

A Perspective of HRH Sultan Azlan Shah's Contribution to the Development of Malaysian Law

His Royal Highness Sultan Azlan Shah was a judge of the superior courts of Malaysia for a period of some 20 years. He was, at the age of 37, the youngest judge to be appointed to the High Court of Malaya. Further, in the normal course of events, His Royal Highness would have been the longest serving Lord President of the Federal Court of Malaysia (for a term of 11 years) had it not been for the sudden turn of events which persuaded him to relinquish the highest judicial office in Malaysia upon his ascension to the throne of the State of Perak.

In 1965, at the age of only 37, His Royal Highness was elevated to the Bench of the High Court of Malaya, and in 1973, His Royal Highness was elevated to the Federal Court of Malaysia as a Federal Court Judge. In 1979, His Royal Highness was appointed the Chief Justice of the High Court of Malaya, an office which he held until his appointment as the Lord President of the Federal Court of Malaysia on 12 November 1982.

His Royal Highness' meteoric advancement within the judiciary in Malaysia is clear testimony of his intellect and capabilities and of his contribution to the development

of Malaysian law. His Royal Highness has always been regarded as one of the most outstanding judges in the history of the Malaysian judiciary. During his tenure as a High Court Judge, Federal Court Judge, Chief Justice and as Lord President, His Royal Highness had the unique distinction of having some 280 of his judgments reported in the law journals. In another 200 reported cases, His Royal Highness was a member of the Federal Court which heard and determined the cases. His Royal Highness heard and determined more than 150 cases in the High Court, sitting as a High Court Judge at first instance whilst holding office as a Federal Court Judge.

The judgments delivered by His Royal Highness were always well received by the legal fraternity. His style was distinctive: he was concise, comprehensive and clear. He dealt with the questions of law involved in each case succinctly and was most forthcoming in his application of legal principles to the facts of the case.

The impact of His Royal Highness' judgments in most branches of the law was such that they contributed to the rapid development of Malaysian law since Independence. His Royal Highness not only modified the application of the relevant English law to suit local conditions, but where there were no corresponding local provisions, His Royal Highness in certain cases did not feel constrained to apply English law or practice. For example, in *Zainal Abidin bin Haji Abdul Rahman v Century Hotel Sdn Bhd* [1982] 1 MLJ 260, the jurisdiction to grant Mareva injunctions as

under English law was given recognition in the Malaysian legal system. In *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16, His Royal Highness broke new ground by recognising the existence of collateral contracts in Malaysia.

In cases where local provisions existed, His Royal Highness always applied them. In *Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd* [1980] 1 MLJ 21, His Royal Highness considered section 66 of the Contracts Act when dealing with the rights of the parties under an illegal contract rather than merely relying on accepted English legal principles. Indeed, earlier in *Dorothy Kwong Chan v Ampang Motors Ltd & Anor* [1969] 2 MLJ 68, Raja Azlan Shah J refused to follow the then-existing English law on the position of a dealer in a hire purchase transaction. His Lordship said that for commercial expediency and for “the mercantile needs of this country”, the dealer had to be treated as an agent of the finance company. His Royal Highness was thus able to create and develop a corpus of Malaysian legal principles hitherto in its infancy.

It should perhaps be pointed out that in many of his decisions His Royal Highness did not feel compelled to adhere to the strict application of the law alone. Many of His Royal Highness’ decisions are influenced by the principles of Equity. Thus His Royal Highness not only applied the law but also administered justice in the cases heard and determined by him. In *Kersah La’usin v Sikin Menan* [1966] 2 MLJ 20, His Royal Highness held that a purchaser of land



who had gone into possession under a sale and purchase agreement had an interest in the land even prior to the registration of the memorandum of transfer.

Other notable features which one may discern from His Royal Highness' judgments are his concern and high regard for upholding justice. In many of his decisions, His Royal Highness took great pains to point out that no person was above the law nor was anyone entitled to any special consideration. In *Ismail v Hasnul* [1968] 1 MLJ 108, Raja Azlan Shah J said:

The practice in all courts has been that a subpoena may be issued against anybody, be he a Minister of the Government or a non-entity ... Injustice will arise if equals are treated unequally.

Similarly, in *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15, His Royal Highness in passing sentence, though mindful of the public position held by the accused, refused to take into consideration these extraneous factors and reiterated:

I repeat what I had said before. The law is no respecter of persons.

ADMINISTRATIVE LAW

Administrative law is a subject which was always of great interest to His Royal Highness Sultan Azlan Shah. In many pronouncements of His Royal Highness in the area of administrative law, one can find streaks of creativity and judicial activism.

Natural justice

From amongst His Royal Highness' early decisions, reference needs to be made to *Doresamy v Public Services Commission* [1971] 2 MLJ 127, where Raja Azlan Shah J, taking a liberal view of natural justice emphasised upon the need for legal representation before administrative bodies in the following words:

The considerations requiring assistance of counsel in the ordinary courts are just as persuasive in proceedings before disciplinary tribunals. This is so especially when a person's reputation and livelihood are in jeopardy. If the ideal of equality before the law is to be meaningful every aggrieved person must be accorded the fullest opportunity to defend himself at the appellate review stage. Where he has a statutory right of appeal and the regulations are silent on the right to the assistance of counsel, he cannot be deprived of such right of assistance.



A very significant pronouncement in the area of administrative law made by His Royal Highness is found in *Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152. In his opinion, Raja Azlan Shah FJ made the following classic statement:

In my opinion, the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action, no matter whether it is labelled judicial, quasi-judicial, or administrative or whether or not the enabling statute makes provision for a hearing.

This statement of law by Raja Azlan Shah FJ is very meaningful as it expanded the scope of natural justice in Malaysia. By this pronouncement, Raja Azlan Shah FJ brought Malaysian administrative law in line with English administrative law where a new liberal trend had been introduced in this area by the House of Lords' decision in *Ridge v Baldwin* [1964] AC 40. *Ketua Pengarah Kastam* can really be regarded as a landmark case in Malaysian administrative law.

