our political experience may be summed up in Ralf Dahrendorf's bitter phrase, "Seeking Rousseau, Finding Hobbes."²

After four years or so I was offered a transfer to Singapore or Malaya. I made appropriate investigations. The salary

1. *Democracy and Liberty*, I, 155.

2. *Law and Order* (1985), 41.

offered in Singapore was higher than that of Malaya; in Singapore the cost of living was lower; in Malaya there was a state of emergency. The choice was clear, and I arrived in Kuala Lumpur, to take over as the Assistant Legal Draftsman from Anthony Webb. This was a brief appointment, to be followed by one in Johore: but later I returned to Kuala Lumpur and spend the rest of my time in the government service as a draftsman involved in much federal legislation, up to 1962. Included in that legislation was the Internal Security Act of 1960, much amended but still on the statute book as Act 82: an Act which perhaps merits a brief mention.

In 1948 a federation-wide state of emergency had been declared and, in the course of time, registered its existence with a mass of emergency legislations: indeed, independence came and the Constitution was conceived and born in emergency conditions, a circumstance to which, even now, insufficient attention has been paid. Around 1959 the Deputy Prime Minister, Tun Razak, came to the view that the emergency should be terminated, and to that end he ordered the security authorities to review the whole body of emergency law, and to indicate what powers they considered essential, were the state of emergency to be lifted. They duly made their recommendations and, as the draftsman concerned, I had to study this distillation of oppression, dating from the colonial era. Disliking much of it, especially did I abhor the proposal to retain the law on preventive detention. As forcefully as I could, I put my opinion to the Minister, explaining, perhaps unnecessarily (after all, he was a member of the Bar), that such detention was justified only in emergency conditions. He looked at me sadly. 'Put yourself in my position,' he said, 'would you release every detainee now?'

Unfortunately, I could see his point of view, for as a prosecutor in Johore I had learnt something of the methods of the terrorists. And Tun Razak was a responsible, conscientious Minister, a man of liberal principles unlikely to abuse his powers: his views on the matter remain on the record in Hansard, when he introduced the second reading of the Bill.

I could not imagine then that the time would come when the power of detention, carefully and deliberately interlocked with article 149 of the Constitution, would be used against political opponents, welfare workers and others dedicated to non-violent, peaceful activities. It was with some considerable surprise that I discovered in 1987 that the Supreme Court (*Theresa Lim Chin Chin and Ors. v. Inspector General of Police* [1988] 1 MLJ 293 at 296) took the view that “from the wording of the provision[s] of the Act there is nothing to show that it is restricted to communist activities.” It seems extraordinary that a court, faced with two interpretations of a law, should adopt the one more restrictive of freedom, and indifferent to the Constitution.

In 1962 I returned to England and, after a year or two, was one of the six lawyers especially recruited into the Home Civil Service together with (of all people) Anthony Webb. So ended my experience as a lawyer in the Malayan Government service, for I left shortly before the creation of Malaysia. Even so, it is not given to many lawyers to assist in a transfer of power. On first hearing, in Sarawak, of a possible move to Malaya, I had enquired from the wisest men I could find exactly how long it would be before Malaya became independent. The shortest period then foreseen was ten years, and even this was discredited as overly optimistic (or should I say pessimistic). In fact, independence arrived in less than three years: a tribute to the skill and wisdom of that great man, the Tunku, and offering a lesson in local politics. In Southeast Asia major events cast few shadows in advance, and when they happen, they happen very quickly indeed.

In 1974 I took up what I suppose I must call an academic career, by becoming a visiting professor at the University of Singapore. The first piece of legal writing I began there was concerned with the origins of the Malaysian bench (included in this book) and, by reason of my past experience, I have maintained an interest in the development of Malaysian constitutional law: a law still based upon English common law principles. Even so, I suspect that these principles must change.

In my book on *Malaysian Law* (1987) I am critical of certain aspects of the common law; and although I do not feel very pleased with myself for being nervous of the principles of judicial review (experience in the civil service does not, alas, make for trust in the judiciary) I suspect that the French approach to administrative law has more merit than the casual, pragmatic approach of the common law. The relationship between the individual and the State is one of the crucial problems of contemporary politics, and has not yet been satisfactorily resolved. I suspect that it will never be.

The history of law has no beginning and no end. The observer can endeavour to take a photograph of the law as it exists at the moment of his observation: but the film is slow, the shutter rusty, the camera shakes, we capture but a fragmentary glimpse. Some writers of textbooks affirm, with an endearing confidence, that their text illustrates the state of the law at such and such a date. Such optimism is to be commended: but law is like the sea, ever changing, and what is on the surface bears little relation to what is underneath.

