THE RECEPTION AND APPLICATION OF ENGLISH LAW IN MALAYSIA

by

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Introduction

The Civil Law Act 1956 (Revised 1972) provides for the application of English law in Malaysia on different cut-off dates for West Malaysia, Sabah and Sarawak respectively. In 1971, the Civil Law Ordinance 1956 which was only applicable in West Malaysia was extended to Sabah and Sarawak vide the Civil Law (Extension) Order 1971. Despite this, Sabah and Sarawak still have their own respective legislation on the application of English law i.e. the Application of Laws Ordinance 1951 in Sabah and the Application of Laws Ordinance 1949 in Sarawak. This article traces the roots, and (not so) humble beginnings of the provisions dealing with the application of English law in Malaysia in the Civil Law Act 1956, the differences in its application between East and West Malaysia, and whether the Application of Laws Ordinances in East Malaysia are still relevant or have been rendered redundant by the revision of the Civil Law Act 1956 in 1972.

The Reception of English Law into Malaysia
(i) Malaya

The British first introduced English law to Penang through the First Charter of Justice in 1807.[1] Before that, following the founding of Penang, the main preoccupation of the British administrators was the maintenance of some form of order. Before the Charter of Justice of 1807, there was already in place in Malaya a system of courts and judges, but the justice they administered was not in accordance with the rules of English law. In petty civil cases, justice was administered among the various native populations by the headmen or captains (as they were called) of their own villages.[2] The decisions of these headmen or captains were subject to an appeal to a European gentleman who acted as Magistrate.[3] This Magistrate himself tried the more important civil cases in the first instance.[4]

When in 1800 instructions for the administration of justice were at last issued, they prescribed that the law for Penang was to be “the law of the different peoples and tribes of which the inhabitants consist, tempered by such parts of the British law as are of universal application”.[5] When the first Judge arrived, he concluded that there was no law except the law of nature. It was to put an end to this period of legal chaos that the Charter of Justice of 1807 was granted.[6] To give effect to the Charter, local customs and laws were allowed to continue but with such portions of the English law as were considered just and expedient.[7] The Charter established a ‘Court of Judicature of Prince of Wales’ Island’ which had the jurisdiction and powers of the Superior Courts in England “so far as circumstances will admit”[8] in civil, criminal and ecclesiastical
matters. In essence, it had the effect of introducing English law to Penang with the necessary modifications.

When the Straits Settlements comprising of Penang, Malacca and Singapore was established, the Second Charter of Justice was introduced in 1826. The crux of the Second Charter was the reiteration of the contents of the First Charter of Justice, and the extension of its application to Malacca and Singapore. It had the effect of introducing English law in the Straits Settlements as it existed in England on 27 November 1826. In 1855, the Third Charter of Justice was introduced, essentially to restructure the court system whereby the court was split into two divisions, one for Penang and one for Malacca and Singapore.

The Civil Law Ordinance 1878 empowered the Supreme Court of the Straits Settlements to administer English common law and equity in the Straits Settlements. This Ordinance was replaced with the Civil Law Ordinance of 1909 and later re-enacted as the Civil Law Ordinance (Chap. 42 of the 1936 Revised Edition).

The appointment of British Residents in each of the Federated Malay States led to the informal reception of English law in those states. In 1937, the Federated Malay States were the first to accept English law on a voluntary basis by passing the Civil Law Enactment 1937 which provided for the application of English law and equity where no other provision had been made or might thereafter be made. The 1937 Enactment did not really effect any great change to the de facto situation but merely gave statutory endorsement to the courts to do what they had already been doing long before the passing of the legislation. The 1937
Enactment essentially introduced English common law and equity into the Federated Malay States, subject to such qualifications as local circumstances render necessary. Similar to the Federated Malay States, the appointment of British Advisors in each of the Unfederated Malay States also led to the informal reception of English law in those states. Officially, the Unfederated Malay States became part of the Federation of Malaya in 1948. In 1951, the Civil Law Enactment of 1937 which was applied only to the Federated Malay States, was extended to the Unfederated Malay States when the Federation of Malaya Civil Law (Extension) Ordinance 1951 was passed into law. By then, English law was officially applied in the whole of Malaya. In 1956, the Civil Law Ordinance 1956 was passed to formally receive the whole of the common law of England and of equity into the Federation of Malaya (including Penang and Malacca), subject to such qualifications as local circumstances rendered necessary. In this way, English law became the law of Malaya.

