

THE LANGUAGE OF JUSTICE IN MALAYSIAN COURTS: THE LAW AND THE REALITY

Sheila Ramalingam*

Johan Shamsuddin Sabaruddin**

Saroja Dhanapal***

Abstract

Perhaps one of the most unique and peculiar aspects of Malaysia's judicial and legal system is the setting up of two High Courts of co-ordinate jurisdiction and status when Malaysia was formed: one in West Malaysia, which is known as the High Court in Malaya; and one in East Malaysia, which is known as the High Court in Sabah and Sarawak. The two High Courts in Malaysia have remained in place until now. Simultaneously with the formation of Malaysia, *Part XIII*A was inserted into the Federal Constitution to provide for additional protection for the States of Sabah and Sarawak. These included, among others, *Article 161* which provided for the continued use of English in court proceedings in East Malaysia. This is different from *Article 152 of the Federal Constitution* read together with the *National Language Acts 1963/67* which provide that Malay is the official language in court proceedings in West Malaysia. Hence, a lasting anomaly in the Malaysian legal system: to all intents and purposes, Malay is the language of the courts in West Malaysia; whereas English is the language of the courts in East Malaysia. This has led to various legal issues in Malaysian jurisprudence. This article seeks to analyse the differences in the use of language in the courts in West and East Malaysia, with a view to answering the question as to whether there can be uniformity of the use of language throughout the courts in Malaysia, bearing in mind the special interests, protection and safeguards afforded to Sabah and Sarawak when Malaysia was formed. For the purpose of this research, a qualitative research method is adopted.

* Senior Lecturer at Faculty of Law, Universiti Malaya, sheila.lingam@um.edu.my

** Dean at Faculty of Law, Universiti Malaya, johans@um.edu.my

*** Senior Lecturer at Faculty of Law, Universiti Malaya (Retired) saroja_dhana@hotmail.com

The data collection method is document analysis consisting of both primary and secondary sources such as the Federal Constitution, Federal Acts of Parliament, textbooks, journal articles, published law reports, online articles, media reports, and case law. The research found that it is entirely possible for Malay to be made the official language in all courts across Malaysia. However, the liberal use of English in courts should continue to be allowed, as this is the reality that is taking place in courts across Malaysia today.

Keywords: Use of Language, Malaysian Courts, Special Position of Sabah and Sarawak, Bilingual system, English and Malay.

BAHASA KEADILAN DI MAHKAMAH MALAYSIA: UNDANG-UNDANG DAN REALITI

Abstrak

Mungkin, salah satu aspek sistem kehakiman dan perundangan Malaysia yang unik dan pelik adalah penubuhan dua Mahkamah Tinggi yang setara bidangkuasa dan tarafnya apabila Malaysia dibentuk: satu di Malaysia Barat, yang dikenali sebagai Mahkamah Tinggi di Malaya; dan satu di Negeri Sabah dan Sarawak, yang dikenali sebagai Mahkamah Tinggi di Sabah dan Sarawak. Kedua-dua Mahkamah Tinggi ini masih kekal sehingga sekarang. Serentak dengan pembentukan Malaysia, *Bahagian XIII* telah dimasukkan ke dalam Perlembagaan Persekutuan yang memperuntukkan perlindungan tambahan kepada Negeri Sabah dan Sarawak. Ini termasuk, antara lainnya, *Artikel 161* yang memperuntukkan untuk penerusan penggunaan Bahasa Inggeris dalam prosiding mahkamah di Negeri Sabah dan Sarawak. Ini berbeza dengan *Artikel 152 Perlembagaan Persekutuan* dibaca bersama dengan *Akta Bahasa Kebangsaan 1963/67* yang memperuntukkan bahawa Bahasa Melayu adalah Bahasa rasmi dalam prosiding mahkamah di Semenanjung Malaysia. Oleh itu, terdapat satu anomali dalam sistem perundangan Malaysia yang masih berlanjutan: untuk semua niat dan tujuan, Bahasa Melayu adalah bahasa mahkamah di Semenanjung Malaysia; manakala Bahasa Inggeris adalah bahasa mahkamah di Negeri Sabah dan Sarawak. Ini telah menyebabkan pelbagai isu perundangan dalam jurispruden Malaysia. Artikel ini berhasrat untuk menganalisa perbezaan dalam penggunaan bahasa di antara mahkamah di Semenanjung Malaysia dan mahkamah di Negeri Sabah dan Sarawak, untuk menjawab soalan samada penggunaan bahasa boleh diseragamkan

dalam semua mahkamah di Malaysia, dengan mengambil kira kepentingan dan perlindungan istimewa yang diberikan kepada Negeri Sabah dan Sarawak apabila Malaysia dibentuk. Bagi tujuan kajian ini, metodologi kualitatif digunakan. Metodologi pengumpulan data adalah melalui analisa dokumen yang terdiri daripada kedua-dua sumber utama dan kedua seperti Perlembagaan Persekutuan, Akta Parlimen Persekutuan, buku teks, artikel jurnal, laporan undang-undang yang diterbitkan, artikel atas talian, laporan media, dan undang-undang kes. Hasil kajian mendapati bahawa Bahasa Melayu boleh dijadikan sebagai bahasa rasmi di semua mahkamah di seluruh Malaysia. Namun, Bahasa Inggeris harus diteruskan penggunaannya secara liberal di mahkamah, kerana ini adalah realiti yang sebenarnya berlaku dalam semua mahkamah di Malaysia hari ini.

Kata kunci: Penggunaan Bahasa, Mahkamah Malaysia, Kedudukan Istimewa Sabah dan Sarawak, Sistem Dwi-Bahasa, Bahasa Inggeris dan Bahasa Melayu.

INTRODUCTION

Malaysia today is a federation of thirteen states¹ and three Federal Territories.² Malaysia was formed on 16 September 1963 when among others, the two states in East Malaysia (Sabah and Sarawak) federated with West Malaysia or Peninsula Malaysia (then known as the Federation of Malaya).³ Not surprisingly, various changes were made to the 1957 Malayan Federal Constitution to make it into a Federal Constitution for Malaysia.⁴ One of these changes involved the judicial and legal system in Malaysia, whereby two High Courts of co-ordinate jurisdiction and status were established: one in West Malaysia, which

¹ See Article 1(2) of the Federal Constitution of Malaysia. The thirteen states are Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Sabah, Sarawak, Selangor and Terengganu.

² See Article 1(4) of the Federal Constitution of Malaysia. The three Federal Territories are Kuala Lumpur, Putrajaya and Labuan.

³ Singapore was initially part of the newly formed Malaysia in 1963, but left the federation in 1965: see Mohamed Suffian, *Tun Mohamed Suffian's An Introduction To The Constitution of Malaysia (3rd Edition)* (Malaysia: Pacifica, 2007), 14.

