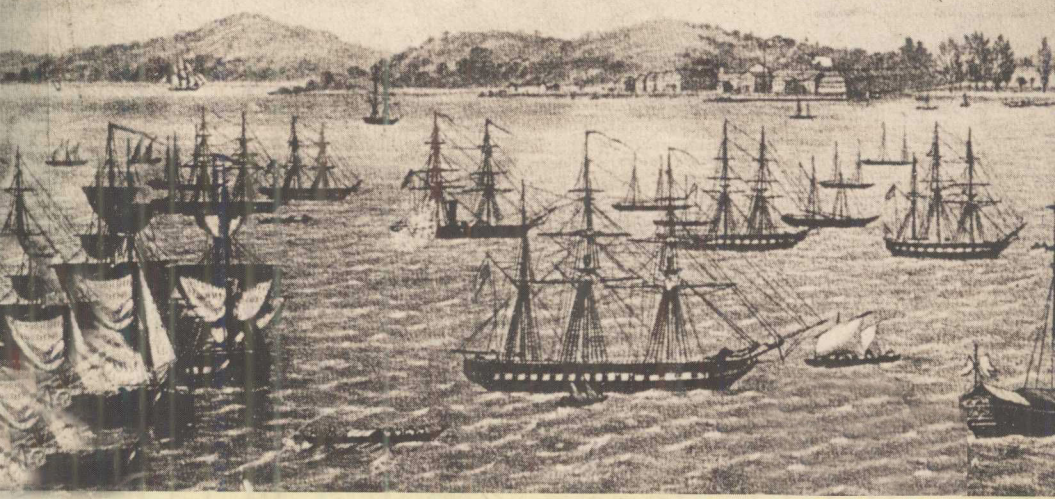
# The Common Law IN SINGAPORE AND MALAYSIA

**A volume of essays marking the 25th anniversary of the Malaya Law Review**

Edited by A. J. Harding



MALAYA LAW REVIEW AND BUTTERWORTHS

# THE COMMON LAW IN SINGAPORE AND MALAYSIA

## A Volume of Essays Marking the 25th Anniversary of the Malaya Law Review 1959–1984

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# EDITORIAL PREFACE

It is twenty-five years since the Malaya Law Review made its first appearance in 1959 as the University of Malaya Law Review, the organ of a new law school set up by Professor LA Sheridan in Singapore in 1957. This book is a *festschrift* marking a quarter of a century of uninterrupted publication of a review which has acquired an international reputation and continues to grow in stature and quality. It is a way also of saying "thank you" to all those who have helped, and continue to help, to build the Review with their various kinds of effort—writing, researching, planning, editing and performing all the other minor but essential tasks such as typing, proofreading and checking citations.

So much by way of fanfares. The Review does not intend to rest on its laurels, such as they are, but to continue to cover new areas of law within its focus and shed new light on the old areas, for the better understanding and development of law for the benefit of the region, and, hopefully, for the benefit of all mankind in some small way. This book therefore looks to the future. It is, we hope, the beginning of a rich new vein in local legal research.

The most important and most interesting question for lawyers in Singapore and Malaysia is also the most difficult to answer. How far has the common law, product of an alien culture and history, disseminated and introduced by the agency of imperial British rule, been applied or adapted to suit conditions vastly different from those in which it was created? And how far can and should it be so applied or adapted?

These questions arise in different forms and in different contexts, and the answers will be supplied for different purposes. The student of law may be interested in the overall development of the legal system. The politician may be interested in the solution of particular problems of which the legal aspect is only one. The professional lawyer may be interested in the law applicable to his client's case and

in predicting its outcome in court. The answers supplied may also be affected by many factors—political, environmental, social, economic, religious, cultural and ethical—and therefore easy answers cannot be given.

Furthermore, the nature of the common law itself makes it difficult to assess just what answers have been given, and even whether any have given at all. Although legal reasoning is patent, demonstrated, and hopefully clear, it is not always complete, and its fundamentals are more often assumed than stated. If the doctrine of precedent affords a justification for conservatism, it also affords room, and even justification, for radical departure or reinterpretation. Uncertainty is part of the philosophy of the common law, for it is only by negotiating the valleys of uncertainty that we can reach the great peaks of legal principle.