(ii) Sabah and Sarawak

The administration of justice in Sarawak in the early colonial days was relatively informal, combining tenets of the English system of justice familiar to the Rajah, and native customs. The formal reception of English law into Sarawak took place in 1928 through the Law of Sarawak Order which provided the statutory authority on the source of law to be applied by the courts. The written law of Sarawak was derived to a large extent from legislation in force in Singapore and the Federation, and therefore indirectly from the written law in India and the United
The laws in Sarawak in the early days took the form of orders issued by the Rajah, examples of which are the *Courts Order 1922*, the *Interpretation Order 1933 and Order L-4 (Laws of Sarawak) 1928*. *Order L-4* provided for a general rule that English law would apply in the absence of specific legislation. In 1949, the *Application of Laws Ordinance in Sarawak* was passed to further expand and clarify the application of English law. This provided that the common law of England and the doctrines of equity, together with statutes of general application as administered or in force in England at the commencement of the Ordinance, shall be the law in force in Sarawak, in so far as the circumstances of Sarawak and its inhabitants permit and subject to such qualifications as local circumstances and native customs render necessary. Sarawak also had an additional provision for Acts of Parliament of the United Kingdom specified in the Schedule to the Ordinance to be in force in Sarawak.

Similar to Sarawak, the written law of Sabah was derived to a large extent from legislation in force in Singapore and the Federation and therefore indirectly from the written law in India and the United Kingdom. In 1938, the *Civil Law Ordinance* was passed, formally acknowledging the reception of English law into Sabah “having regard to native customs and local conditions”. In 1951, the *Application of Laws Ordinance* was passed to further clarify and expand the application of English law in Sabah. The *1951 Ordinance* provided that the common law of England and the doctrines of equity, together with statutes of general application as administered or in force in England at the
commencement of the Ordinance, shall be the law in force in Sabah, in so far as the circumstances of Sabah and its inhabitants permit and subject to such qualifications as local circumstances and native customs render necessary.[31]

(iii) Summary

In 1963 when Malaysia was formed, there were altogether three different statutes which recognized the application of English law in Malaysia, i.e. the Civil Law Ordinance 1956 in West Malaysia, the Application of Laws Ordinance 1949 in Sarawak and the Application of Laws Ordinance 1951 in Sabah. Soon after the formation of Malaysia, the Civil Law Ordinance 1956 was extended to Sabah and Sarawak through the Civil Law Ordinance (Extension) Order 1971. Hence, all three statutes were amalgamated into one single statute called the Civil Law Act 1956 (Revised 1972), which has since applied to the whole of Malaysia although differences still remain between the legislation in West and East Malaysia. A summary of the chronology of the legislation introducing English law into Malaysia is provided in Table 1 below:

**Table 1**

<table>
<thead>
<tr>
<th>Year</th>
<th>Legislation</th>
<th>Purpose</th>
</tr>
</thead>
<tbody>
<tr>
<td>1807</td>
<td>First Charter of Justice</td>
<td>Statutory authority for introduction of English law into Penang</td>
</tr>
<tr>
<td>1826</td>
<td>Second Charter</td>
<td>Statutory authority for introduction of</td>
</tr>
<tr>
<td>Year</td>
<td>Legislation</td>
<td>Description</td>
</tr>
<tr>
<td>------</td>
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</tr>
<tr>
<td>1855</td>
<td>Third Charter of Justice</td>
<td>Restructuring of court system in Straits Settlement</td>
</tr>
<tr>
<td>1878</td>
<td>Civil Law Ordinance</td>
<td>Empowered the Supreme Court of the Straits Settlements to administer English law in the Straits Settlements</td>
</tr>
<tr>
<td>1909</td>
<td>Civil Law Ordinance</td>
<td>Replaced Civil Law Ordinance of 1878</td>
</tr>
<tr>
<td>1928</td>
<td>Law of Sarawak Ordinance or Order L-4</td>
<td>Statutory authority for introduction of English law into Sarawak</td>
</tr>
<tr>
<td>1937</td>
<td>Civil Law Enactment (1937 FMS No 3)</td>
<td>Statutory authority for introduction of English law into the Federated Malay States</td>
</tr>
<tr>
<td>1938</td>
<td>Civil Law Ordinance 1938</td>
<td>Statutory authority for introduction of English law into Sabah</td>
</tr>
<tr>
<td>1949</td>
<td>Application of Laws Ordinance 1949</td>
<td>Statutory authority for introduction of English common law, equity and statutes of general application into Sarawak</td>
</tr>
</tbody>
</table>
1951  | Application of Laws Ordinance 1951 | Statutory authority for introduction of English common law, equity and statutes of general application into Sabah