⁴ For ease of reference, the term 'Federal Constitution' will be used to denote the Federal Constitution of Malaysia which is currently in force.

is known as the High Court in Malaya; and one in East Malaysia, which is known as the High Court in Sabah and Sarawak.⁵ The rationale for having two High Courts at that time was the distance between East and West Malaysia.⁶ The two High Courts in Malaysia have remained in place until now.

In addition, various provisions were inserted into the Federal Constitution to provide for special or additional protection for the States of Sabah and Sarawak.⁷ One of these special protections included *Article 161* which provided for the continued use of English in court proceedings in Sabah and Sarawak, unless otherwise approved by Legislatures of the States of Sabah and Sarawak.⁸ This is different from *Article 152 of the Federal Constitution* read together with the *National Language Acts 1963/67* which provide that Malay is the official language in court proceedings. Hence, a lasting anomaly in the Malaysian legal system: to all intents and purposes, Malay is the language of the courts in West Malaysia; whereas English is the language of the courts in East Malaysia. This has led to various legal issues which remain unresolved till to date.

Due to this existing state of affairs, this research aims to identify whether there can be uniformity in the use of language throughout all the courts in Malaysia. In answering this question, a qualitative research method using the data collection method of document analysis is adopted. The documents analysed for the purpose of this research include both primary and secondary sources such as the Federal Constitution, Federal Acts of Parliament, law textbooks, journal articles, published law reports, online articles, media reports, and case law.

⁵ Article 121(1) of the Federal Constitution.

⁶ See paragraph 159 of the Cobbold Commission Report.

⁷ Section 66 of the Malaysia Act 1963, and Part XIIA of the Federal Constitution.

⁸ Article 161(3) of the Federal Constitution.

HISTORY OF THE USE OF LANGUAGE IN MALAYSIAN COURTS

The history of the use of language in Malaysian courts is closely intertwined with the education system and policies on language introduced in Malaysia. Before any form of colonization, Malay was the *lingua franca* of South East Asia for centuries and was used among foreign traders who came in large numbers to trade with the local residents.⁹ It dominated other languages in South East Asia at that time namely Sanskrit, Arabic and Persian.¹⁰ Malay or various forms of pidgin Malay was the language of commerce.¹¹ The spread of Hinduism and Buddhism in the early centuries to the Malay archipelago from India, was done via the Malay language.¹² Later, the Muslim missionaries saw fit to use this language and not any other in Islamising the natives of the peninsula and the islands.¹³ Even the teaching of Christianity, which came after Islam, to those who had not been converted to Islam was done via the Malay language.¹⁴ According to one author:

Malay flourished as the language of administration during the Srivijaya rule of the Malay Peninsula and the archipelago (7th to 13th century A.D.). It continued in this function in the time of the Malacca empire in the 15th and 16th century. It had always been the language of the courts of the kingdoms of the Malay archipelago. At the time of the colonization of the Malay Peninsula by the British, Malay was already a fully vital language which was not confined to the peninsula but was

⁹ Peter Lowenberg, "Malay in Indonesia, Malaysia and Singapore: Three Faces of a National Language," The Educational Resources Information Centre (ERIC), 1985. Retrieved from: <http://files.eric.ed.gov/fulltext/ED276272.pdf>.

¹⁰ Ibid.

¹¹ Ibid.

¹² Asmah Haji Omar, "The Language Policy of Malaysia: A formula for Balanced Pluralism," in *South-East Asian Linguistics No. 9: Language Policy, Language Planning and Sociolinguistics in South-East Asia*, ed. David Bradley. (Pacific Linguistics, 1985), 39-49. Retrieved from: <http://sealang.net/sala/archives/pdf8/asmah1985language.pdf>

¹³ Ibid.

¹⁴ Ibid.

spread far and wide in the whole of the archipelago.¹⁵

All this changed when Malaya fell into the hands of the British Empire in the 19th century. English education was first introduced in Malaya in 1816 with the establishment of the Free School in Penang which was run by Christian missionaries.¹⁶ Then in the 1870's, the British began to expand their influence in Malaya, Sabah, Sarawak and Brunei. Concurrent with this increasing British expansion came large scale immigration of Chinese from China and Indians from India and Sri Lanka to the region.¹⁷ By 1911, the colony of Malaya had an extremely pluralistic society speaking a myriad of different languages.¹⁸ As the volume of their mercantile trade expanded, the British saw the need for English-educated non-Europeans to act as local officials, business agents and clerks on behalf of the British Government. Hence, as early as the beginning of the 19th century, the British Government established English-medium schools in the Straits Settlements and in other urban centres. English was the predominant language used in these English-medium schools, where it was first taught, and then used as the medium of instruction and for other school activities.¹⁹ The first government English school was built in Kuala Lumpur in 1890.²⁰

Largely as a result of these English-medium schools, the use of English continually increased during the British colonial era, almost totally replacing Malay at all levels and in most domains of government, including administration and the legal system, domestic and international commerce, and transportation and communication.²¹ As a result, Malay language began to lose ground and did not really regain its status until well after independence. One of the outcomes of

¹⁵ Ibid.

¹⁶ Zairina Othman, "Political Integration: A National Language for Malaysia," (Master's Thesis, Western Michigan University, 1984), 66. Retrieved from: http://scholarworks.wmich.edu/cgi/viewcontent.cgi?article=2540&context=masters_theses.

¹⁷ Lowenberg, "Malay in Indonesia, Malaysia and Singapore."

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Othman, "*Political Integration*."

²¹ Ibid.

such a development was a need for interpretation or translation services. The use of interpreters in Malaysian courts today can properly be traced back to the colonial days when the British introduced their legal system in the country.²² After World War II, English was much in use in courts in the Federated Malay States although Malay was still used particularly at the subordinate level.²³ By the end of the Japanese occupation, the functions of Malay in the former British territories were still extremely restricted.²⁴

When the territories of Malaya were brought together as the Federation of Malaya, the Federation of Malaya Agreement 1948 (the then constitution), had no language provision of general application like the present *Article 152 of the Federal Constitution*. The only reference to language in the 1948 Agreement provided that the language of the Federal Executive Council and the Federal Legislative Council “shall be in English and Malay, provided that anything which is required to be printed or reduced into writing shall be expressed in the English language.”²⁵ Eight years later in 1956-7 when the independence of Malaya was drawing near, the Reid Commission which was jointly appointed by the British Government and the Rulers of Malaya to draft the present Constitution, recommended that Malay should be the national as well as the official language, though for a considerable period of time, English should continue to be used as an official language:

There are some purposes, such as the authoritative text of an Act of Parliament and proceedings in Courts of Justice other than taking of evidence, for which it may be found best to retain the English language for a considerable number of years, but we think that it is right that for all ordinary purposes Malay should in due course become the sole official language.²⁶

²² Wong Fook Khoo, “Court Interpreting in a Multiracial Society – The Malaysian Experience,” in *Interpreting: Yesterday, Today and Tomorrow*, ed. David Bowen and Margareta Bowen. (Philadelphia: John Benjamins Publishing Company, 1990), 108-116.