At another level we may well be in doubt what is the precise meaning of "common law", a term which can be used in a bewildering variety of senses, and is indeed so used in this volume, as in many others. It can mean one thing to an Englishman, another to an Australian, yet another to an American, and yet another to a Singaporean or a Malaysian. It can refer to English law generally, English law other than statutes and equity, English law so far as it is in force in another jurisdiction, or English law so far as it has been made Australian, American, Singaporean or Malaysian. In the title of this volume it means something rather different and I can do no better than quote Professor GW Bartholomew:

> It is neither a matter of substantive rules nor a matter of procedures in the administration of justice. It resides . . . in the mental attitudes and habits of legal thought that historically evolved in England and what are still referred to as common law systems. These attitudes and habits are imponderable and it would be difficult if not impossible to spell them out with any exactitude. [R Hassan, ed, "Singapore: Society in Transition", 1976, p 100].

In addition the term can also be said to mean all those fundamental principles of English law which were introduced into Singapore by the Second Charter of Justice of 1826, and into Malaysia by the Civil Law Ordinance. It is however the former sense which is important, for everything stems from attitudes of mind.

For these reasons the naive question posed earlier needs to be rephrased according to the context in which it is asked and the purpose of asking it. This book poses the question in different ways according to the subject matter dealt with and the various inclina-

tions of the contributors, which the editor has in no way tried to shape or influence: local law is in a formative stage, and so is local legal research and literature.

Malaysia has enjoyed independence since 1957 and Singapore has had self-government since 1959. In the life of legal systems this is but the twinkling of an eye, for legal notions do not spring up overnight. The legal systems discussed in this book are not autochthonous and are autonomous only in that they enjoy sovereignty. Singapore still looks to the Judicial Committee of the Privy Council as its final court of appeal and Malaysia has only recently finally thrown off the English judicial yoke. The local judiciary have had roughly only one generation on the bench, and even that always in the knowledge that their decisions might be struck down by the English judges.

Nonetheless the mere fact of having to decide cases in which the facts reflect the variety of human life itself must necessarily involve the application and development of legal principle. When the principles involved are those created for another time and place and another breed of men the result cannot be achieved mechanically. For this reason this book takes a look back and a look forward. It tries to take stock of the local law now in the light of the body of principle and the traditions inherited from the period of British rule, and it tries to suggest possible approaches, where necessary or useful, to the future development of the law.

Some of the essays are partly or mainly directed at statute law rather than judge-made law. No matter. We are concerned with the way in which the English legal tradition has fared and how it has been or might be, adopted, followed, applied, interpreted, altered, tolerated, distorted, ignored, abolished, or used for purposes for which it was never intended.

Readers will notice that, in spite of the title, there is a heavy bias in this book in favour of Singapore. This is due to three factors. First, all the contributors being present or past teachers of law in Singapore, they naturally speak, as it were, with a Singaporean accent; secondly, the common law in Singapore has not been written about so extensively as the common law in Malaysia; thirdly, some of the topics discussed are such that Singapore and Malaysia require separate treatment because of fundamental differences between the two legal systems, especially of course in relation to reception provisions and statute law generally. Nonetheless the Malaysian reader will find plenty of original work of direct or indirect importance for Malaysia, even in those essays specifically on Singapore.

It has been my intention in preparing this book to provide the reader with a number of interesting case studies rather than an overview of all legal subjects in both jurisdictions, which would be an encyclopaedic undertaking. The selection has depended on the contributors' own preferences and the actual issues arising naturally from the discussion of law in the two countries, bearing in mind, in particular, important questions of policy and development. However all major areas of the law are represented, so that at least the flavour of each, if not the whole dish, can be sampled.

