MAT ADAT BIN UNDANG UNDANG v. UNDANG UNDANG BIN MATA MATA

Innovation may be justified by results, even in academic law (though it seldom is). Normally, a legal periodical publishes comments on cases which have been reported, but should the neglect of the *Malayan Law Journal* and its mighty competitors so far to notice *Mat* v. *Undang* (for short) deprive the world of comment on this important Federation of Malaya contribution to the law of the Federation of Malaya? Though apparently decided in 1957, this case has hidden its light under a coconut shell, and even now it is not permitted to disclose how copies of the judgments came to be available. In the circumstances, it is thought convenient to set out the judgments verbatim.

The facts of the case are surprisingly straightforward. Mat went out to a dance one Saturday night, promising to be home by 11 p.m. He did not return until shortly after midnight, whereupon his father (Undang) soundly beat him and Mat sued his father for assault. The main question of law was the applicability of the (English) Prevention of Cruelty to Persons Act, 1907, [1] generally known as "the Black and Tan Act," [2] section 1,[3] especially having regard to the terms of section 3(1) of the Civil Law Ordinance, 1956,[4] and, if applicable, the 1907 Act's effect.

The trial was held in what was formerly the Federated Malay States in mid-1956, and at its close the learned judge delivered the following extempore judgment.

1. 7 Edw. 7, c. 57.
2. Investigations have not revealed whether this nickname derives from the surnames of members of the House of Commons connected with the passage of the bill or from the colours and activities the legislation, at bottom, sought to prevent.
3. The section reads: "From and after the passing of this Act, no corporal punishment shall be inflicted on a Sunday."
4. The subsection reads: "Save in so far as other provision has been made or may hereafter be made by any written law in force in the Federation or any part thereof, the Court shall apply the common law of England and the rules of equity as administered in England at the date of the coming into force of this Ordinance; Provided always that the said common law and rules of equity shall be applied so far only as the circumstances of the States and Settlements comprised in the Federation and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary."

" Plaintiff is a lad of 22, probably too young to be allowed out dancing, but above the age usually associated with spanking. Defendant, however, is a stern disciplinarian, which is good to see in these days of universally slipping standards. No one would doubt that plaintiff thoroughly deserved what he got, and the only question for this court arises out of the timing. The Prevention of Cruelty to Persons Act, 1907, passed by the Imperial Parliament, and undoubtedly still in force in England, prohibits corporal punishment on Sundays. Does the Act apply in this State?

"An interesting argument on this pure question of law was addressed to me by counsel on both sides with such ability as they could muster. Even if the Act does apply here, I am not sure that it is meant to apply to acts of private individuals. I think it might be confined to acts in public prisons, public schools and places like that. Even if the Act applies to parents, I doubt if it prohibits beatings which are richly merited, which can hardly be described as corporal punishment, so much as instruction, as part of the upbringing of a young gentleman. Furthermore, in respect of a transaction carried out just after the ensuing midnight between people who got up on a Saturday morning and have not committed the *novus actus interveniens* of going to bed in the interim, I should be prepared to hold that what took place, while it may have been on a Sunday according to the calendar, was not on a Sunday within the meaning of the Act of 1907, but on what might be described as a continuation, extension or projection of Saturday. Finally, even if the father acted illegally, I doubt whether plaintiff has a remedy in tort for assault: he should probably have prosecuted defendant or applied for specific relief.

"Happily I need not decide any of these intriguing questions. I hold that the Black and Tan Act is not in force in this State.

"This State has never been a British colony. The Black and Tan Act itself contains no provision requiring or suggesting that it be applied outside England. The argument that an Act of 1907, probably designed to remedy some barbarity prevalent locally at an early stage of the evolution of English society, suddenly took effect here in April 1956, does not appeal to me. [Here his lordship read out sections 3 and 5 of the Civil Law Ordinance, 1956.] I cannot convince myself that this case raises any question of mercantile law, so section 5 does not apply. It was not argued that it did. But I mention section 5 because that section does, within limits, make English legislation applicable when questions of mercantile law arise, because then it states that 'the law to be administered shall be the same as would be administered in England . . .' It refers to 'the law.' Section 3 requires me to apply 'the common law of England and the rules of equity as administered in England . . .' Acts of Parliament are *prima facie* not part of the common law or equity, and this *prima facie* interpretation of section 3 is reinforced by

the different wording of section 5. I am further convinced that section 3 does not introduce any Acts of Parliament into this State, by perusing that part of the Civil Law Ordinance which expressly enacts for us certain statutory reforms made in England. If the English legislation applied here anyway, whole sections of the Ordinance would be unnecessary, and it would not be consonant with the respect due from this court to the dignity of the Legislative Council to conclude that it enacted waste paper. The common law permits, and equity, in the sense of natural justice, demands, the acts of defendant complained of by plaintiff. The suit is dismissed with costs."