In *Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia* [1981] 2 MLJ 196, Raja Azlan Shah CJ (Malaya), sitting in the Federal Court, made a great contribution to the development of Malaysian administrative law by laying down the proposition that the relationship between a lecturer and the university is not purely that of "master and servant" but that a lecturer "has a status supported

by statute” and that he “is entitled to the protection of a hearing before the appropriate disciplinary authority”.

Ultra vires

An important case decided by His Royal Highness on the issue of ultra vires acts by statutory authorities is *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135. Here, in one of his most famous judgments, Raja Azlan Shah Acting CJ (Malaya) very forcefully expressed the idea of controlled discretionary power as follows:

Unfettered discretion is a contradiction in terms ... Every legal power must have legal limits, otherwise there is dictatorship ... In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law.

His Royal Highness’ emphasis on the courts being the protectors of the people against the abuse of power by the government or public authorities unmistakably echoes the



great dissent of Lord Atkin in *Liversidge v Anderson* [1942] AC 206 at 244, where Lord Atkin said that “it has always been one of the pillars of freedom, one of the principles of liberty ... that judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.”

Government privilege

In *BA Rao v Sapuran Kaur* [1978] 2 MLJ 146, Raja Azlan Shah FJ went into the question of the scope of the government privilege not to produce documents in the court as envisaged in section 123 of the Evidence Act. This pronouncement brought Malaysian law in line with the progressive view taken in this connection in *Conway v Rimmer* [1968] 2 AC 910. Raja Azlan Shah FJ stated the principle as follows:

In this country, objection as to production ... is decided by the court in an inquiry of all available evidence. This is because the court understands better than all others the process of balancing competing considerations. It has power to call for the documents, examine them, and determine for itself the validity of the claim. Unless the court is satisfied that there exists a valid basis for assertion of the privilege, the evidence must be produced. This strikes a legitimate balance between the public and private interest.

Declaration

On the other hand, one can point out some of the pronouncements where His Royal Highness Sultan Azlan Shah adopted a cautious view of the law. In *Land Executive Committee of Federal Territory v Syarikat Harper Gilfillan Bhd* [1981] 1 MLJ 234, Raja Azlan Shah Acting LP said :

Thus it can be seen that the modern use of declaratory judgment had already developed into the most important means of ascertaining the legal powers of public authorities in the intricate mixture of public and private enterprise which is becoming a distinctive feature of our life. But we must add a warning note that its use must not be carried too far. The power to grant declaratory judgment in lieu of the prerogative orders or statutory reliefs must be exercised with caution. The power must be exercised “sparingly”, with “great care and jealousy”.

He had revealed a similar cautious attitude as regards the issue of a declaration in *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29. Raja Azlan Shah FJ observed:

Consistency makes for certainty, and this court being at the centre of the legal system in this country, is responsible for the stability, the consistency and the predictability of the administration of law.



In *Mohamed Nordin bin Johan v Attorney General, Malaysia* [1983] 1 MLJ 68, Raja Azlan Shah Acting LP held that the power of the Attorney General under regulation 2(2) of the Essential (Security Cases) Regulations 1975 was one of “pure judgment” and not subject to an “objective test” and not amenable to judicial review. His Lordship noted that the regulation was “certainly draconian in its terms”, but concluded that the language of the regulation left no room for a judicial examination as to the sufficiency of the grounds on which the Attorney General acted in forming his opinion, and a contrary construction would render inefficacious the whole purpose and scheme of the Regulations as a whole.

The landmark judgments of His Royal Highness Sultan Azlan Shah on administrative law are widely acknowledged to have been instrumental in the seismic shift of Malaysian administrative law towards a more liberal and progressive view post-independence, whereby governmental and administrative action are subject to rigorous scrutiny through judicial review by the courts. In this, Malaysian law proudly marched alongside the similar trend under English administrative law, developed by such great English judges as Lord Reid, Lord Wilberforce and Lord Diplock.

LAND LAW

Exercise of power by State Authority

His Royal Highness' defence of the property rights of private individuals against the arbitrary exercise by a public authority such as the State Authority of its powers may be seen in the case of *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135. This case throws considerable light on the scope and extent of the State Authority's power to impose such conditions which it deems fit in matters pertaining to land use and planning.

The decision of Raja Azlan Shah Acting CJ (Malaya) serves as a warning to the State Authority that the exercise of its discretion is not unfettered but is instead subject to scrutiny and control by the courts.

Caveats

The decision of Raja Azlan Shah FJ in the Federal Court case of *Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53, dealing with caveats, is authority for the proposition that a purchaser of land under a contract of sale acquires a contractual right in respect of the land which is capable of being protected by the entry of a private caveat in respect of the said land.



CONSTITUTIONAL LAW

From the judgments delivered by His Royal Highness on constitutional law, a few general observations may be made as regards His Royal Highness' approach to the Malaysian Constitution. The first thing which strikes a reader of these opinions is that His Royal Highness had an unrivalled knowledge and understanding of the Federal Constitution. The second feature of these opinions is that, by and large, His Royal Highness exhibited a positivistic judicial attitude towards the Constitution.

In *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, Raja Azlan Shah FJ recognised that “the Constitution is not a mere collection of pious platitudes”, and that:

it is the supreme law of the land embodying three basic concepts: one of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach. The second is the distribution of sovereign power between the States and the Federation ... The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among, the executive, legislative and judicial branches of government, compendiously expressed in modern terms that we are a government of laws not of men.

In one of His Royal Highness' opinions, he adopted and advocated a liberal judicial attitude towards the

Constitution. This is what Raja Azlan Shah Acting LP said in *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29:

In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way—“with less rigidity and more generosity than other Acts”. A constitution is *sui generis*, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation.