1951  | Civil Law (Extension) Ordinance 1951 | Extended the Civil Law Enactment of 1937 (applicable only to the Federated Malay States) to the Unfederated Malay States

1956  | Civil Law Ordinance 1956 | The application of English law for the whole of the Federation of Malaya (including Penang and Malacca)

1972  | Civil Law Act 1956 (Revised 1972) | The application of English law for the whole of Malaysia (including Sabah and Sarawak)

THE APPLICATION OF ENGLISH LAW IN MALAYSIA

As mentioned earlier, the Malayan _Civil Law Ordinance 1956_ was extended to Sabah and Sarawak by the _Civil Law Ordinance (Extension) Order 1971_ which came into force on 1 April 1972. However, the statutes in Sabah and Sarawak which allowed for the application of English law in those States still continue to be in force. A summary of the different legislations in force in West Malaysia, Sabah and Sarawak on the application of English law is provided in Table 2 below:
Table 2

<table>
<thead>
<tr>
<th>Subject matter</th>
<th>West Malaysia</th>
<th>Sabah</th>
<th>Sarawak</th>
</tr>
</thead>
</table>

Section 3(1) of the Civil Law Ordinance 1956 provides that the Court shall apply the common law in England and the rules of equity, as administered in England at the date of coming into force of the Ordinance i.e. 7 April 1956, subject to local circumstances. This has been interpreted to mean that English statutes are excluded from application in the Federation of Malaya.<sup>[33]</sup> Whereas the Application of Laws Ordinance 1949 in Sarawak and the Application of Laws Ordinance 1951 in Sabah have wider provisions for the application of English law. Section 2 of both statutes provide that the common law of England, the doctrines of equity together with statutes of general application as administered in England at the commencement of the statutes (i.e. 1 December 1951 for Sabah and 12 December 1949 for Sarawak), shall be in force in Sabah and Sarawak respectively subject to such qualifications as local circumstances and native customs render necessary. Hence, unlike West Malaysia, English statutes of general application applied to East Malaysia.<sup>[34]</sup> With the extension of the Malayan Civil Law Ordinance 1956 to East Malaysia, the Application of Laws Ordinances in Sabah and Sarawak were replaced in so far as they related to any matter in the
Federal list of subjects.\textsuperscript{[35]} Most of the provisions of the Application of Laws Ordinances in Sabah and Sarawak have already been included in the Civil Law Act 1956 as revised in 1972. This includes the application of common law, equity and statutes of general application, subject to local circumstances, as administered or in force in England on 1 December 1951 in Sabah\textsuperscript{[36]} and as administered or in force in England on 12 December 1949 in Sarawak.\textsuperscript{[37]}