The plaintiff went to the Court of Appeal where, in 1957, the following three reserved judgments were delivered.

Chell J.: "The plaintiff's legal arguments did not appeal to the learned judge, so the plaintiff appeals to us. I do not find the interpretation of section 3, Civil Law Ordinance, so straightforward, and I cannot help thinking it possible that the learned judge allowed his approval of the defendant's conduct — an approval, I may say, widely shared — to influence his views on what is properly a pure question of law.

" The learned judge's comparison of the words of the two sections, 3 and 5, of the Civil Law Ordinance can be counterbalanced by a comparison of section 5 of that Ordinance with section 2(1), Civil Law Enactment, 1937, previously applying in the same territory. It may be that the words of section 5 of the 1956 Ordinance are wider than those of section 3, but those of section 3 are wider than those of section 2 (1) of the F.M.S. Enactment. The latter stated that in the Federated Malay States, 'the common law of England, and the rules of equity, as administered in England at the commencement of this Enactment, other than any modifications of such law or any such rules enacted by statute, shall be in force.' Note the repetition of the word 'such.' That section implies that, but for their express exclusion, statutory rules and modifications of laws would be comprised in the terms 'common law' and 'the rules of equity.' The omission of the exclusion by the 1956 Ordinance, section 3, suggests that statutes are meant to be included. This seems consonant with the natural meaning of the words. Among the rules of common law and equity there is to be found one that Acts of Parliament are part of the law. Moreover, section 3 of the 1956 Ordinance provides for the application by our courts of 'the common law of England and the rules of equity *as administered in England.'* It is clear that 'common law' is contrasted with 'equity,' and not with legislation, for, *as administered in England,* both common law and equity are administered as modified by Acts of Parliament.

" In my opinion this point of view is in no manner weakened by looking at the rest of the Civil Law Ordinance. This interpretation does not make any part of that Ordinance waste paper. Section 3 applies

English law only 'save in so far as other provision has been made or may hereafter be made by any written law in force in the Federation or any part thereof.' It follows that the law reform sections of the Civil Law Ordinance are not unnecessary, but operate to prevent the operation in the Federation of the corresponding English statutes.

"I therefore conclude that the Black and Tan Act applies here.

" A number of ways of not applying the 1907 Act so as to impose liability on the defendant on the facts of this case were suggested by the learned judge, with what appears to me greater ingenuity than attention to the basic principle of statutory interpretation, 'the tin rule,' as it is called here, that words should, if possible, be given their ordinary meaning (if any), even if — perhaps one might almost say 'especially if — that gives rise to extraordinary results. The only point that gives me pause is whether an action in tort is the correct method of redress for what I have no doubt the Act renders an illegality. As the Act was probably passed to protect people, who might otherwise have been beaten, from having to sit on hard pews in discomfort, it can be said that the Act contemplated giving a remedy to someone receiving corporal punishment in clear defiance of the declared will of Parliament. I would allow the appeal."

Eye J.: "It is with great diffidence that I express myself in a fashion differing from the opinion of my brother Chell, whose opinions have always commanded the greatest respect, especially on any matter of law or fact. I should derive some comfort from my ability to arrive at a result similar to that arrived at by the learned trial judge, whose illuminating judgments are a source of inspiration to all who practise in the great common law system shared by this Federation with many other great nations of the Commonwealth; I should, as a puisne judge, derive comfort from playing a part, however small, in dismissing an appeal; I should, I say, and must needs express myself in this guarded fashion, for I do not: because I find myself, albeit reluctantly and after much hesitation, driven to this result by a course of reasoning wholly different from that employed by the learned judge in the court below.