²³ Wong,, “Multiracial Society.”

²⁴ Lowenberg, “Malay in Indonesia, Malaysia and Singapore.”

²⁵ See Clauses 35 and 63 of the Federation of Malaya Agreement 1948.

²⁶ The Reid Commission Report 1957, Chapter IX, paragraphs 170-171.

The Reid Commission Report was published for general discussion and debate. After considering the views made known in the Press and elsewhere, the Malayan and British Governments published their decision in 1957 in a White Paper entitled '*Federation of Malaya – Constitutional Proposals.*' The Malayan Government then was the coalition known as the Alliance consisting of members of the three major racial parties: the United Malays National Organisation (UMNO), the Malayan Chinese Association (MCA) and the Malayan Indian Congress (MIC). They too agreed to make Malay the national as well as the official language, but they balanced this decision by protecting the use of other languages for unofficial purposes. English was allowed to be used as an official language for a period of at least ten years from the independence of Malaya in 1957.

The reason for choosing Malay as the national language was because Malay was seen as "*a symbol of and vehicle for national identity and integration*" and that only 10% of the population (comprising of non-European elites during the colonial era) could speak English.²⁷ The expression "national language" was deliberately used because it was intended that the Malay language be used not only for official purposes but also "*as an instrument for bringing together the diverse and polyglot races that live here and thus promote national unity*".²⁸ Whilst the Malay language was used as an instrument for unifying the whole nation, the importance of English continued to be recognized.

To give effect to the tri-racial Malayan Government's decision on this point, and as part of the National Language Policy, *Article 152* was accordingly written in its present form.²⁹ *Article 152* established Malay as the sole national language of the country from the time of Independence. For official purposes, however, it provided for the use of English side by side with Malay for ten years after Independence. It was not spelled out how this bilingual policy was to

²⁷ Lowenberg, "Malay in Indonesia, Malaysia and Singapore."

²⁸ See the Federal Court judgment in *Merdeka University Berhad v Government of Malaysia* [1982] 2 MLJ 243 at page 249.

²⁹ Except that the original words "the Supreme court" in clause (4) were later amended to "the Federal or High Court", and secondly clause (6) was not inserted into the Articles until 1971 by the Constitution (Amendment) Act A30.

be implemented, but in actual practice English was still very much in use in government administration as well as in the private sector for the ten-year period given.³⁰ In 1960, a review committee was set up by Abdul Rahman Talib, which suggested recommendations for the implementation of the new national education policy.³¹ One of the main recommendations of the Rahman Report was for the conversion from English to Malay medium of instruction in schools.³² These recommendations later became the *Education Act of 1961*.³³ According to one author, “*education has been the biggest single medium for the implementation of Bahasa Malaysia as the national language*”.³⁴

Then came the political violence of 13 May 1969.³⁵ In an effort to appease the Malay majority in the population and to diffuse ethnic tensions by promoting a Malaysian identity, the Malaysian government in the second half of the 1960s began to take more determined steps to strengthen the position of the Malay language, which it renamed a more ethnically neutral ‘Bahasa Malaysia’.³⁶ From 1968 onwards, the conversion of the English medium schools to Malay medium began at a gradual pace and proceeded on a piecemeal basis.³⁷ Even so, less than 10 years later by 1976, all English-medium primary schools were completely converted into schools where Malay was used as the medium of instruction. By 1982, all the former English-medium secondary schools were converted to National Schools in Peninsula Malaysia.³⁸ In fact, under the Third Malaysia Plan (1976-1980) right through to the Sixth Malaysia Plan (1991-1995), the emphasis was that Malay be used as the language of education in schools for national integration and unity among the people of Malaysia.³⁹ English is

³⁰ Lowenberg, “Malay in Indonesia, Malaysia and Singapore.”

³¹ Othman, “Political Integration,” 67.

³² Ibid.

³³ Ibid.

³⁴ Othman, “Political Integration,” 68.

³⁵ Sumit K Mandal, “Reconsidering Cultural Globalization: The English Language in Malaysia,” *Third World Quarterly* 21 (2000): 1001-1012.

³⁶ Mandal, “English Language in Malaysia.” This is despite the fact that the official term ‘Malay’ or ‘Bahasa Melayu’ continued to be used in the Federal Constitution.

³⁷ Omar, “The Language Policy of Malaysia.”

³⁸ Ibid.

³⁹ Mohamed Ishak Abdul Hamid and Nik Azahani Nik Mohammad, “Legal History of Education in Malaysia: A Marriage of Western and Eastern

defined in the National Education Policy as the second most important language (after Malay) and should be taught in schools as a second language.⁴⁰ In Sabah and Sarawak, the Woodhead Report in 1955 urged the British government to take over the responsibility of education for Sabah, and later Sarawak.⁴¹ In 1960, the McLellan report increased the awareness of the Sarawak government of the necessity of having an integrated education system.⁴² Accordingly, the *Education Act 1961*, which provided, among others, that the Malay language shall be the main medium of instruction,⁴³ was extended to Sarawak in 1977, and the change of the medium of instruction to Malay throughout the entire school system was completed in Sabah and Sarawak by 1985.⁴⁴ Before that, therefore, it could be said that English was the *de facto* official language in Sabah and Sarawak.⁴⁵

ARTICLE 152 OF THE FEDERAL CONSTITUTION, THE NATIONAL LANGUAGE ACTS 1963/1967 AND OTHER LAWS

Article 152 of the Constitution of the Federation of Malaya on national language was wholly incorporated into the Constitution of the Federation of Malaysia. *Article 152(1)* provides that the national language shall be Malay. At the same time, it provides that no person shall be prohibited from using (otherwise than for official purposes), or from teaching or learning any other language in the Federation. Further, English may be used for official purposes for 10 years after Merdeka Day and thereafter until Parliament otherwise provides.⁴⁶ Similarly, for a period of 10 years after Merdeka Day, and thereafter

Educational Legacy,” *Current Law Journal* 1 LNS(A) (2015): cii.

⁴⁰ Omar, “The Language Policy of Malaysia.”

⁴¹ Othman, “Political Integration,” 67.

⁴² Ibid.

⁴³ Hamid and Mohammad, “A Marriage of Western and Eastern Educational Legacy.”

⁴⁴ Maya Khemlani David, “Role and Functions of Code-Switching in Malaysian Courtrooms,” *Multilingua* 22 (2003): 5-20.

⁴⁵ See paragraph 148(f) of the Cobbold Commission Report.

