

### WARM WELCOME TO OUR NEW VICE CHANCELLOR/PRESIDENT

**W**ith great pleasure the Legal Office takes note of the appointment of a distinguished educationist, YBhg Emeritus Professor Dato' Dr Hassan Said who has been appointed the new Vice Chancellor of UiTM, effective 1 February 2016. He takes over from YBhg Tan Sri Dato' Sri Prof Ir Dr Sahol Hamid Abu Bakar whose term as Vice Chancellor of UiTM ended on 31 December 2015.

Prior to his appointment, Emeritus Professor Dato' Dr Hassan Said was the Vice Chancellor and President of Taylor's University, as well as the former Director-General of the Department of Higher Education, Ministry of Higher Education (January 2005 - April 2008). He holds a Bachelor's Degree in Mathematics from the University of Manchester, UK (1979), Master of Science from Brunel University, UK (1981) and a PhD from Brunel University (1984). He specialises in Computer-Aided Geometric Design.

We, at PPUU warmly welcome our new Vice Chancellor to UiTM. We are confident that in view of his excellent leadership record and academic achievements, YBhg Emeritus Professor Dato' Dr Hassan Said will take UiTM to a higher level, both in the richness of education and the quality of its staff.



*"Allah never changes a condition which  
He has conferred upon a people until they  
change what is in their own selves"*

*(Holy Qur'an, Surah 8:53).*

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# LEX AMICUS

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### PIETY

*“True piety does not consist in turning your faces towards the east or the west - but truly pious is he who believes in God, and the Last Day, and the angels, and revelations, and the prophets: and spends his sustenance - however much he himself may cherish it - upon his near of kin, and the orphans, and the needy, and the wayfarer, and the bondage; ... and (truly pious are) they who keep their promises whenever they promise, and are patient in misfortune and hardship and in time of peril”  
(Holy Qur’an, Surah 2:177).*

# GREETINGS FROM THE OFFICE OF THE LEGAL ADVISOR



Dear Readers,

**H**ere, again we are excited to present to you with our *Lex Amicus* - volume 2.

Of late, the Office of the Legal Advisor (PPUU) has been very busy with various responsibilities as stated in its Charter where “it is committed to providing legal services of the highest quality to all its clients ... It shall provide all necessary legal assistance to the Ministry of Higher Education, Board of Directors of UiTM, the Chancellory, the Campuses of UiTM, the Faculties and Units of UiTM in relation to drafting of MoUs and MoAs, vetting of legal documents, staff and student disciplinary proceedings, personnel matters and commercial affairs of the University”.

It is our wish to inform and share with our readers the latest development in PPUU.

June 8th, 2015 was a memorable day for all persons in the office, where we successfully hosted a meeting of the Council of Legal Advisors (MPUU) for all public universities in Malaysia. It was held at De Palma Hotel, Shah Alam. One of the highlights of the meeting was a sharing session

“Past, Present and Future of a Legal Advisor in a Public University” by Emeritus Professor Datuk Dr Shad Saleem Faruqi from UiTM.

Another successful event hosted by PPUU was a “Seminar bagi Penasihat Undang-Undang Seluruh Sistem UiTM” on 1-2 October 2015. It was held in the august Senate Hall of UiTM where participants from branch campuses were able to hear presentations from the officers of PPUU as well as interactive sessions with them on legal matters pertaining to disciplinary issues, breach of scholarship contracts, development projects and many more.

In this issue, we also warmly welcome our new Vice Chancellor/President – Emeritus Professor Dato’ Dr Hassan Said to UiTM.

We truly hope that **Lex Amicus** which means ‘Friends of the Law’ would be our readers’ friend. Hope they could browse through it and learn from it.

Happy Reading!