Post-script

No meaningful discussion of Malaysian constitutional law can possibly take place without first having regard to the seminal judgment of Raja Azlan Shah FJ in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 in which His Royal Highness expressed an absolute conviction that “we are a government of laws, not of men”. His Royal Highness emphasised that “each country frames its constitution according to its genius and for the good of its own society”, and encouraged the study of other Constitutions “to learn from their experiences, and from a desire to see how their progress and well-being is ensured by their fundamental law”. His Royal Highness was also astutely aware and



appreciative that “a Constitution has to work not only in the environment in which it was drafted but also centuries later”, a need which remains just as true today as it was nearly four decades ago.

Further, His Royal Highness Sultan Azlan Shah displayed a remarkable understanding and sensitivity as to the forms and limits of judicial review, especially the need for the courts to respect the juridical boundaries envisaged by the doctrine of separation of powers, so that the courts would not usurp the role of parliament or encroach onto the province of the executive or legislature. Thus, in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, Raja Azlan Shah FJ observed that criticisms of the wisdom of legislative or government policy should properly be “addressed to the legislature, and not the courts”, for in a democracy the people “have their remedy at the ballot box”.

In *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, His Royal Highness held that matters of succession of a Ruler (including election of Undangs (Ruling Chiefs)) were non-justiciable, as otherwise the courts would be usurping the function of the Dewan (The Council of the Yang di-Pertuan Besar and the Ruling Chiefs) expressed in the Federal Constitution.

Elsewhere, the judgment of Raja Azlan Shah Acting LP in *Phang Chin Hock v Public Prosecutor (No 2)* [1980] 1 MLJ 213 contains a masterful and classic exposition of

the constitutional role, functions and workings of the Conference of Rulers and the Yang di-Pertuan Agong, the highest constitutional offices which His Royal Highness later held and performed with utmost distinction. Of the distinction between the roles of the two constitutional offices of a Ruler and the Yang di-Pertuan Agong, His Royal Highness observed:

In all his functions, the Yang di-Pertuan Agong is not a Ruler within the meaning of a Ruler of a constitutional state of the Federation. When a Ruler becomes the Yang di-Pertuan Agong, he cannot hold at the same time his position of a Ruler but he is required to appoint a Regent. At the Conference of Rulers, the Regent attends as a Ruler, but the Yang di-Pertuan Agong is not entitled to attend as a Ruler and for this reason, he does not attend on the first day when the Rulers exercise the functions set out which lie within their discretion. Law and procedure therefore are matters which cannot come within the honours, etc. of the Rulers.

Where a matter fell squarely within the jurisdiction and competence of the judiciary, His Royal Highness emphatically defended the constitutional role of the judiciary. The most well-known example of this approach can be found in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, where His Royal Highness emphatically stated that the courts are “the only defence of the liberty of the subject against departmental aggression”, and serve as “a most



important safeguard for the ordinary citizen” to ensure that governmental powers are “exercised in accordance with the law”. Similarly, in *Public Prosecutor v Tengku Mahmood Iskandar & Anor* [1973] 1 MLJ 128, His Royal Highness observed that “cases are never tried in police stations, but in open courts to which the public has access. The rack and torture chamber must not be substituted for the witness stand”. His Royal Highness’ unwavering belief in the supremacy of the rule of law arguably found its best expression in the same case, where His Royal Highness pithily observed, “The only superior to be obeyed is the law and no superior is to be obeyed who dares to set himself above the law.”

We may now say with the highest degree of certainty that the authoritative statements of principles by His Royal Highness Sultan Azlan Shah have defined and shaped our understanding of modern Malaysian constitutional law.

COMMERCIAL AND CONTRACT LAW

In certain areas of the law of contract, His Royal Highness made some important decisions which have contributed to the development of the law of contract in Malaysia. His enunciation of certain principles of the law of contract remain authoritative in Malaysia. Similarly, in the sphere of commercial law, the contribution of His Royal Highness is of great significance.

Collateral contract

In *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16, Raja Azlan Shah CJ (Malaya) took a bold step in recognising the existence of collateral contracts in Malaysia. There were no reported cases in Malaysia prior to His Royal Highness' decision in this case where the application of collateral contracts in Malaysia was recognised. It is for this reason that the decision of His Royal Highness in the Federal Court in *Tan Swee Hoe* is significant. His Royal Highness, by relying on certain English cases which had established the existence of collateral contracts, held that such contracts should be recognised under Malaysian law. This is a major contribution by His Royal Highness in that branch of the law of contract in Malaysia dealing with the admissibility of oral evidence to prove the existence of a separate contract which was meant to be collateral to the main contract.

In this case, His Royal Highness demonstrated an astute appreciation and sensitivity for the need for the law to accommodate the needs of ordinary people. His Royal Highness, in rejecting an argument that an oral agreement was not binding on the appellants, pertinently observed:

We do not see how the appellants can escape from the bond of the oral promise which was given and which seems to us to have been given for perfectly good consideration. It may well be asked: why not put the oral promise into the written agreement if it is so important? The short answer is that often people do not behave in this way and the law



should accommodate to the needs of ordinary people and not expect from them the responses of astute businessmen.

In *Bolkiah (His Royal Highness Prince Jefri) and Others v State and Another (No 4)* [2007] UKPC 63, a Privy Council Appeal from Brunei concerning the interpretation of sections 91–92 of the Brunei Evidence Act, which is identical to the Malaysian Evidence Act, the Privy Council referred to the judgment of Raja Azlan Shah CJ (Malaya) in this case. Lord Mance observed:

... the Malaysian Federal Court of Civil Appeal applied the common law authorities to which I have referred and took the same view as I would under the identically worded provisions of ss 91 and 92 of the Malaysian Evidence Act. They are *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16 (where judgment was given by no less than Raja Azlan Shah CJ) and *Tan Chong & Sons Motor Co Sdn Bhd v McKnight* [1983] 1 MLJ 220. Written agreements were in these cases executed on the faith of an inconsistent collateral oral promise and representation, respectively, and ss 91 and 92 were held to be no bar to such promise and representation being proved and relied upon. I would not wish to disagree with these authorities.