⁴⁶ Article 152(2) of the Federal Constitution. ‘Official purposes’ is defined in Article 152(6) of the Federal Constitution as any purpose of the Government, whether Federal or States, and includes any purpose of a public authority.

until Parliament otherwise provides, all proceedings in all courts in Malaysia shall be in the English language.⁴⁷

However, it is a different position altogether in Sabah and Sarawak: *Article 161(1) of the Federal Constitution*⁴⁸ provided that until ten years after Malaysia Day, no Act of Parliament terminating or restricting the use of the English language for any of the purposes mentioned in *Article 152(2) to (5) of the Federal Constitution* shall come into operation, until and unless approved by enactments of the Legislatures of the States of Sabah or Sarawak.⁴⁹ This included, among others, the use of English for proceedings in the subordinate courts, the High Court in Sabah and Sarawak, the Court of Appeal or the Federal Court.⁵⁰ It can be seen that both *Articles 152 and 161 of the Federal Constitution* provide that English shall be the language of the courts for a fixed period of time unless provided otherwise by Parliament and in the case of Sabah and Sarawak, unless approved by enactments of the Legislatures of those States.

In conformity with the constitutional changes, the *National Language Act 1963 (Revised 1967)* was enacted. The *National Language Act 1963* contained only a few provisions which are now contained in *Sections 9, 10 and 11 of the Revised 1967 Act*.⁵¹ The *National Language Acts 1963/1967* provided for the use of the national language in Malaysia, but shall only be applicable in Sabah and Sarawak on such dates as the respective State Authorities may by enactments of the Legislatures decide.⁵² *Section 2 of the Act* provides that the national language⁵³ shall be used for official purposes. *Section*

⁴⁷ Article 152(4) and (5) of the Federal Constitution.

⁴⁸ This is one of the special protections afforded to Sabah and Sarawak, inserted in the Federal Constitution of Malaysia by Section 66 of the Malaysia Act 1963.

⁴⁹ See Section 61(3) of the Malaysia Act 1963 and Article 161(3) of the Federal Constitution.

⁵⁰ See also Article 161(2)(b) of the Federal Constitution. By the Constitution (Amendment) Act 1994 the proceedings also included proceedings in the Court of Appeal.

⁵¹ Ah Kam Voon, "Bahasa Malaysia in the Malaysian Legal System" (PhD Thesis, University of Malaya, 1982), 7.

⁵² Section 1 of the National Language Acts 1963/1967.

⁵³ Defined in Section 3 of the Interpretation Acts 1948/1967 as the national

3 of the Act allows the Government to use any translation of official documents or communication in any other language for purposes necessary in the public interest. Section 4 of the Act provides that the Yang Di-Pertuan Agong⁵⁴ may permit the continued use of the English language for such official purposes as may be deemed fit. One of these purposes is legal advice or opinion and correspondence pertaining to such advice or opinion relating to any law the authoritative text of which is English.⁵⁵

Further, Section 6 of the *National Language Acts 1963/1967* provides that as of 1 September 1967, the authoritative text of all Federal and State legislation shall be in the national language and in the English language, the former being authoritative unless the Yang di-Pertuan Agong otherwise prescribes. Since 1967, there has been a concerted effort on the part of the judiciary to elevate the use of Malay in courts in West Malaysia. In 1969, a Registrar's Circular was issued to all Sessions Court Judges and Magistrates, urging them to use Malay in all court proceedings, and for all court correspondences to be in Malay.⁵⁶ In 1981, another Registrar's Circular was issued to all courts in West Malaysia,⁵⁷ stating that all correspondences connected with administrative and judicial matters must be written fully in Malay. In the lower courts, all mentions must be in Malay; witnesses may give evidence in any language which must be translated into Malay; examination-in-chief, cross-examination and re-examination are to be

language provided for by Article 152 of the Federal Constitution.

⁵⁴ The King.

⁵⁵ See P.U. 410/1967. See also the case of *Merdeka University Bhd v Government of Malaysia* [1982] 2 MLJ 243 where the Federal Court (the apex Court in Malaysia) in construing Article 152 referred to Sections 2 and 4 of the *National Language Acts 1963/1967* and held that the Malay language is the national language and the official language, and that subject to exceptions with regard to the continued use of the English language under Section 4 of the Act and of other languages by other provisions of the Act, a person is prohibited from using any other language for official purposes.

⁵⁶ See Registrar's Circular No. 7 of 1969 dated 20 November 1969. This directive in fact echoes an earlier directive, Registrar's Circular No. 2 of 1962 dated 6 December 1962.

⁵⁷ See *Pekeliling Pendaftaran (U) No. 12 Tahun 1981* dated 21 September 1981. This Circular was carbon copied to the Chief Judge and Judges of the High Court in Sabah and Sarawak.

conducted in Malay, but applications for the same to be conducted in English may be allowed; submissions are to be in Malay as far as possible; and the Judges and Magistrates are to write their grounds of judgment in Malay. It would appear that this effectively ‘forced’ lawyers from East Malaysia who appeared in the Court of Appeal or the Federal Court to also correspond in Malay.

Then came the *Rules of the High Court 1980* and the *Subordinate Court Rules 1980* which provided that all documents required in pursuance of these Rules shall be in the national language and may be accompanied by a translation thereof in the English language.⁵⁸ However, in Sabah and Sarawak, the converse was true only for the High Court i.e. any document required for use in pursuance of these Rules shall be in the English language and may be accompanied by a translation thereof in the national language.⁵⁹ In the early 1980s, one author notes that Malay was extensively used in all administrative matters in the High Courts, and even more so in the subordinate courts.⁶⁰ For civil cases, simple applications and mentions were done in Malay; however, pleadings and submissions were still in English because ironically, although the *Rules of the High Court 1980* and the *Subordinate Court Rules 1980* provided for all documents to be filed in Malay in the courts in West Malaysia, the Rules themselves were in English which allowed documents to be still filed in English in pursuance of the Rules.⁶¹ In summary, the extent of the usage of Malay in courts in the early 1980s depended on the nature of the case involved, the proficiency of the parties involved and the discretion of the Presiding Officer.⁶²

⁵⁸ See Order 92 rule 1 of the Rules of the High Court 1980 and Order 53 rule 5 of the Subordinate Court Rules 1980.

⁵⁹ See Order 92 rule 2 of the Rules of the High Court 1980. There is no equivalent provision in the Subordinate Court Rules 1980. With the new Rules of Court 2012, the position is the same as the former Rules of the High Court 1980 for both the High Courts as well as Subordinate Courts (Order 92), Rules of the Court of Appeal 1994 (Rule 101(2)) and Rules of the Federal Court 1995 (Rule 133(2)).

⁶⁰ Voon, “Malaysian Legal System.”

⁶¹ Ibid.

⁶² Ibid.