For Sabah, Section 3(1) of the Application of Laws Ordinance 1951 provides that proceedings by way of habeas corpus, mandamus, prohibition, certiorari or injunction restraining any person who acts in an office in which he is not entitled to act shall be available to Sabah to the same extent as in England. Sections 3(2) and (3) of the Application of Laws Ordinance 1951 provides that the jurisdiction and procedure for the proceedings stated in Section 3(1) are to follow the Queen’s Bench Division in England. Section 3(1) of the Application of Laws Ordinance 1951 is provided for in Section 3(3)(i) of the Civil Law Act 1956, but Sections 3(2) and (3) of the Application of Laws Ordinance 1951 are not included in the Civil Law Act 1956. However, regard must be given to the Courts of Judicature Act 1964 which governs all superior courts i.e. the Federal Court, Court of Appeal and the High Courts (including the High Court in Sabah and Sarawak). Paragraph 1 of the Schedule to the Courts of Judicature Act 1964 deals with prerogative writs, and empowers the Courts to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any others, for the enforcement of the
rights conferred by *Part II of the Federal Constitution*[^38] or any of them, or for any purpose. Furthermore, *Section 4 of the Courts of Judicature Act 1964* provides that in the event of an inconsistency or conflict between the *Courts of Judicature Act 1964* and any other written law other than the Federal Constitution, the provisions of the *Courts of Judicature Act 1964* shall prevail. The practice, procedure and rules of court governing the issuance of prerogative writs is provided for in *Order 53 of the Rules of Court 2012*, which also applies throughout Malaysia. Therefore, the provisions of the *Application of Laws Ordinance 1951* in Sabah has been adequately provided for in the *Civil Law Act 1956*, the *Courts of Judicature Act 1964* and the *Rules of Court 2012*.

For Sarawak, *Section 3 of the Application of Laws Ordinance 1949* provides that the Acts of Parliament of the United Kingdom as specified in the Schedule to the Ordinance shall, to the extent specified in the Schedule, be in force in Sarawak as from the date specified in the Schedule, subject to alterations and amendments necessary for the circumstances of Sarawak and in particular, subject to modifications set forth in the Schedule. *Section 4 of the Application of Laws Ordinance 1949* states that the Council Negeri may, by resolution, amend the Schedule and may add thereto any Act of the Parliament of the United Kingdom whether enacted before or after 12 December 1949. Both *Sections 3 and 4 of the Application of Laws Ordinance 1949* have been specifically provided for in *Section 3(3)(ii) of the Civil Law Act 1956*. The *Second Schedule to the Civil Law Act 1956* sets out the list of Acts of Parliament of the United Kingdom that continue to apply in Sarawak,
to the extent as stipulated in the second column, and subject to the modifications stipulated in the third column.\[39\]

The summary of the provisions of the Application of Laws Ordinance 1951 in Sabah and the Application of Laws Ordinance 1949 in Sarawak which have already been included in the Civil Law Act 1956, are set out in Table 3 below:

Table 3

<table>
<thead>
<tr>
<th>Civil Law Act 1956 (Revised 1972)</th>
<th>Application of Laws Ordinance 1951 (Sabah)</th>
<th>Application of Laws Ordinance 1949 (Sarawak)</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Section 3(1)(a)</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Common law and equity administered in England on 7 April 1956 applicable in West Malaysia subject to local circumstances</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>• Section 3(1)(b)</td>
<td>• Section 2</td>
<td>-</td>
</tr>
<tr>
<td>Common law, equity and statutes of general application in England on 1 December 1951 applicable in Sabah subject to local circumstances</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>• Section 3(1)(c)</td>
<td>-</td>
<td>• Section 2</td>
</tr>
<tr>
<td>-------------------</td>
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<td>-------------------</td>
</tr>
<tr>
<td>Common law, equity and statutes of general application in England on 12 December 1949 applicable in Sarawak subject to local circumstances</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>• Section 3(3)(i)</th>
<th>• Section 3(1)</th>
<th>-</th>
</tr>
</thead>
<tbody>
<tr>
<td>Proceedings by way of habeas corpus, mandamus, prohibition, certiorari or injunction shall be available to Sabah to the same extent as in England</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>• Section 3(2) and (3)</th>
<th>-</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Jurisdiction and procedure for proceedings stated in Section 3(1) to follow Queen’s Bench Division in England</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Nothing in the Civil Law Act 1956.