Promissory estoppel

The decision of Raja Azlan Shah FJ in the Federal Court case of *Sim Siok Eng v Government of Malaysia* [1978] 1 MLJ 15 is the leading case in Malaysia which establishes the rule

that in certain cases the doctrine of promissory estoppel is applicable against the Government. In fact, in *Cheng Keng Hong v Government of the Federation of Malaya* [1966] 2 MLJ 33, one of the earliest cases decided by His Royal Highness as a High Court Judge, Raja Azlan Shah J similarly held that a letter written by an officer purportedly on behalf of the Chief Architect of the Ministry of Education to a contractor gave rise to an estoppel whereby the then Government of the Federation of Malaya was precluded from disputing the authority of the officer.

Restitutionary remedies

In the context of restitution under section 66 of the Contracts Act 1950 in relation to illegal agreements, the decision of His Royal Highness in the Federal Court case of *Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd* [1980] 1 MLJ 21 is salutary. The detailed analysis of the section by His Lordship in that case is illustrative of his extensive knowledge of the provisions of the Contracts Act. It is also a landmark decision whereby the Federal Court recognised that the defence of illegality expressed by the maxim *ex turpi causa non oritur actio* applied to claims for restitution under section 66 of the Contracts Act.

Illegal contracts

In *Tan Bing Hock v Abu Samah* [1967] 2 MLJ 148, one of the earliest cases to be reported in Malaysia on the validity of



an agreement to assign forest rights under a forest licence, Raja Azlan Shah J held such agreement to be illegal as contravening the Forest Rules (Pahang) 1935. His Lordship categorised such contracts to possess “the notorious badge of the *Ali Baba* form of contracts”, a phrase which ever since has been commonly used to describe a contract whereby an interest or right conferred on a particular person is purportedly assigned or transferred to another who is not entitled to such rights or interest. His Royal Highness in this case also held that even though a contract which is illegal had been executed by both the parties to the contract, it did not prevent the defendant from raising the defence of illegality.

Insurance

In the landmark case of *Boon & Cheah Steel Pipes Sdn Bhd v Asia Insurance Co Ltd & Ors* [1973] 1 MLJ 101, the court had to determine the correct test to establish constructive total loss in marine insurance claims. Raja Azlan Shah J boldly declined to follow the “prudent uninsured owner” test as explained by Lord Abinger CB in *Roux v Salvador* 132 ER 413 at 421 and Vaughan Williams LJ in *Angel v Merchant’s Marine Insurance Company* [1903] 1 KB 811 at 816. His Royal Highness observed:

I cannot subscribe to this view. In determining whether the cargo was a constructive total loss, the true test in the present case where the cargo could be looked at

and the cost of repair estimated, is whether the cost of recovering, reconditioning and forwarding the cargo to the destination would exceed their value on arrival. The “prudent uninsured owner” test must be discarded.

In that case, counsel for the defendant insurer was Michael Mustill QC, later Lord Mustill, who was a leading authority on insurance law in the United Kingdom (Lord Mustill delivered the Sixth Sultan Azlan Shah Law Lecture in 1991 entitled “Negligence in the World of Finance”). This decision of Raja Azlan Shah J is quoted as authority for the principle of law he enunciated in several major textbooks in the Commonwealth on the law of marine insurance. (See for example FD Rose, *Marine Insurance: Law and Practice* (2nd edition) at paras 9.43 and 20.29; John Dunt, *Marine Cargo Insurance* at paras 13.38, 13.41, 13.47.)

Equitable assignments and equitable right to liens

In *Mercantile Bank Ltd v The Official Assignee of the Property of How Han Teh* [1969] 2 MLJ 196, Raja Azlan Shah J took a bold step in recognising a right in equity to a lien which had not complied with the provisions of the National Land Code. At a time when there was much uncertainty as to the application of equitable rules under the Torrens system of registration as embodied in the National Land Code, the views expressed by His Royal Highness in this case were most welcomed in clearing this uncertainty. During the course of the judgment, His Lordship said:



Independent of our land legislation our courts have always recognised equitable and contractual interests in land.

ARBITRATION

Prior to the introduction of the Arbitration Act 2005 (Act 646), the law and practice of arbitration were mainly governed by the Arbitration Act 1952 (Act 93) as well as the common law. His Royal Highness Sultan Azlan Shah delivered authoritative judgments in several landmark decisions dealing with two important areas of arbitration law, namely the challenging of arbitration awards and the stay of court proceedings in favour of arbitration.

Challenging arbitration awards

In the landmark case of *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210, Raja Azlan Shah J laid down the authoritative test to be applied by Malaysian courts in determining whether a court is entitled to interfere with the award of an arbitrator.

In that case, His Royal Highness held that it is essential to keep in mind the distinction between (i) a case where a dispute is referred to an arbitrator in whose decision a question of law becomes material, and (ii) a case in which a specific question of law has been referred to him. In the former case the court may interfere if and when any error

appears on the face of the award, but in the latter case no such interference is possible based on the ground that an erroneous decision had been made on the question of law.

The decision in *Sharikat Pemborong* also authoritatively settled the law on what amounts to “misconduct” by an arbitrator. His Royal Highness clarified that “in the law of arbitration misconduct is used in its technical sense as denoting irregularity and not moral turpitude”. In *The Government of India v Cairn Energy India Pty Ltd & Anor* [2011] 6 MLJ 441, the Federal Court declined to depart from, and re-affirmed the statement of principles by Raja Azlan Shah J in *Sharikat Pemborong*.