The original *Section 8 of the National Language Acts 1963/1967* provided that all proceedings in the courts in West Malaysia shall be in Malay or English or partly in Malay and partly in English. In 1990, *Section 8 of the National Language Acts 1963/1967* was amended by the *National Language (Amendment) Act 1990*. *Section 8 of the Act* now provides that all proceedings (other than the giving of evidence by a witness) in all courts in West Malaysia shall be in the national language, provided that the Court may either of its own motion or on the application of any party to the proceedings, and after considering the interests of justice, order that the proceedings shall be partly in the national language and partly in the English language.⁶³

The application of the *National Language Acts 1963/1967* was extended to Sabah and Sarawak in 1983 via the *National Language (Amendment and Extension) Act 1983*, but provided that it is adopted by State Enactments.⁶⁴ In Sabah, the State Government of Sabah passed the *National Language (Application) Enactment 1973* that extended the *National Language Acts 1963/1967* to the State of Sabah. However, there are some doubts as to the legality of the 1973 Enactment as it was enacted before the 1983 Act. The *National Language Acts 1963/1967* have not been adopted in Sarawak. Therefore, the position in East Malaysia appears to be that provided for in *Article 161 of the Federal Constitution* (which was included in the Federal Constitution when Malaysia was formed), i.e. that English is the official language of the courts in East Malaysia.

The rules of court practice also make this position abundantly clear. *Order 92 of the Rules of Court 2012*, *Rule 101 of the Rules of the Court of Appeal 1994* and *Rule 133 of the Rules of the Federal Court 1995* provide, among others, that any document required for use in pursuance of these Rules shall be in the national language and may be accompanied by a translation thereof in the English language.⁶⁵ Whereas for Sabah and Sarawak, the converse is true i.e. any document required for use in pursuance of these Rules shall be in the English

⁶³ As amended by the National Language (Amendment) Act 1990 (Act A765).

⁶⁴ See National Language (Amendment and Extension) Act 1983 (A555/84).

⁶⁵ Order 92 Rule 1 of the Rules of Court 2012, Rule 101(1) of the Rules of the Court of Appeal 1994 and Rule 133(1) of the Rules of the Federal Court 1995.

language and may be accompanied by a translation thereof in the national language.⁶⁶

THE LEGAL ISSUES

Up to the year 2010, the cases dealing with the wrong use of language in courts went both ways; i.e. either it was seen as a serious irregularity or else seen as a curable irregularity. Examples of cases that viewed language as a serious irregularity include *Calex-HLK Ltd lwn Nordin bin Abdul Hamid & Yang lain*⁶⁷ and *Zainun bte Hj Dahan lwn Rakyat Merchant Bankers Bhd & Satu lagi*.⁶⁸ In both cases which originated from the High Court in Malaya, documents that were filed in court only in the English language without any translation into the national language, were held to be a nullity as they were in breach of *Section 8 of the National Language Acts 1963/1967*.

On the other hand, an example of a case that viewed language as a curable irregularity was *Yomeishu Seizo Co Ltd & Ors v Sinma Medical Products (M) Sdn Bhd*.⁶⁹ In this case, the High Court held that *Section 8 of the Act* gives the court a discretionary power which should be exercised judicially. Even if neither party to the action applies to have the proviso invoked, the court on its own motion may invoke it. The paramount consideration is the interests of justice, not generally but in respect of the proceedings at hand.⁷⁰ This *dicta* was followed by the High Court in *Re Tioh Ngee Heng; ex p Yap Kiu Lian @ Norhashimah Yap (Adminstratrix of the estate of Mohamad Shariff bin Haji Hussain)*.⁷¹ In this case, the debtor attempted to cast doubt on the validity of the bankruptcy notice on the ground that it was filed in the English language as opposed to being filed in Malay. In interpreting *Section 8 of the National Language Acts 1963/1967*, the court held that this provision clearly allowed the use of the English language in court proceedings in certain circumstances, the paramount consideration

⁶⁶ Order 92 Rule 2 of the Rules of Court 2012, Rule 101(2) of the Rules of the Court of Appeal 1994 and Rule 133(2) of the Rules of the Federal Court 1995.

⁶⁷ [1997] 5 MLJ 589.

⁶⁸ [1998] 1 MLJ 532.

⁶⁹ [1996] 2 MLJ 334.

⁷⁰ Ibid, 345-346.

⁷¹ [2000] 6 MLJ 155.

being “*the attainment of truth and in the interest of justice.*”⁷² It was further held that since the bankruptcy notice had been accepted and sealed by the court registry, it was “*clothed with the authority of the court*” and therefore, there was a presumption of regularity.⁷³

The above cases were all decided by different branches of the High Court in Malaya whose decisions are not binding on other branches of the High Court in Malaya. In 2010, the Court of Appeal had occasion to consider this issue in the case of *Dato’ Seri Anwar Ibrahim v Tun Dr Mahathir Mohamad*.⁷⁴ In this case, the appellant had sued the respondent for alleged defamation. The respondent applied to strike out the appellant’s writ of summons and statement of claim and this was allowed by the High Court. The appellant appealed to the Court of Appeal against the High Court’s decision. The respondent applied for the appellant’s record of appeal to be struck out and/or set aside on the ground, among others, that the memorandum of appeal was filed only in English. It was held by the Court of Appeal that *Article 152 of the Federal Constitution* read together with *Section 8 of the National Language Acts 1963/1967* are mandatory provisions which must be adhered to. Thus, the absence of the memorandum of appeal in the national language rendered the record of appeal incurably defective. Consequently, the appeal was dismissed.

It is interesting to note that the Court of Appeal in the *Dato’ Seri Anwar Ibrahim* case relied on the case of *Zainun bte Hj Dahan*, but made no mention of *Yomeishu Seizo Co Ltd* or *Re Tioh Ngee Heng*. It is also interesting to note that the case of *Zainun bte Hj Dahan* was a decision of the High Court, and therefore the Court of Appeal was not bound to follow it.⁷⁵ It would appear, therefore, that in wishing to dismiss the appeal, the Court of Appeal had given favour to a more rigid and inflexible interpretation of *Article 152 of the Federal Constitution*, *Section 8 of the National Language Acts 1963/1967* and the rules of court. It is submitted that perhaps political motivation may also have been a contributing factor in the Court of Appeal’s decision in this case.

⁷² Ibid, 159.

⁷³ Ibid, 159-160.

⁷⁴ [2010] 1 CLJ 444.

⁷⁵ The Court of Appeal being superior to the High Court in the Malaysian court hierarchy.

Unfortunately, this is not the end of the matter. It must be remembered that the rules of court provide that in Sabah and Sarawak, any documents required for use in pursuance of the rules are to be filed in the English language and may be accompanied by a translation in the national language. Hence, it can be summarized that the position is reversed in Sabah and Sarawak i.e. any documents required for use in court are to be filed in the English language and may be accompanied by a translation in the national language.