" I find it unnecessary, with great respect to the learned trial judge and to my brother Chell, as well as to the able and lucid arguments I have had the honour to listen to from the bar in this court, to decide whether, if applicable in Malaya, the Black and Tan Act (7 Edw. 7, c. 57) passed in 1907 by the United Kingdom Parliament under the short title, 'The Prevention of Cruelty to Persons Act, 1907' (see section 4(2) thereof for the short title), gives a remedy in tort by way of damages or specific relief to a person aggrieved by an illegal act contrary to the precepts of that enactment. I also find it unnecessary to decide whether, if applicable in Malaya, or any part thereof, the statute referred to renders illegal any action carried out by the defendant. I also find it unnecessary to decide whether section 3 of the Federation of Malaya Civil Law Ordinance, 1956 (Federation of Malaya Ordinance No. 5 of 1956), has the

effect of ever making any Act of the Imperial Parliament apply in the Federation, because upon whatever view may be taken of that, it appears to me, in my humble opinion, that the 1956 Ordinance does not apply the 1907 Act.

" The first reason that makes me think the 1907 Act inapplicable is its own terms. It does not purport to apply outside England. It does not even extend to Ireland or Scotland, nor have I been able to trace any corresponding legislation in force in either of those great countries. Its long title declares the 1907 Act to be an 'Act for the suppression of disturbances of days of peace and quiet by raucous yells and like noises occasioned by the infliction of corporal punishment in England.' Now, in the Federation of Malaya, we are not 'in England,' and in my view there are excluded from importation into Malaya by the Civil Law Ordinance, 1956, all Acts of the Imperial Parliament whose own terms do not envisage their extension outside their domicil of origin.

" Secondly, we are required by subsection (1) of section 3 of the Civil Law Ordinance, 1956, insofar as we are required by it to do anything at all, to apply certain rules 'as administered in England.' I have to apply this provision to the facts of the case, and not in some abstract, theoretical and academic way, for the law of this country is concerned with concrete problems not with the speculations of scholars. What are the facts? The plaintiff alleges that he was assaulted by the defendant in a place which, for present purposes, I can conveniently describe as being comprised in the Federation of Malaya and having theretofore been comprised in the Federated Malay States. It appears to me to be as plain as a pikestaff that, *as administered in England,* neither the common law nor the rules of equity have anything to say about what happens in the part of the Commonwealth where the defendant is alleged to have assaulted the plaintiff. An English court would decline jurisdiction. Even, however, if by some stretch of imagination, or for the purposes of further argument, one assumed that an English court would accept jurisdiction, what would it hold? Why, to be sure, our learned and respected brethren in England would hold that, according to the common law and rules of equity *as administered in England,* there was nothing to render the Black and Tan Act applicable in any part of Malaya.

" The appeal is dismissed with costs."

Poppin J.: " At the outset I wish to dissociate myself from the various expressions of approval of the conduct of the defendant. My object in doing this is not to indicate disapproval of his beating the plaintiff, but to make it plain that approval or disapproval is irrelevant and that what we are called upon to decide is whether that beating gives rise to an action for damages. My conclusion is that it does not, and I therefore concur with my brother Eye in dismissing the appeal.

" Doubtless much entertaining learning can be concocted about whether and when English Acts of Parliament apply in Malaya, but, like

Mr. Justice Eye, I do not feel called upon to add to what has already fallen from the trial judge and from Mr. Justice Chell on this vexed subject. Like my brother Eye, I consider that whatever view may be taken of that, the Act of 1907 does not apply in this case.

" I should content myself with ending my judgment there were it not for the fact that I cannot fall in with the reasoning of Mr. Justice Eye, which seems to me destructive of the basis upon which section 3 of the 1956 Ordinance is founded.

" The key to this case lies in the proviso to the first subsection of the section to which I have just referred.

" It could be argued that, by the proviso, 'the said common law and rules of equity' are to be applied in the Federation of Malaya 'so far only as the circumstances of the States and Settlements . . . permit' and 'so far only as their respective inhabitants permit,' and the defendant, who is an inhabitant, did not permit; but I prefer to construe the words 'the circumstances of as applying to the inhabitants as well as to the States (as the Settlements are, too, now).

" The question of whether the circumstances of our inhabitants permit the application of any rule of English common law or equity as administered in England to any particular case in Malaya is one of fact. The burden of proof is on the plaintiff. This he has failed to discharge. In fact, he led no evidence on the matter at all. It is not one of which judicial notice can be taken. What is the attitude of our inhabitants, or the relevant class of them, to corporal punishment? I decline to speculate. But I can from my own general experience suggest that, whatever may be the position among the Indians and Chinese of Penang (see *Coomarapah Chetty* v. *Kang Oon Lock,* 1 Kyshe 314), Sunday has no special significance among the Malays of the State in which occurred the trifling episode which gave rise to these unfortunate proceedings. Saturday night or early Sunday morning might be a better time for corporal punishment than Friday for a Muslim.