The essays presented here fall into three groups. The first, consisting of four essays, is concerned mainly with the origins, structure and functioning of the legal system in Singapore, though much of the material in the essays by Soon Choo Hock/Andrew Phang and Walter Woon is applicable to Malaysia, and the other two essays, by Professor Geoffrey Bartholomew and Helena Chan, are at least of some interest to Malaysia because of its historical legal ties with Singapore and the Privy Council. Geoffrey Bartholomew discusses some of the wider issues concerning the reception of the common law in Singapore and the continuing development of the law in the light of this reception; Soon Choo Hock and Andrew Phang take a very new look at an old problem which never goes away—the continuing reception of English mercantile law in Singapore, a problem which concerns all aspects of the legal system, not just commercial law; Helena Chan looks at the legacy of the Privy Council in Singapore and Malaysia on a broad canvas; and Walter Woon dissects the intractable problem of *stare decisis* in relation to Singapore and the Straits Settlements.

The second group presents four essays drawn from important areas of substantive law. The first three are concerned with particular problems of the application of the common law in the local setting and the last three are concerned purely with private law: Stanley Yeo's essay deals with the common problem of statutory codification, and the continuing reception of the common law by statutory interpretation, in the context of criminal law defences; Leong Wai Kum's essay gives an historical insight into the failure of the common law in an area of Singapore family law where the common law and Chinese culture met head on; the editor's own contribution looks at a disputed area involving tort, evidence, and judicial policy; finally in this section Bill Riquier shows how social necessity and public law have given a new interpretation to traditional common law notions of property in Singapore.

This brings us to the third group, which concerns public law.

There are three essays in this group: Christine Chinkin takes up the important theme of abuse of administrative discretion and discusses the attitude of the judiciary to judicial review; in the second essay Krishna Iyer discusses the remedy of certiorari in the light of its common law base and modern reforms and looks to the possible future reform of administrative law remedies locally; and Val Winslow concludes the book with a discussion of the bias rule in natural justice.

Constitutional law has not been dealt with because it has been much written about in relation to Malaysia, and a volume of essays on the Singapore Constitution is in preparation and will be appearing shortly.

No attempt has been made here to give any exhaustive treatment of reception as such. The reader will find that this has of course been touched upon in some of the essays, notably the first two, and there is considerable literature on the subject already.

To consider the questions broached here is a fascinating but unending enterprise. We cannot pretend to have found startling conclusions or furnished any definitive answers. However, we hope that, by directing attention to the important question of how the common law can or should be localized, further interest and research will be spawned and an attempt made at last to grapple with what seem to us to be crucial questions of law and society.

I wish to thank the other ten contributors, who were at the time of writing all on the staff of the Law Faculty in the National University of Singapore, with the exception of Professor Bartholomew, a former Dean of the Law Faculty of the National University of Singapore and a former Editor of the Review. (More importantly, his name is indelibly associated in the minds of generations of lawyers in Singapore and Malaysia with the subject of this book, the common law in Singapore and Malaysia, of which he can be said to be the progenitor.)

I should like also to express thanks to Miss Susheela Pillay, Miss Sim Mei Ling and Mr Lim Eu Ming for their opportune, thorough and cheerful assistance in the more mundane aspects of the preparation of the manuscript; Mr Ng Lian Seng for countless hours of painstaking word-processing; Mr Tan Keng Feng for his encouragement; Mr George Wei, Miss Helena Chan and Dr Krishna Iyer for their invaluable assistance; and my wife, Kun Bek, for tolerating the neuroses and odd hours which necessarily accompany editorial work. Last, but not least, I must thank the Malaya Law Review

itself for funding and co-publishing this book, and wish it another successful quarter-century.

The law is generally stated as at January 1985, but it has been possible in some cases to include materials reported after that date.

A J Harding,
Monash University,

January 1985.

*This book is dedicated to all those who have been involved in any capacity with the Malaya Law Review over the last 25 years, particularly those who have striven to write about the local law, and on a personal note the Editor would like to dedicate his own labours to the memory of the late Mr Yap Un Pho, who passed away during those labours.*

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Page references printed in bold type indicate where the section is set out in part or in full.

## SINGAPORE