In *Ali Noruddin Bin Boying v Badan Pencegah Rasuah*,⁷⁶ the accused was charged in the High Court at Kuching with a corruption offence allegedly committed in Kuching, Sarawak. The accused argued that the charges were a nullity and should be quashed because they were drafted in the national language, which was contrary to, among others, *Articles 161 and 152 of the Federal Constitution* and the *National Language Acts 1963/1967*. The High Court in this case held that the charge was not defective. This is because since there was no suggestion that the accused did not understand the charge, no failure of justice had been occasioned, and such an irregularity is capable of being cured. In coming to his decision, none of the earlier cases on the language of the courts were relied on by the learned Judicial Commissioner.

In *Wong Leh Yin v Public Prosecutor*,⁷⁷ the issue was almost identical to the *Dato' Seri Anwar Ibrahim* case. The appellant raised a preliminary objection to the petition of appeal filed by the public prosecutor in the High Court at Sibu on the ground that the petition was written in the national language and was therefore defective and ought to be struck out. Surprisingly, the Court of Appeal dismissed the preliminary objection on the basis that there was “*no miscarriage of justice*”.⁷⁸ It was also held that the entire objection was that the petition of appeal was filed in the High Court in Malay, and not that because of the use of the national language, the appellant had been denied an opportunity to understand the grounds of appeal for him to adequately defend himself.⁷⁹ It would be remembered that in the *Dato' Seri Anwar*

⁷⁶ [2010] MLJU 230.

⁷⁷ [2013] 5 MLJ 820.

⁷⁸ Ibid, 826 [21].

⁷⁹ Ibid.

Ibrahim case, no such averment was also made by the respondent, and yet the memorandum of appeal was held to be a nullity based solely on the fact that it was filed in English. The Court of Appeal also distinguished the case of *Dato' Seri Anwar Ibrahim* by stating that language was not the sole reason for the dismissal of the appeal; there were other factors that contributed to the defect of the appeal, such as the failure to file a chronology of events and a proper index.⁸⁰

Another area of concern involves grounds of judgments. According to the definition of 'proceeding',⁸¹ it includes any proceeding, whether civil or criminal, and includes an application at any stage of the proceeding. A plain reading of this section would suggest that the grounds of judgments are part of the 'proceedings'. However, in the two Federal Court cases of *Dato' Seri Anwar Ibrahim v Tun Dr. Mahathir Mohamad*⁸² and *Harcharan Singh a/l Piara Singh v Public Prosecutor*,⁸³ the court held that while a judgment or order forms part of a court proceeding, the grounds of judgment do not and therefore, it is not mandatory for grounds of judgments to be in the national language.

From the literature produced herein, a few peculiarities may be noted. In West Malaysia, anything not filed in the national language is seen as a breach of the language provisions and therefore a nullity. However, in Sabah and Sarawak, anything not filed in the English language is seen as a mere technicality capable of being cured. When the issue concerns the court's own document such as the grounds of judgment, the court again seems to take a more liberal view of the language provisions and allow grounds of judgment to be either in the national language or the English language.

The point here really is that the provisions as they are, give room for inconsistent application of the law, as evidenced by the cases cited in the paragraphs above. In some cases, this even leads to grave injustice to the litigants as their entire case may be thrown out just because a document was filed in the 'wrong' language.

⁸⁰ Ibid, 825-826 [20].

⁸¹ Section 3 of the Courts of Judicature Act 1964.

⁸² [2011] 1 CLJ 1.

⁸³ [2011] 6 MLJ 145.

UNIFORMITY OF LANGUAGE IN THE MALAYSIAN COURTS

As mentioned earlier, language is tied closely with education policies in Malaysia. The Language Policy of 1967 stipulated the use of national language in all official functions, and was therefore responsible for inculcating a proficiency level in the language among government officials and workers.⁸⁴ The *Education Act 1961* which provided, among others, that the Malay language shall be the main medium of instruction,⁸⁵ was extended to Sarawak in 1977, and the change of the medium of instruction to Malay throughout the entire school system was completed in Sabah and Sarawak by 1985.⁸⁶ Recent studies have shown that Malay is slowly replacing native languages in East Malaysia mainly due to migration and economic change, urbanization and improved transportation and communication, the language used in schools, government policies, religious conversion and the definition of Malay.⁸⁷ In Sarawak, there appears to be a growing acceptance for the Malay language to be used for official purposes, and the people under survey in a study stated that they were “*keen to be proficient in both English and Bahasa Malaysia*”.⁸⁸ Therefore, there can be little doubt that by now, East Malaysians are able to converse in Malay. Recently, prominent politician Anwar Ibrahim stated that the national language helps to unite the people of Malaysia.⁸⁹ Thus, the importance

⁸⁴ Asmah Haji Omar, “Patterns of Language Communication in Malaysia,” *Southeast Asian Journal of Social Science* 13, no.1 (1985): 19-28.

⁸⁵ Hamid and Mohammad, “A Marriage of Western and Eastern Educational Legacy.”

⁸⁶ David, “Code-Switching.”

⁸⁷ “Sarawak, a land of many tongues,” *The Borneo Post Online*, 2010, <http://www.theborneopost.com/2010/12/23/sarawak-a-land-of-many-tongues/>. See also “Follow the Sarawak, Sabah way of unity, Minister urges,” *The Malay Mail Online*, 2017, <http://www.themalaymailonline.com/malaysia/article/follow-the-sarawak-sabah-way-of-unity-minister-urges#ZZLzu829CeCZ57h0.97>.

⁸⁸ Su-Hie Ting, “Impact of language planning on language attitudes: A case study in Sarawak.” *Journal of multilingual and multicultural development* 24,no.3(2003):195-210, https://www.researchgate.net/profile/SuHie_Ting/publication/228932238_Impact_of_Language_Planning_on_Language_Attitudes_A_Case_Study_in_Sarawak/links/02e7e52e9c4d22b1a2000000.pdf

⁸⁹ “National Language helps to unite the people, says Anwar,” *The Star*

and significance of Malay in Malaysia cannot be overlooked or ignored.