Stay of proceedings in favour of arbitration

Elsewhere, on the issue of matters agreed to be referred to arbitration by the parties to a contract, Raja Azlan Shah J in an important judgment in the case of *Alagappa Chettiar v Palanivelpillai & Ors* [1967] 1 MLJ 208 held that persons who seek to stay court proceedings and remit the matter in dispute to arbitration under section 5 of the Arbitration Ordinance 1952 have to satisfy the following conditions:

- (i) that the matters in dispute arose out of the contract between the parties and are matters within the scope of the arbitration agreement;



- (ii) that there is no sufficient reason why the said matters should not be referred to arbitration in accordance with the agreement;
- (iii) that the application was made by a party to the agreement or by some person claiming through or under such a party;
- (iv) that they have not taken any further step in an action beyond entering appearance; and
- (v) that at the time when the action was commenced they were and still remain ready and willing to do all things necessary to the proper conduct of the arbitration.

In *Lan You Timber Co v United General Insurance Co Ltd* [1968] 1 MLJ 181, Raja Azlan Shah J stated the applicable principles in similar terms.

The statement of principles by His Royal Highness in *Alagappa Chettiar* continues to be followed. *Alagappa Chettiar v Palanivelpillai & Ors* was discussed extensively by M Sornarajah (CJ Koh Professor of Law at the National University of Singapore and Tunku Abdul Rahman Professor of Law at the University of Malaya) in an article entitled “Stay of Litigation Pending Arbitration” (6 SACJ 1994, page 61).

In this regard, it is evident that His Royal Highness was acutely aware of the increasing importance of arbitration

as an alternative dispute resolution mechanism, and took great care to formulate the applicable principles in His Royal Highness' customary clear and lucid manner.

CRIMINAL LAW

As a judge His Royal Highness Sultan Azlan Shah decided a number of criminal cases and as usual His Royal Highness expressed with clarity and felicity the principles of law applicable. Many of the cases touch not only on questions of criminal procedure and evidence, but also substantive law. For example in *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174, light was shed on the distinction between murder and culpable homicide not amounting to murder; in *Sathiadas v Public Prosecutor* [1970] 2 MLJ 241, Raja Azlan Shah J dealt with the ingredients of the offence of criminal breach of trust; and in *Chandrasekaran & Ors v Public Prosecutor* [1971] 1 MLJ 153, Raja Azlan Shah J dealt with the ingredients of a conspiracy.

Sedition

In *Public Prosecutor v Ooi Kee Saik & Ors* [1971] 2 MLJ 108, Raja Azlan Shah J dealt with the law of sedition and provided valuable guidance on the interpretation of the Sedition Act 1948. His Lordship said:

In interpreting the Sedition Act 1948, I have been urged by Sir Dingle Foot to follow the common law principles



of sedition in England. In England it can now be taken as established that in order to constitute sedition the words complained of are themselves of such a nature as to be likely to incite violence, tumult or public disorder. I can find no justification for this contention. The opinion of the Judicial Committee of the Privy Council in *Wallace-Johnson v The King* demonstrated the need to apply our own sedition law although there is close resemblance at some points between the terms of our sedition law and the statement of the English law of sedition.

Raja Azlan Shah J then added:

Although it is well to say that our sedition law had its source, if not its equivalent from English soil, its waters had, since its inception in 1948, flowed in different streams. I do not think it necessary to consider the matter in great detail because I have been compelled to come to the conclusion that it is impossible to spell out any requirement of intention to incite violence, tumult or public disorder to constitute sedition under the Sedition Act. The words of subsection (3) of section 3 of our Sedition Act and the subject-matter with which it deals repel any suggestion that such intention is an essential ingredient of the offence.

During the course of his judgment in *Public Prosecutor v Ooi Kee Saik & Ors* [1971] 2 MLJ 108, His Lordship made the following observation on freedom of expression:

It is of course true, as a general statement, that the greatest latitude must be given to freedom of expression. It would also seem to be true, as a general statement, that free and frank political discussion and criticism of government policies cannot be developed in an atmosphere of surveillance and constraint. But as far as I am aware, no constitutional state has seriously attempted to translate the *right* into an absolute right. Restrictions are a necessary part of the *right* and in many countries of the world freedom of speech and expression is, in spite of formal safeguards, seriously restricted in practice.

After a detailed study of the position as to freedom of speech in India, United States and England, His Lordship observed:

My purpose in citing these cases is to illustrate the trend to which freedom of expression in the constitutional states tends to be viewed in strictly pragmatic terms. We must resist the tendency to regard right to freedom of speech as self-subsistent or absolute. The right to freedom of speech is simply the right which everyone has to say, write or publish what he pleases so long as he does not commit a breach of the law. If he says or publishes anything expressive of a seditious tendency he is guilty of sedition. The Government has a right to preserve public peace and order, and therefore, has a good right to prohibit the propagation of opinions which have a seditious tendency. Any government which acts against sedition has to meet the criticism that it is seeking to protect itself and to keep itself in power.



Raja Azlan Shah J then pointed out:

Whether such criticism is justified or not, is, in our system of Government, a matter upon which, in my opinion, Parliament and the people, and not the courts, should pass judgment. Therefore, a meaningful understanding of the right to freedom of speech under the Constitution must be based on the realities of our contemporary society in Malaysia by striking a balance of the individual interest against the general security or the general morals, or the existing political and cultural institutions. ...

A line must therefore be drawn between the right to freedom of speech and sedition. In this country the court draws the line.

Possession of obscene publication

In *KS Roberts v Public Prosecutor* [1970] 2 MLJ 137, Raja Azlan Shah J made some of his characteristic remarks in dealing with a case of possession of an obscene publication. One of the grounds of appeal was that the publication was an approved publication by the Government and therefore not an obscene publication. Raja Azlan Shah J said:

I think there is a fallacy in the argument. In my view the word *approved* strong as it is, cannot be read without any qualification. It does not mean *extra legem*. We boast of being a free democratic country but that does not mean

that we are not subject to law. The impugned article is clearly obscene and a publication is an obscene publication even if only part of it is obscene.