"Could we then apply the 1907 Act subject to modifications rendered necessary by local circumstances? That might be possible, but only if we knew far more both about the relevant circumstances and about the policy of the Act of 1907. Speculation is unprofitable, and it is much the safest course to regard the 1907 Act as wholly irrelevant.

" There remains the question, largely passed over, of whether the defendant's conduct is tortious apart from legislation. To that I answer: *'de minimis non curat lex, volenti non fit injuria,* and *ex turpi causa non oritur actio.' "*

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By a fortunate coincidence, a copy of the Privy Council's decision in *Mat* v. *Undang* arrived without explanation at the headquarters of the Cardiganshire Malayan Law Institute very shortly after news of the suggestion that reports of the proceedings in the courts below might be published. Since the fact that *Mat* v. *Undang* was taken on appeal does not seem to be widely known, it may be of service to make known how the Board[1] viewed the question of the applicability of the Black and Tan Act[2] in the Federation.

Lord Aytor *(temporis acti)* stated the facts of the case, outlined the proceedings in the courts below and continued:

" Their Lordships wish first of all to deal briefly with two arguments put to them on behalf of the respondent and approved by Chell J. in the Court of Appeal. It is indisputable that there is a rule of common law that Acts of Parliament are part of the law. (Whether the words 'common law' as used in this statement bear the same meaning as in section 3 of the Civil Law Ordinance is a matter to which their Lordships will return later. For the present, it is assumed that they do.) That rule is, of course, applicable. But it in no way follows that Acts of Parliament are applicable. That consequence would follow if the rule were rephrased; if, for instance, it were said that there is a rule of common law that all judges shall apply Acts of the Imperial Parliament in all disputes which come before them. But in this case, the rule would be by no means indisputable. It is, at the very least, clearly arguable that the rule extends no further than obliging a common law judge to apply legislation applicable within the jurisdiction in which he sits; and this begs the question of the present appeal.

" Chell J. was also persuaded by the fact that the obligation created by section 3 of the Ordinance is to apply the common law of England and rules of equity 'as administered in England,' that is, in the view of Chell J., as modified and affected by subsequent legislation. This view is one of many grammatically possible ones. The words 'as administered in England' may indicate much more than Chell J. assumed. For example, they may indicate administration by duly appointed judges, wearing red robes, in places appointed by the proper authorities. In particular, they may indicate that the 'rules of equity' referred to are those evolved by Chancery over the centuries, and to-day administered in England, as opposed to any other 'rules of equity' to which appeal is frequently made by citizens of all stations from recalcitrant foreign secretaries to rebellious soap-box orators. None of these meanings follows with inexorable logic from four words chosen by a somnolent assembly of politicians. The task of the court is to winkle out the legislature's purpose with the pin which it provides to

1. Lord Anum, Lord Osis, Sir Osis Jecoris and Lord Aytor *(temporis acti).*
2. An act to control the tapping of small beers on Sunday.

wit, the whole of the enactment in question, and then to implement it. Bearing this in mind, it seems to their Lordships as plain as a polaris that the legislature's only purpose in adding the words 'as administered in England' was to identify the 'rules of equity' in question. If the words 'the common law' need further clarification, *a fortiori* does the phrase 'the rules of equity.'

" In reaching these conclusions, their Lordships thus far leave their task undischarged. In order to complete it, their Lordships need only follow the example of Eye J. in referring to the proviso to section 3(1) of the Civil Law Ordinance. The Black and Tan Act is an 'act for the suppression of disturbance of days of peace and quiet by raucous yells and like noises occasioned by the infliction of corporal punishment in England.' Their Lordships take judicial notice of the fact that in the Federation of Malaya, (unlike the neighbouring State of Singapore where there are no days of quiet), every day is a day of quiet. No distinction between days of quiet and other days exists, and it follows that local circumstances do not permit of the application of a statute which has as its purpose the maintenance of that distinction. That disposes of the case. Since, however, lengthy arguments have been addressed to their Lordships on the principle of applicability of English statutes in the Federation, their Lordships propose to state, *obiter,* their views on this question.