But see:

- Section 4 and Paragraph 1 of the Schedule to the Courts of Judicature Act 1964

- Order 53 of the Rules of
In conclusion, since the provisions of the *Application of Laws Ordinance 1951* in Sabah have been adequately provided for in the *Civil Law Act 1956*, the *Courts of Judicature Act 1964* and the *Rules of Court 2012*, and the provisions of the *Application of Laws Ordinance 1949* in Sarawak have been adequately provided for in the *Civil Law Act 1956*, it is submitted that the *Application of Laws Ordinances* in Sabah and Sarawak have already been impliedly repealed and are therefore redundant. It has been said that the definition of law must include efficacy of the law. “Efficacy, however, is relevant only insofar as it affects the practices of the law-applying institutions. If, for example, the courts consistently refuse to act on a law, that law is not part of the legal system the courts operate, despite the fact that it was lawfully enacted and was never repealed.”[40] The author is of the view that the *Application of Laws*  

<table>
<thead>
<tr>
<th>Court 2012</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>• Section 3(3)(ii)</td>
<td>-</td>
</tr>
<tr>
<td>• Second Schedule</td>
<td></td>
</tr>
</tbody>
</table>

Certain United Kingdom statutes which applied to Sarawak, shall continue to be in force in Sarawak subject to alterations, amendments and modifications necessary for the circumstances of Sarawak

- Sections 3 and 4
Ordinances in Sabah and Sarawak should be officially repealed due to obsolescence and also to avoid any confusion.

The future of Section 3 of the Civil Law Act 1956

There are some debates on whether there is even a need for the application of English laws in Malaysia after more than 60 years of independence. Some scholars have advocated for the repeal for either Section 3 of the Civil Law Act 1956 or the entire Act itself. In the case of a lacuna, Malaysian courts should not refer to English common law, but rather, they ought to search for local solutions within Malaysian laws and court decisions which would inevitably prioritise the local conditions and people. In the words of some authors:

“It is about time the Civil Law Act 1956 be abolished, releasing Malaysia from the last remaining vestige of colonial rule. The Civil Law Act 1956 may have served its purpose in providing Malaysia with a supplementary English common law or equity in its fledgling years after independence. But times have changed...”.

“After 50 years of independence and numerous achievements proclaimed, Malaysia should feel strong enough to develop its own law by looking within herself first. Physical judicial autonomy obtained by severance of appeal to the Judicial Committee of the Privy Council should be followed by substantive autonomy by severing the umbilical cord to English law...”.
On the other hand, there have also been protectors of the common law and the \textit{Civil Law Act 1956}, most notably from the Malaysian Bar.\cite{44} According to the Malaysian Bar, English cases that have been accepted by the Malaysian courts automatically become part of the Malaysian common law. All these years, Malaysian court decisions are reported in Malaysian law reports that then become precedents for future cases. However, the statements made by the Malaysian Bar have to be looked at in context. These statements were made in reply to calls for the abolition of the common law system to be replaced with a Syariah court system, and not whether the application of the English common law system should be abolished outright in Malaysia in place of Malaysian common law.

Some other authors have propounded that the \textit{Civil Law Act 1956} need not be amended further. This is because The Act does not prohibit the development of Malaysian common law due to the proviso that requires regard to be given to local circumstances in applying English law which enables the Malaysian courts to create Malaysian common law.\cite{45} The language of the Act was never intended for the wholesale application of English law.\cite{46} Many judges have also emphasized the need for Malaysian courts to start developing the Malaysian common law. For example in the High Court case of \textit{Syarikat Batu Sinar Sdn Bhd & Ors v. UMBC Finance Bhd & Ors},\cite{47} Peh Swee Chin J (as he then was) stated “\textit{We have to develop our own common law just like what Australia has been doing, by directing our minds to the ‘local circumstances’ or ‘local}
This statement was later upheld by the Federal Court in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors.*[48]