In these essays I have endeavoured to give my own interpretation of various aspects of law: yet even as I wrote, I have endured a certain melancholy. What I see is not perhaps what it is. Each of us develops certain perceptions of the varied aspects of truth that envelop our lives. These perceptions are in part the product of our own personalities, in part the product of the influences that have shaped the progress of our lives and thoughts. A time comes when we cannot distinguish them, for our memories, both conscious and unconscious, are drenched in echoes of the past; and our minds are further confused by impressions of the present, and hopes for the future. Even the lawyer is not exempt from this universal discipline, this purgative experience. We learn very slowly, and often life has to administer the same lesson over and over again, before our dull minds grasp the messages that it teaches.

Five of these essays deal with the Constitution, as observed between the years 1962, 1977 and 1987. As the reader may note, my observations on the role of the Rulers in 1962 proved to

be quite inaccurate, although at the time it certainly did seem to me, as a civil servant, that the centripetal forces within the government were irresistible. The effects of Article 153 and 13 May 1969, however, reinforced the apparent need for a Malay, as opposed to a Malaysian identity, and this has proved to be a reactionary influence. It is in the spirit of article 8 of the Constitution that peaceful progress must lie. Within Malaysian society there are powerful, liberal forces at work, and not even the suppression of newspapers and the detention of members of Parliament can suppress them. As a former civil servant favouring a nice, tidy situation, I sometimes wish that it were possible to abolish dissent, untidiness: indeed, the whole political process often appears to be shabby, extravagant and inefficient, and one sometimes longs for a quiet, efficient dictatorship. But this is a dangerous fantasy, a step on the road to serfdom. One of the more bitter facts of life, taught by experience, is the need to permit the expression of opinions contrary to one's own.

In Malaysia, at least, the individual is still left with some dignity. Recently, I was told of a young woman detainee who, just before her release, was given by her police captors a cake decorated with images of Snoopy; and that was, as it were, her going-away present. In that little gesture I see one secret of the strength of Malaysian society, and a sure hope for the future.

In all, these essays reflect a personal view of events and trends in Malaysia. I can only hope that one or two of them will be of interest to law students and others. Several have appeared in journals and elsewhere, as indicated in the text, and I am grateful to the Malaya Law Review, Journal of Malaysian and Comparative Law, Malaysian Law Journal and Oxford University Press for having no objection to their publication.

R H Hickling
Faculty of Law
University Kebangsaan Malaysia
2 August 1989



Contents

Foreword
Preface

Chapter One	
The Origins of the Malaysian Bench	1
Chapter Two	
High Tempers in High Places	28
Chapter Three	
The Influence of the Chinese Upon Legislative History in Malaysia and Singapore	41
Chapter Four	
The Historical Background to the Malaysian Constitution	76
Chapter Five	
The First Years of the Federation of the Malayan Constitution	97
Chapter Six	
Some Aspects of Fundamental Liberties Under the Constitution of the Federation of Malaya	127
Chapter Seven	
An Overview of Constitutional Changes in Malaysia 1957-1977	149
Chapter Eight	
The Prerogative in Malaysia	183
Chapter Nine	
The Development of the Malaysian Constitution – Major Achievements and Shortcomings, 1987	224
Chapter Ten	
Law Past, Present and Future	247
Chapter Eleven	
The Reception of the English Divorce Law in Malaysia	259





Chapter One

The Origins Of The Malaysian Bench

In Hugh Clifford's Report on Kelantan and Trengganu,¹ written in August, 1895, there is a graphic sketch of the judicial system obtaining in a State of Malaya at that time. "The rude justice which was dispensed in former reigns," wrote Clifford, "has now been replaced by a system under which the length of the litigant's purse forms his best claim to a hearing." The system has changed but little, even in the west; money still lubricates the machinery of justice, but not in so erratic a fashion as it did in those States at that time.

"From the Malay point of view," continued Clifford, "the administration of justice is always regarded by the rulers of the State as a leading and legitimate form of revenue. The *pem-basoh balai* or fees of Court – literally the money paid for cleansing the State Hall after the hearing of a case has soiled it² – yield one portion of this revenue, and the other and larger portion

1. F.M.S. Government Press, Kuala Lumpur, 1938. Skeat, in his *Personal Account of the Cambridge University Expedition 1899-1900* (J.M.B.R.A.S. Vol. XXVI Pt. 4) gives a vivid picture of penalties, tortures and mutilations encountered in Kelantan and Trengganu about the same time.

2. The writer remembers, in his first days at work in a Thai Ministry in Bangkok in 1968, a civil servant being stabbed and killed by an outraged visitor. On the following day a cleansing ceremony, presided over by Buddhist priests, was necessary.