Voluntarily causing hurt

In *Public Prosecutor v Tengku Mahmood Iskandar & Anor* [1973] 1 MLJ 128, Raja Azlan Shah J dealt with the offence of voluntarily causing hurt. The learned President of the Sessions Court in that case, after finding the accused guilty, had made an order binding over the accused under section 173A of the Criminal Procedure Code having taken into consideration the fact the accused was a prince of the Royal House of Johore. The Public Prosecutor appealed. Raja Azlan Shah J began his judgment by saying:

Today it is not so much the respondents who are on trial but justice itself. How much justice is justice? If the courts strive to maintain a fair balance between the two scales, that is, the interest of the accused person and the interest of the community, then I must say justice is just. The aim of justice must be balance and fairness. No tenderness for the offender can be allowed to obscure that aim. The concept of fairness must not be strained till it is narrowed to a filament.

Later in his judgment, Raja Azlan Shah J said that the learned President in making the order had thereby conflicted with Article 8 of the Constitution which says that all persons are equal before the law. He added:



That implies that there is only one kind of law in this country to which all citizens are amenable. With us, every citizen irrespective of his official or social status is under the same responsibility for every act done without legal justification. This equality of all in the eyes of the law minimizes tyranny.

ADMINISTRATION OF CRIMINAL JUSTICE

His Royal Highness Sultan Azlan Shah's foremost case on the administration of criminal justice was on the trial process in the case of *Ragunathan v Pendakwa Raya* [1982] 1 MLJ 139, where His Royal Highness adopted the decision of the Privy Council in *Haw Tua Tau v Public Prosecutor* [1981] 2 MLJ 49, and in the process changed the law in Malaysia with regard to the duty of the presiding judicial officer at the end of the prosecution case. He must be satisfied that a *prima facie* case is proved and *prima facie* now means all essential elements of the offence charged are proved, the facts being not inherently incredible.

PRACTICE AND PROCEDURE

His Royal Highness Sultan Azlan Shah had more than an ample share of procedural cases for his consideration during his years as Judge, Federal Court Judge, Chief Justice and Lord President. His Royal Highness' contribution to the development of our case law on civil procedure is significant and immense.

History will probably give the most prominent place to His Royal Highness' decision in *Zainal Abidin v Century Hotel* [1982] 1 MLJ 260. This case saw the dramatic entrance of the *Mareva* injunction into our jurisdiction. But the contributions of this former illustrious member of the Malaysian judiciary embraces almost all aspects of procedure from such preliminary issues as limitation to the final matters of appeal and execution. Each case is an example of His Royal Highness' clarity of expression and his wide and sound understanding of civil procedure.

In the area of limitation and the pleading of an acknowledgment His Royal Highness' decision in *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10 was adopted and applied by the Privy Council in *Oversea-Chinese Banking Corporation Ltd v Philip Wee Kee Puan* [1984] 2 MLJ 1.

Pleadings

His Royal Highness' judgments display a liberal approach to the interpretation of the rules of court and practice. His Royal Highness was not one for permitting technical points to deny justice to a party. In *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10, His Royal Highness in delivering the judgment of the Federal Court said:

As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. To condemn a party on



a ground of which no material facts have been pleaded may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.

By this His Royal Highness must not be assumed to be indifferent to instances of non-compliance with procedure. His firm attitude for compliance of settled procedure is evident from many of His Royal Highness' cases. In *The Chartered Bank v Yong Chan* [1974] 1 MLJ 157, Raja Azlan Shah FJ said:

If we are to maintain a high standard in our trial system, it is indubitably not to treat reliance upon forms of pleading as pedantry or mere formalism.

Mareva injunction

Zainal Abidin bin Haji Abdul Rahman v Century Hotel Sdn Bhd [1982] 1 MLJ 260 indicates His Royal Highness' bold stand over the need to incorporate modern trends and ideas into our law. His Royal Highness in delivering the judgment of the Federal Court said:

In this country we encourage greater foreign participation and investment in development projects. In such a situation where foreign businessmen including foreign multinational corporations have injected large sums of

money and have substantial assets in this country, it would be a potential vehicle of injustice if the plaintiff is denied the facilities afforded by a *Mareva* injunction against the foreign defaulter who may try to dissipate his funds and assets in this country. It is significant that in other jurisdictions the *Mareva* principle has been adopted. The existence of the *Mareva* jurisdiction had been affirmed in New Zealand and Australia, except New South Wales (see *Hunt v BP Exploration Company (Libya) Ltd*). In Singapore, the existence of the jurisdiction has been acknowledged, although there is as yet no judicial pronouncement upon it (see [1981] 2 MLJ cvii). We have a good deal of commercial activity involving foreign parties and the application of the *Mareva* doctrine is likely to play an important role. It is an extremely useful addition to the judicial armoury and is clearly capable of general application.

Contempt of court

His Royal Highness' emphasis on adherence to the rules of natural justice can be seen in his caution in several cases that the courts should be very reluctant to invoke their power to summarily commit persons for contempt of court. This was because, as Raja Azlan Shah Acting LP observed in *Jaginder Singh & Ors v Attorney-General* [1983] 1 MLJ 71,

... the summary contempt procedure more often involves a denial of many of the principles of natural justice,



requiring, as it did in this case, that the judge should not only be both prosecutor and adjudicator, but should also have been witness to the matters to be adjudicated upon.

Similarly, in *Karam Singh v Public Prosecutor* [1975] 1 MLJ 229, Raja Azlan Shah FJ observed:

The power [to summarily commit a person for contempt of court] is both salutary and dangerous. ... it should be used reluctantly but fearlessly when and only when it is necessary to prevent justice from being obstructed or undermined. That is not because judges, witnesses and counsel who are officers of the court, take themselves seriously, but because justice, whose servants we all are, must be taken seriously in a civilized society if the rule of law is to be maintained.