Article 152 of the Federal Constitution provides that Malay is both the national⁹⁰ as well as the official⁹¹ language. “Official purpose” is defined as any purpose of the Government, including any public authority.⁹² The administration of justice is clearly an official purpose.⁹³ As mentioned earlier, *Section 6 of the National Language Acts 1963/1967* provides that as of 1 September 1967, the authoritative text of all Federal and State legislation shall be in the national language and in the English language, the former being authoritative. The Law Revision and Law Reform Division of the Attorney-General’s Chambers is tasked, among others, to translate texts of pre-1967 laws to the national language. Since 1967, there has also been a concerted effort on the part of the judiciary to elevate the use of Malay in the West Malaysian courts. Although the *National Language Acts 1963/1967* has not been extended to Sabah⁹⁴ and Sarawak, it must be noted that Federal Acts apply throughout Malaysia, including in Sabah and Sarawak. Therefore, it would not be easy for Sabah and Sarawak to continue to use only English in courts when the authoritative texts of Federal Acts are now in Malay. Further, it is also to be noted that the people of Sabah and Sarawak did not outright reject Malay as the

Online, 2018,

<https://www.thestar.com.my/news/nation/2018/09/23/national-language-helps-to-unite-the-people-says-anwar/>

⁹⁰ Article 152(1) of the Federal Constitution.

⁹¹ Article 152(2) read together with Article 152(6) of the Federal Constitution.

⁹² Article 152(6) of the Federal Constitution.

⁹³ Voon, “Malaysian Legal System.”

⁹⁴ There is some confusion as to whether the National Language Acts 1963/1967 applies in Sabah because in 1973 the State Government of Sabah passed the National Language (Application) Enactment 1973 that extended the National Language Acts 1963/1967 to Sabah. However, in 1983 the National Language (Amendment and Extension) Act 1983 extended the National Language Acts 1963/1967 to Sabah and Sarawak provided that it is adopted by State Enactments. Therefore, it is unclear whether the 1973 Enactment still prevails notwithstanding the 1983 Act.

official language, but said that it is to be used side by side with English.⁹⁵

For all these reasons, it is submitted that the *National Language Acts 1963/1967* should be extended to East Malaysia for the purpose of making Malay the official language of all courts in the whole of Malaysia. Sabah through the *National Language (Application) Enactment 1973* clearly evinces an intention to follow the provisions of the Act. It remains to persuade the State Government of Sarawak to adopt the provisions of the Act. The inconsistencies in the application of the use of language in courts between East and West Malaysia can be reduced if only one language is used throughout the courts. This would reduce injustice and promote consistency in the law.

Having said that, it would be noted that the provisions of the *National Language Acts 1963/1967*, in particular *Sections 3 and 4*, do not exclude the use of English for official purposes. The natural conclusion to be drawn here is that in so far as the use of language in Courts is concerned, the position of English has not changed in spite of the enactment of this Act.

Today, most discussions in the lower courts (Sessions and Magistrates) are in Malay.⁹⁶ However, legal provisos and directives of the Chief Registrar for use of English were deemed in the ‘*interests of justice*’ justify the continuation of the colonial language in many areas. In the superior courts (High Court, Court of Appeal and Federal Court), requests to use English are “*usually made and granted perfunctorily*”.⁹⁷ Indeed, English is frequently used in the superior courts; it is the default language of most commercial law and civil litigation.⁹⁸ Further, the exalted status of British common law under the *Civil Law Act 1956 (revised 1972)* has also contributed to the continued entrenchment of English especially in the superior courts. Even in the Sessions Courts,

⁹⁵ See paragraph 148(f)(ii) of the Cobbold Commission Report.

⁹⁶ Richard Powell, *Motivations for Language Choice in Malaysian Courtrooms* (Kuala Lumpur: University of Malaya Kuala Lumpur Press, 2008), 39.

⁹⁷ Powell, *Language Choice in Malaysian Courtrooms*.

⁹⁸ Richard Powell and Azirah Hashim, “Language Disadvantage In Malaysian Litigation And Arbitration,” *World Englishes* 30, no. 1 (2011): 92-105.

most judges frequently switch to English.⁹⁹ Many legal practitioners feel that the Malay legal lexicon remains inadequate for modern legal arguments, particularly those depending on authorities available only in English.¹⁰⁰ In court itself, language alternation between Malay and English is fairly common, with the most common being the insertion of a single lexical word in English into passages of Malay.¹⁰¹

Over the last quarter of a century, Malaysia's legal profession has been transformed from one dominated by lawyers trained in English into a bilingual one.¹⁰² Code shifts (the use of different languages with different interlocutors) and code-switches (moving from one language to another with the same speaker) occur often in Malaysian courtrooms.¹⁰³ This is especially so in cases where expert witnesses testify. In one case observed in a study, a doctor spoke almost entirely in English in a predominantly Malay case, which may be the natural choice as the document referred to was in English which dominates the medical domain.¹⁰⁴

Sabah and Sarawak have both been hesitant to switch totally from English to Malay,¹⁰⁵ a reluctance at least partially due to a fear of Malay domination over their largely non-Malay population.¹⁰⁶ However, a study done back in 2003 showed that Sarawakians were keen on being proficient in both English and Malay.¹⁰⁷ In the end,

⁹⁹ Richard Powell, "Language Alternation in Malaysian Courtrooms and Comparisons with Other Common Law Jurisdictions," in *Code Switching in Malaysia*, ed. Maya Khemlani David et al. (Peter Lang, 2009), 147.

¹⁰⁰ Powell, "Language Choice in Malaysian Courtrooms."

¹⁰¹ Powell, "Language Alternation in Malaysian Courtrooms," 139.

¹⁰² Powell and Hashim, "Language Disadvantage."

¹⁰³ David, "Code-Switching." See also Powell, "Language Alternation in Malaysian Courtrooms," 136.

¹⁰⁴ David, "Code-Switching." See also Powell, "Language Alternation in Malaysian Courtrooms."

¹⁰⁵ See for example "Constitution states English remains Sarawak's official language," *Herald Malaysia* Online, 2015, <http://www.heraldmalaysia.com/news/constitution-states-english-remains-sarawaks-official-language/26466/5>.

¹⁰⁶ Lowenberg, "Malay in Indonesia, Malaysia and Singapore."

¹⁰⁷ Ting, "A case study in Sarawak." See also "Wan Junaidi: Better to use BM in Parliament," *The Borneo Post Online*, 2015, <http://www.theborneopost.com/2015/05/05/wan-junaidi-better-to-use-bm-in-parliament/>.

Malaysia has found that its long dependence on English, both domestically and internationally, cannot be eradicated as easily as had been hoped in the late 1960s, and there has been concerted effort to upgrade English over the years.¹⁰⁸ Some words continue to be used widely in English, for example “*mention*”. In fact, Registrar’s Circular (U) No. 12 of 1981 urges the use of Malay in all court correspondences etc, it specifies that ‘*mentions*’ are to be conducted in Malay in the lower courts. Further, it is not mandatory for grounds of judgment to be in Malay.¹⁰⁹ As aptly said by a distinguished author,¹¹⁰ “*In the case of Malaysia, the language [of law] is English, with the Malay language increasingly developed to express and accommodate the law.*” It is therefore undeniable that till today, English is still the operational language in the law courts and, for the foreseeable future, law will continue to operate if not fully in English, then at least bilingually i.e. in both English and Malay.