Musrifah Sapardi  
Chief Editor

# UNIVERSITI TEKNOLOGI MARA ACT 1976 (ACT 173): AN INTRODUCTION

by: Shad Saleem Faruqi\*

All public universities are statutory bodies created and regulated by several federal Acts of Parliament. These are:

- Akta Universiti dan Kolej Universiti 1976 (Akta 30 or "AUKU"). This statute applies to all public universities (other than UiTM and UIAM). Private universities have their own Private Higher Educational Institutions Act 1966 [Act 555].
- Statutory Bodies (Discipline & Surcharge) Act 2000 (Act 605). This is the current law on staff discipline in all public universities.
- Universiti Teknologi MARA Act 1976 (Akta 173). This is a special law for UiTM.
- National Council on Higher Education Act 1996 [Act 546].
- Perbadanan Tabung Pendidikan Tinggi Nasional Act 1997 [Act 566]
- University of Malaya Act 1961, No. 40 of 1961

**UiTM's law:** The establishment of the University, its governing institutions, its principal officers, its legal position, its powers, functions and duties are governed by the following laws:

- Universiti Teknologi MARA Act 1976 (Akta 173 – as amended in 1986, 1996, and 1999. This is our "enabling" or "parent law" that created us and conferred on us powers, functions and duties.
- Statutory Bodies (Discipline & Surcharge) Act 2000 (Act 605). This is the law on staff discipline.
- Educational Institutions (Discipline) Act 1976 (Act 174). This is the law on student discipline.

**General laws:** Besides the above Acts, other general laws of Malaysia like the Audit Act 1957, Statutory Bodies (Accounts and Annual Reports) Act 1980, Employees Provident Fund Act 1991, Employees Social Security Act 1969, Employment Act 1955, Trade Unions Act 1959, Industrial Relations Act 1967, Government Contracts Act 1949, Public Authorities Protection Act 1948, Anti-Corruption Act 1997, Penal Code and the Official Secrets Act 1972 have an indirect bearing on our powers, procedures, duties and immunities.

**The Non-Legal Fountains of Authority and Responsibility**  
Administrative Directives: The formal provisions of the law are supplemented by periodic directives from the Government. It is

noteworthy, however, that directives, circulars, instructions and schemes framed by MOF and JPA are not automatically binding on universities because we are separate statutory bodies and are not part of the "public services of the Federation" as defined by Article 132(1) of the Federal Constitution. Only such directives from the JPA & MOF are applicable as are adopted by our Lembaga Pengarah. However, due to the bureaucratic traditions of the country, the LPU tends to adopt most Government Circulars laid before it.

General Orders not applicable: It is also noteworthy that on staff matters the General Orders of the public services are not applicable to universities. University employees are not "government servants" and are not part of the public services of the Federation as defined by Article 132 of the Federal Constitution. The General Orders of the federal government do not apply to us unless adopted by our Lembaga Pengarah

## UiTM'S Act 173

This Act has 47 sections and two Schedules. The Act has been amended thrice – in 1986, 1996 and 1999. Another amendment is ready for tabling.

- The 1986 amendment dealt with branch campuses and Deputy Directors (now known as Deputy Vice-Chancellors).
- The 1996 amendment conferred on UiTM all the powers of a university except the description of a university.
- The 1999 amendment elevated UiTM's from an institute to that of a full-fledged university.

Act 173's main provisions are as follows:

UiTM has a Special Constitutional Position

This is secured in two ways:

First, Section 1A of Act 173 states that the university is established pursuant to Article 153 of the Federal Constitution. (Article 153 is about the "special position of the 'Malays' and the 'Natives of Sabah & Sarawak'"). Act 173 does not explicitly reserve UiTM for Bumiputeras but that was the clear intention of the amendment in 1999.

Second, Section 3A of Act 173 makes AUKU inapplicable to UiTM. The reason for making AUKU inapplicable to us is because AUKU has a clause to the effect that subject to Article 153, there

\*Emeritus Professor of Law and Legal Advisor to the University

shall be no discrimination in the university on grounds of race or religion. AUKU clashes with UiTM's Bumiputera agenda.

### Who is a Bumiputera?

The legal Office is often approached to give an opinion on whether an applicant is a "Bumiputera" for purposes of admission. The legal answer is that the term Bumiputera is a political, not a legal term. The Federal and State Constitutions talk of "Malays" and the "Natives of Sabah and Sarawak".