EVIDENCE

His Royal Highness left an indelible mark in the law of evidence, one of the most important branches of law and practice.

Extrinsic evidence

In the landmark decision of *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16, Raja Azlan Shah CJ (Malaya) held that notwithstanding the provisions of sections 91

and 92 of the Evidence Act which provide that extrinsic evidence is generally inadmissible to vary or qualify the terms of a written contract, the law recognised that a collateral agreement can exist side by side with the main agreement which it contradicts, which was not precluded by sections 91 and 92 of the Act. As we have seen above, this case is also a landmark decision in the law of contract. This landmark decision of His Royal Highness was followed by the Privy Council in *Bolkiah (His Royal Highness Prince Jefri) and Others v State and Another (No 4)* [2007] UKPC 63.

Assessing credibility of witnesses

One of His Royal Highness' most important contributions to the law of evidence can be seen in his seminal judgment in *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15, where Raja Azlan Shah FJ laid down an authoritative statement of principle on the correct approach to be adopted by the courts in assessing the credibility of witnesses and accepting or rejecting their evidence. His Royal Highness observed as follows:

The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the



other. It is, therefore, necessary to scrutinize each evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances.

Expert evidence

In *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212, Raja Azlan Shah CJ (Malaya) in an important judgment highlighted the proper approach to be adopted by the courts in dealing with expert opinions. His Royal Highness opined:

Our system of jurisprudence does not generally speaking, remit the determination of dispute to experts. Some questions are left to the robust good sense of a jury. Others are resolved by the conventional wisdom of a judge sitting alone. In the course of elucidating disputed questions, aids in the form of expert opinions are in appropriate cases placed before juries or judges. But, except on purely scientific issues, expert evidence is to be used by the court for the purpose of assisting rather than compelling the formulation of the ultimate judgments. In the ultimate analysis it is the tribunal of fact, whether it be a judge or jury, which is required to weigh all the evidence and determine the probabilities. It cannot transfer this task to the expert witness, the court must come to its own opinion.

LABOUR LAW

The judgments of His Royal Highness Sultan Azlan Shah on labour law reflect a keen understanding of the competing legal rights of management and labour. The judgments have touched on many points relating to labour law, but it is in the field of industrial disputes that His Royal Highness' judgments have left an indelible mark.

Industrial Relations Act

In several judgments His Royal Highness lucidly expounded the legislative rationale behind the introduction of the Act. In *Non-Metallic Mineral Products Manufacturing Employees Union & Ors v South East Asia Fire Bricks Sdn Bhd* [1976] 2 MLJ 67, Raja Azlan Shah FJ explained it thus:

The Act is intended to be a self-contained one. It seeks to achieve social justice on the basis of collective bargaining, conciliation and arbitration. Awards are given in circumstances peculiar to each dispute and the Industrial Court is to a large extent free from the restrictions and technical considerations imposed on ordinary courts.



Remedies of a dismissed worker

In *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors* [1981] 1 MLJ 238, Raja Azlan Shah CJ (Malaya) gave an exegesis on the essential distinction in the remedies available to a dismissed worker at common law and under the Act. It has now become a classic with students and lawyers alike on the question. It deserves full reproduction:

In the case of a claim for wrongful dismissal, a workman may bring an action for damages at common law. This is the usual remedy for breach of contract, for example, a summary dismissal where the workman has not committed misconduct. The rewards, however, are rather meagre because in practice the damages are limited to the pay which would have been earned by the workman had the proper period of notice been given ... At common law it is not possible for a wrongfully dismissed workman to obtain an order for reinstatement because the common law knew only one remedy, viz, an award of damages. Further, the courts will not normally “reinstatement” a workman who has been wrongfully dismissed by granting a declaration that his dismissal was invalid: see *Vine v National Dock Labour Board*; *Francis v Municipal Councillors of Kuala Lumpur*. At the most it will declare that it was wrongful. However his common law right has been profoundly affected in this country by the system of industrial awards enacted in the Industrial Relations Act 1967. The wrongfully dismissed workman can now look to the remedies provided by the arbitration system. He can now look to the authorities or his union to prosecute the employer

and force the latter to reinstate him. Reinstatement, a statutorily recognized form of specific performance, has become a normal remedy and this coupled with a full refund of his wages could certainly far exceed the meagre damages normally granted at common law. The speedy and effective resolution of disputes or differences is clearly seen to be in the national interest, but it is also apparent that any attempt to impose a legal obligation without a prior exploration for a voluntary conciliation could aggravate rather than solve the problem. To this end the Director General is empowered by section 20 of the Act to offer assistance to the parties to the dispute to expedite a settlement by means of conciliatory meetings.

A consistent feature of the His Royal Highness' judgments on labour law have been their expository character, particularly on those parts of the Act that had hitherto bedevilled labour lawyers. In *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129, Raja Azlan Shah CJ (Malaya) gave quietus to the long debate whether there still existed under the new regime of the Act the distinction between contractual termination of employment and dismissal.

Discretion of Minister

In another case, *National Union of Hotel, Bar & Restaurant Workers v Minister of Labour and Manpower* [1980] 2 MLJ 189, Raja Azlan Shah CJ (Malaya) dealt with the equally vexed problem of the jurisdiction of the Minister of Labour



to refer disputes to the Industrial Court and the extent to which that discretion is subject to judicial review by the High Court. His Lordship was not content merely to rely on the *Wednesbury* principle propounded by Lord Greene MR on the discretionary power of public officials, or its later enunciation in *Secretary of State for Education and Science v Metropolitan Borough of Tameside* [1976] 3 All ER 665, but sought to relate the principle contextually to the discretionary power envisaged under the Act:

He is an elected Minister and is entitled to have his opinion of industrial problems within the area of his responsibility respected. In controversial matters such as are involved in industrial relations there is room for differences of opinion as to what is expedient.