Providing institutional support for Malay can elevate its position but it cannot get rid of the competing language. Recent comments from language experts and academicians are that while it is good to maintain the abundant diversity found in Malaysia, the sovereignty of the national language must be strengthened at all levels,¹¹¹ but not

¹⁰⁸ Ting, “A case study in Sarawak.” See also “Wan Junaidi: Better to use BM in Parliament,” The Borneo Post Online, 2015, <http://www.theborneopost.com/2015/05/05/wan-junaidi-better-to-use-bm-in-parliament/>.

¹⁰⁹ See for example the Federal Court cases of *Dato’ Seri Anwar Ibrahim v Tun Dr. Mahathir Mohamad* [2011] 1 CLJ 1 and *Harcharan Singh a/l Piara Singh v Public Prosecutor* [2011] 6 MLJ 145.

¹¹⁰ Wu Min Aun, *The Malaysian Legal System* (Second Edition) (Kuala Lumpur: Longman, 1999), 168.

¹¹¹ See for example Mohd Hazmi Mohd Rusli, “Where is Our Respect for the National Language?,” The Malay Mail Online, 2017, <http://www.themalaymailonline.com/what-you-think/article/where-is-our-respect-for-the-national-language-mohd-hazmi-mohd-rusli#SrpKA9xU7BTtAllH.97>, “Appreciate Our National Language,” New Straits Times Online, 2017, <https://www.nst.com.my/opinion/letters/2017/07/255957/appreciate-our-national-language> and “BM Proficiency key to national unity, language expert says,” The Malay Mail Online, 2016, <http://www.themalaymailonline.com/malaysia/article/bm-proficiency->

necessarily by making Malay replace English.¹¹² It cannot be denied that English is more widely spoken in the world and is important for globalization and internationalism, and Malay is possibly not yet ready to pervade all spheres in Malaysia.¹¹³ One prominent lawyer even opined that it would not be unjustified to require new entrants to the legal profession to also pass an English Language Qualifying Examination to be able to compete in “*an increasingly competitive global environment where international business is transacted primarily in English*”.¹¹⁴

It is also important to note that the court rules themselves acknowledge the continued importance of English. The court rules provide that any document in the English language may be used as an exhibit, “*with or without a translation thereof in the national language*”.¹¹⁵ In the *Rules of Court 2012*, it is even allowed in cases of urgency for pleadings to be filed only in English, with the Malay translation filed two weeks thereafter.¹¹⁶ It is submitted that this is a clear recognition by the courts in Malaysia, via its rules, of the importance of English in court proceedings.

It is therefore quite obvious that English will continue to be used in courts quite extensively. It can be seen that since the independence of Malaya in 1957, English has never really left the courts. Therefore, significant latitude should be allowed for the use of English in pleadings as well as for speaking in Court, especially in East

key-to-national-unity-language-expert-says#drtBdQzJhKHy1hP8.97.

¹¹² See “Follow the Sarawak, Sabah way of unity, Minister urges,” The Malay Mail Online, 2017, <http://www.themalaymailonline.com/malaysia/article/follow-the-sarawak-sabah-way-of-unity-minister-urges#ZZLzu829CeCZ57h0.97>.

¹¹³ See Abdar Rahman Koya, “What Ails the National Language,” Free Malaysia Today, 2017, <http://www.freemalaysiatoday.com/category/opinion/2017/07/06/what-ails-the-national-language/>.

¹¹⁴ Roger Tan, “High Time for a New Bar,” The Malaysian Bar, 2011, http://www.malaysianbar.org.my/members_opinions_and_comments/high_time_for_a_new_bar.html.

¹¹⁵ See the proviso to Order 92 rule 1(1) of the Rules of Court 2012, the proviso to Rule 101(1) of the Rules of the Court of Appeal 1994 and the proviso to Rule 133(1) of the Rules of the Federal Court 1995.

¹¹⁶ See Order 92 Rule 1(4) of the Rules of Court 2012.

Malaysia because they are used to it. The Courts should be more lenient if documents are filed in the 'wrong' language (i.e. English). As can be seen in the findings above, everyone concerned in the judicial and legal system in the whole of Malaysia, from judges to lawyers, is well versed in both Malay and English. Therefore, a case cannot be dismissed solely for the reason that it was filed in the 'wrong' language. This is because firstly, both Malay and English cannot be a 'wrong' language in Malaysia. Secondly, the justice of the case must always prevail. There are other forms of punishment that could be meted out if pleadings were filed only in English. For example, there can be an order whereby the solicitor would be penalized with costs personally for not filing pleadings in Malay. It is submitted that this would be an effective way of securing compliance with language provisions without jeopardizing the sanctity of the case. It should also be pointed out that in an increasingly globalized platform with many foreign investors and international companies doing business in Malaysia, it would make more sense if English is allowed to be used in pleadings and in the courts themselves. It is submitted that this would heighten Malaysia's good standing in the international stage. In the end, as evidenced by the research in this area, our courts are going to be bi-lingual for the foreseeable future and the researcher sees no reason why this cannot be acceptable to all parties since it is already the practice in courts now. That being the case, there is no reason why this cannot be the official law of the land.

CONCLUSION

Due to the education system in Malaysia using Malay as the medium of instruction, Malay has found wider coverage in all spheres of government and administrative roles, including in the judicial and legal system throughout Malaysia, especially among the younger generation. The reality is, as evidenced by documented academic research findings, that most East Malaysians today are well versed in Malay, due mainly to the education policies in Malaysia which used Malay as the medium of instruction in schools across Malaysia from the 1980s onwards. Therefore, it would be possible to extend the *National Language Acts 1963/1967* to East Malaysia for the purposes of making Malay the official language in all courts in Malaysia. However, due to the continued extensive use of English in courts as shown in the various research findings, significant latitude should be allowed for the use of

English in pleadings as well as for speaking in Court. The flexible use of English can be made official via amendments to *Section 8 of the National Language Acts 1963/1967* on the use of language in court proceedings followed by amendments to the *Rules of Court 2012*, *Rules of the Court of Appeal 1994* and *Rules of the Federal Court 1995* on the language provisions. There should also be rules of court to provide for a suitable punishment if documents are filed in the ‘wrong’ language, but it cannot result in the case being dismissed as this would cause grave injustice to litigants.

Bearing in mind the importance of the constitutional safeguards afforded to Sabah and Sarawak, it is worth reiterating that the article’s proposal is not to do away with English altogether, but merely to make Malay the official language in courts, and at the same time to allow significant leeway for English to be used in pleadings as well as when addressing the court. In short, the article proposes to formalise by way of legislation the reality that is already taking place in courts around Malaysia today. Having the same language provision apply throughout Malaysia would certainly eradicate the problem of inconsistent application of the language provisions between East and West Malaysia as is currently the case.