" Their Lordships do not share the view of the trial judge that 'Acts of Parliament are *prima facie* not part of the common law or equity.' Whether those terms include statutory rules depends upon the purpose for and the context within which they are used. The long title of the Civil Law Ordinance ('An Ordinance to consolidate and amend the law relating to the Civil Law to be administered in the Federation of Malaya') at least serves to exclude such meanings of the terms 'common law' and 'equity' as are wider than the widest of the meanings of the term 'the Civil Law' possible in that context. There seems, in fact, to be only one possible meaning, for these reasons. The use of the term 'civil law' in contradistinction to 'divine' or 'natural' law would seem inappropriate in a statute whose purview is *ex hypothesi,* positive law. So also, in a state lacking an established church, would the use of the term 'civil law' in contradistinction to the term 'canon law.' The remaining possibilities are 'civil law' as opposed to 'common law' — again an inappropriate distinction, and 'civil law' as opposed to 'criminal law' — a very proper distinction in the circumstances and confirmed by the Malayan practice with regard to criminal law which has for a long time been codified and kept separate from its English counterpart. It therefore seems to their Lordships that the term 'common law' is used in a sense exclusive of criminal law. This would render inappropriate any meaning of the term 'common law' so wide as to encompass criminal matters.

" Further help is derived from the structure of Part II of the Ordinance. This comprises four sections. Section 3 deals with the application of common law and the rules of equity; section 4 with the law relating to insolvency; section 5 with the mercantile law and section 6 with land law. Their Lordships are impressed by two facts. The first of these is that the applicability of Part II to matters affecting land should be excluded, almost as an afterthought *ex abundanti cautela,* by a separate section. This rather suggests that the terms used in the rest of Part II are used in a sense exclusive of matters affecting land, rather than in a sense *prima facie* including such, in which case one would have expected express exclusion by way of provisoes in the sections themselves. The second fact which strikes their Lordships as significant is the classification adopted in Part II. The Ordinance deals with the law applicable in civil law matters. Part II is headed 'General,' and proceeds to classify the civil law into a) matters of common law and equity; b) insolvency; c) mercantile law and d) land law. (It may be noted that section 27 adds a further category — that of the law relating to the custody and control of infants.) This makes it abundantly plain that the phrase 'common law' for example, is used in a sense which enables it to fit neatly into the classification adopted, *i.e.* exclusive of equity, insolvency, mercantile law, land law, and custody and control of infants. No student of law could fail to recognise that the phrase refers to those branches of the law which he became acquainted with under the rubrics of contract and tort. The same reasoning applies to the phrase 'the rules of equity.' No doubt, as learned counsel suggested, there will be some who will object that there is no clear-cut division between the fields of contract, tort and equity and that of land law. They can do no better than follow the example of Eye J. in the Court of Appeal, and reject such abstract, theoretical and academic speculations and turn instead to the pragmatism of our law schools for guidance. Those institutions have, for generations, successfully adopted the classifications now indicated by section 3 of the Ordinance.

"There remains but the question of the applicability of statutes within the fields so defined. This is easily answered. No one can doubt that the Law Reform (Frustrated Contracts) Act, 1943 and the Defamation Act, 1952, are part of the law of contract and tort respectively. *Prima facie,* therefore, they are now applicable within the Federation. But the proviso to section 3(1) must always be borne in mind. This explains the re-enactment in the Ordinance itself of several of the English statutes which, *prima facie,* would apply under section 3(1). Their express inclusion removes the doubt introduced by the proviso. They are to be applied notwithstanding local circumstances.

" Their Lordships have only one thing to add. Even if the view be taken that the phrases 'common law' and 'equity' do not immediately introduce English statutes, the force of the argument that without some statutory supplementation English common law and equity would be

unworkable would have to be met. It is their Lordships' view that if the pure common law and equity were found to be unworkable, then local circumstances would render necessary some qualification of them. To what extent statutory qualification would be necessary need not now be considered. It may be that none but some of the earliest and most fundamental statutes, (such as the statute *in consimili casu)* create necessary qualifications. It may, indeed, be the case that such statutes ought properly to be considered as part of pure common law and equity, and not merely as subsequent statutory supplementations of it.

" All this, however, is by the way. For reasons above stated, their Lordships are of opinion that the Black and Tan Act is not applicable within the Federation of Malaya and accordingly will so report to the Head of the Federation."

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