Earlier in the judgment Raja Azlan Shah CJ (Malaya) had, however, made it clear that the Minister did not exercise an unfettered discretion and that his decision was open to challenge if he had misconstrued the Act or exercised his powers in a way as to defeat the policy and object of the Act.

Trade union

A survey of Malaysian labour cases reveals that organised labour had its best judicial spokesman in His Royal Highness Sultan Azlan Shah. Of these, *Non-Metallic Mineral Products Manufacturing Employees Union & Ors v South East Asia Fire Bricks Sdn Bhd* [1976] 2 MLJ 67 was hailed as a “labour charter” by trade unions soon after its decision.


The *South East Asia Fire Bricks* case was a landmark decision for legitimate trade union activity. His Royal Highness put the point beyond peradventure that a trade union could engage in lawful strike and in consequence its members would not jeopardise their contracts of employment. His Royal Highness took the opportunity to declare:

Workers organisations cannot exist if workers are not free to join them, to work for them, and to remain in them. This is a fundamental right which is enshrined in our Constitution and which expresses the aspiration of workmen. It is declaratory of present day industrial relations that management should encourage workmen to join a union and to play an active part in its work, but this is restricted to the activities of a registered trade union, such as the freedom to strike. “The right of workmen to strike is an essential element in the principle of collective bargaining” per Lord Wright in *Crofter Hand Woven Harris Tweed Co Ltd v Veitch & Anor* [1942] AC 435, 463. That is a truism. There can be no equilibrium in industrial relations today without the freedom to strike. If workers could not, in the last resort, collectively withhold their labour, they could not bargain collectively.

His Lordship was careful to enter the caveat that his declaration of trade union rights was confined to the activities of a registered trade union only. Later in the judgment he cautioned that strike action must be for a lawful purpose. It was typical of the balanced view that



His Royal Highness Sultan Azlan Shah took on the vexed problems posed by industrial conflict.

His Royal Highness' definitive pronouncements in this regard helped to shape the growth of a proper body of industrial law under the new regime of the Act. 

Editor's note

Freely adapted from *Judgments of His Royal Highness Sultan Azlan Shah with Commentary* (Professional Law Books Publishers, Kuala Lumpur, 1986), edited by Professor Dato' Dr Visu Sinnadurai, from chapter entitled "Contributions of HRH Sultan Azlan Shah to the Development of Malaysian Law". The contributors of the original version on the various fields of law were the then academics from the Faculty of Law, University of Malaya.

Due to space constraints, the present revised version includes adaptations of the commentaries on Criminal Law by Professor Tan Sri Ahmad Ibrahim (former Dean of Faculty of Law, University of Malaya, later Dean of the Kulliyah of Laws, International Islamic University of Malaysia); Administration of Criminal Justice by Associate Professor Mimi Kamariah Majid (later Professor Dato' Dr, former Dean of Faculty of Law, University of Malaya, author of *Criminal Procedure in Malaysia*); Administrative Law and Constitutional Law by Professor MP Jain (author of *Administrative Law in Malaysia and Singapore*); and Practice and Procedure by Associate Professor P Balan, (later Professor Dato', former Dean of Faculty of Law, University of Malaya).


Other original contributors whose adapted commentaries are included in this revised version are: Professor Dato' Dr Visu Sinnadurai (former Dean of Faculty of Law, University of Malaya); Associate Professor Teo Keang Sood (now Professor at National University of Singapore, co-author of *Land Law in Malaysia: Cases and Commentary*); and Cyrus V Das (now Dato' Dr, External Examiner, Faculty of Law, University of Malaya).

This revised version contains a Post Script on Constitutional Law by Low Weng Tchung, and new materials on other fields of law.

“The decision to
abolish appeals to the
Yang di-Pertuan Agong
comes within the matters
which the Rulers may
deliberate upon,
subject to the condition
that their deliberations
are in accordance with
the advice of their Executive Councils
and in the company of the
Yang di-Pertua-Yang di-Pertua Negeri
and the Yang di-Pertuan Agong.
But the Rulers
take no decision
in the matter.”

per Raja Azlan Shah Acting LP
Phang Chin Hock v Public Prosecutor (No 2)
[1980] 1 MLJ 213, Federal Court






“ The consultative functions of
the Conference in clause (5)
is limited to administrative
action under Article 153
[of the Constitution]
i.e. to matters affecting
the special position,
in West Malaysia,
of the Malays.

But in their deliberative functions, the Rulers may range over any field since clause (2) refers to questions of national policy and any other matter the Conference thinks fit. When they come to these functions, the practice has developed, they sit on the second day of the Conference and they are then attended by the Yang di-Pertuan Agong who shall be accompanied by the Prime Minister. In their deliberations, the clause specifically provides that not only the Rulers and the Yang di-Pertua-Yang di-Pertua Negeri but also the Yang di-Pertuan Agong shall act in accordance with the advice of the respective Executive Councils and Cabinet respectively. Necessarily in these matters, the Rulers make no decisions.

”



In all his functions,
the Yang di-Pertuan Agong
is not a Ruler within
the meaning of
a Ruler of a constitutional
state of the Federation.

When a Ruler becomes the
Yang di-Pertuan Agong,
he cannot hold at the same time
his position of a Ruler but he is
required to appoint a Regent.
At the Conference of Rulers,
the Regent attends as a Ruler,
but the Yang di-Pertuan Agong is not
entitled to attend as a Ruler
and for this reason,
he does not attend on the first day
when the Rulers exercise the functions
set out which lie within their discretion.
Law and procedure therefore are
matters which cannot come
within the honours, etc. of the Rulers.

per Raja Azlan Shah Acting LP

Phang Chin Hock v Public Prosecutor (No 2)

[1980] 1 MLJ 213, Federal Court