This article does not propose to go into the debate on whether *Section 3 of the Civil Law Act 1956* should be repealed or otherwise but rather, on whether there can be uniformity in the application of English law throughout Malaysia. Therefore, apart from repealing the *Application of Laws Ordinances* in Sabah and Sarawak respectively, it is suggested that Parliament may want to revisit *Section 3 of the Civil Law Act 1956*, with particular regard to the application of statutes of general application to Sabah and Sarawak. If it is not necessary to apply English statutes in Peninsular Malaysia, there is no reason why the same should not apply for Sabah and Sarawak. Such a difference in application may lead to disparity in the laws when the law should be standardised and applicable to the whole country. The English statutes applicable in Sarawak, for example, the *Law Reform (Contributory Negligence) Act 1945* and *the Law Reform (Enforcement of Contracts) Act 1954* are archaic and it is doubtful whether the provisions are still applicable in the United Kingdom itself but here we stubbornly cling on to these outdated laws. Besides, many of these acts are really not applicable in Malaysia for example the *Law Reform (Enforcement of Contracts) Act 1954* which is to amend the *Statute of Frauds 1677* and the *Sale of Goods Act 1893*. We have our own legislation in Malaysia dealing with these issues; therefore there is no longer any need to rely on archaic English statutes anymore.

It is also suggested that the cut-off dates for the application of English law in West Malaysia (7 April 1956), Sabah (1 December 1951) and
Sarawak (12 December 1949) respectively be analysed further. It is submitted that the cut-off dates are unrealistic because a case decided after the cut-off date may still draw a principle from earlier judgments pronounced before the cut-off date, and therefore relevant for purposes of Section 3 of the Civil Law Act 1956. Also, some common law principles were followed by Malaysian courts even after the cut-off date, such as the principle of negligent misstatement as laid down in Hedley Byrne & Co. Ltd. v. Heller & Partners[49] and as applied by the Supreme Court in Kluang Wood Products Sdn Bhd & Anor v. Hong Leong Finance Bhd & Anor[50] and by the High Court in Neogh Soo Oh v. Rethinasamy.[51]

In Government of the State of Sarawak & Anor v. Chong Chieng Jen,[52] the Court of Appeal had occasion to consider whether a common law principle laid down in Derbyshire County Council v. Times Newspapers Ltd[53] that a local authority or government could sue for defamation, could apply to Malaysia in light of the cut-off date in Section 3 of the Civil Law Act 1956. The Court of Appeal held that “…the development of common law in Malaysia rests squarely in our hands and the courts are duty bound to develop the same to suit the times that we live in.” The Court of Appeal went on to distinguish the facts in the case before it with the facts in the Derbyshire case, so that the cut-off date was never really considered by the Court of Appeal. It is clear from this case that the cut-off dates stated in Section 3 of the Civil Law Act 1956 is redundant in so far as our courts are concerned.

Conclusion
There is no doubt that English law played a major part in our nation’s legal system right up until independence. As a fledgling independent nation, it was important to hold on to the laws of the land that we were used to. Hence, Section 3 of the Civil Law Act 1956 and the Application of Laws Ordinances of Sabah and Sarawak played an important role in maintaining the certainty and stability of the legal system. However, after more than 60 years of independence, perhaps it is time to re-visit Section 3 of the Civil Law Act 1956 with a view to streamlining the same between West Malaysia, Sabah and Sarawak by officially repealing the Application of Laws Ordinances of Sabah and Sarawak, as well as to purge archaic, outdated and redundant provisions in the Act.

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Endnotes:


[3] Ibid.

[4] Ibid.

[5] Ibid.
[6] Ibid.


[9] Ibid.


[16] Ibid., Chapter 6, page 138.


See Section 2(i) of the Civil Law Enactment 1937 (No. 3 of 1937) F.M.S.

See Section 2.


Ibid.


Ibid.


Ibid., at page 121.

See for eg *Mahadar v. Chee* (1941) SCR 96.


Ordinance No. 27 of 1949, now known as Cap. 2, Revised Laws of Sarawak, 1958, amended by GNS 179/59, GNS 66/60 and FLN 179/65.


Section 3(1)(b) of the Civil Law Act 1956 (Revised 1972) and Section 2 of the Application of Laws Ordinance 1951 in Sabah.

Section 3(1)(c) of the Civil Law Act 1956 (Revised 1972) and Section 2 of the Application of Laws Ordinance 1949 in Sarawak.

Part II of the Federal Constitution deals with Fundamental Liberties.


[47] [1990] 1 LNS 80.

[48] [2006] 2 CLJ 1.


[50] [1999] 1 CLJ 1.

[51] [1984] 1 MLJ 126.

[52] [2016] 5 CLJ 169.

[53] [1992] 3 All ER 65.