Malay: A "Malay" is defined in Article 160(2) to refer to a person who –

- i. professes Islam
- ii. habitually speaks Malay
- iii. conforms to Malay custom, and
- iv. was born in Malaya or Singapore before Aug. 31, 1957, or born of parents or grandparents one of whom was born or is domiciled in Malaya or Singapore on Merdeka day.

The definition is unique in that ethnicity is not emphasised. Religion, language, Malay custom and roots in Tanah Melayu/Singapore are critical factors. People of mixed parentage can qualify as Malays provided all four requirements are met. Article 160(2) does not show gender bias but many public servants disregard the mother's race and require descent from a male. This is unconstitutional and may embarrass the university in a court.

**Natives of Sabah:** Sabah natives are listed out in Article 161A(6)(a) and the Sabah Interpretation (Definition of Native) Ordinance 1952. Thirty-nine ethnic communities are included. A recurring problem is that the law is gender biased. The domicile of the father is regarded as relevant but not of the mother's.

**Natives of Sarawak:** Sarawak natives (consisting of 28 groups) are listed out in Article 161A(7). A recurring problem is that some applicants from Sarawak have one native and one non-native parent. Under Article 161A(6)(a) they are ineligible to be called 'natives of Sarawak'. This raises the ire of many Sarawak politicians.

In recent months, questions have been raised in Parliament about whether UiTM can regard Siamese students as Bumiputeras; and whether more places can be opened up to orang asli Muslim foreigners to provide ethnic diversity in our campuses.

### A Separate Corporate Personality

Section 3 creates the university as a separate statutory body with a corporate status of its own. It has all the powers to own property, enter into contracts, transact business, sue and be sued in its own name, etc. The implication of Section 3 is that UiTM is a separate legal persona distinct from the Federal Government.

### Powers of the University

Section 4(1), subsections (a) to (h) confer on UiTM specific powers in a whole range of fields including education, training, finance, administration, welfare and discipline. These powers are in theory independent of the Minister. Among the powers are:

- academic powers to provide courses, confer degrees, confer honours or awards, recognize other degrees, diplomas etc, institute chairs
- research and innovation; patenting and franchising
- human relations matters including power to appoint and promote staff, determine conditions of service
- financial powers including demanding and receiving of fees
- Welfare of staff and students including power to have pension and welfare schemes, granting of loans to staff and students, grant of fellowships, scholarships, bursaries, medals, prizes
- development powers including setting up and managing of libraries, labs, residence of staff and students
- power to enter into contracts

Section 10-12 give general powers to transact business and hire agents.

Section 28 gives power to receive gifts.

In strict law, our LPU is allowed to exercise the above powers under Section 4(1) 10-12 and 28 independently. In actual practice most of the above powers have been extra-legally locked up by the KPT, JPA, and MOF through extra-legal Circulars or practices.

In law, a Pekeliling cannot override an Act of Parliament. In reality, Pekelilings override laws e.g. our right to own land is in practice overridden by the Pekeliling that requires us to transfer land to the Federal Land Commissioner if government aid is to be obtained to develop the land! Dasar Kementerian has become more important than the clear provisions of law.

### Commercial Powers

Section 4A gives us "additional commercial powers", (generally referred to as "corporate powers") to:

- to enter into business,
- set up companies under the Companies Act
- set up corporations under our own Act 173
- borrow money, securing borrowings
- make investments, hold shares, stocks, debentures and other investments, and
- acquire, hold, rent, mortgage, purchase, take on lease, hire or acquire real and personal estate

The First Schedule gives powers to the university to make rules in respect of a corporation set up under Section 4(a)(1)(c).

These powers are subject to the prior approval of the Ministry of Finance [Section 4A91]).

A minor issue that comes up now and then is that in some cases there is a clash between Section 4 (our independent powers) and Section 4A (our powers with the permission of MOF). For example, the power to take lease is covered by both Section 3(c) and Section 4(A)(1).

**Joint Courses with other universities**

Twinning courses plus franchise courses are allowed under Section 9 with the permission of the Minister.

Institutions of the University: The Board of Directors

Section 13 provides for the composition of 9-member Board. Except for the VC, the other eight members are outsiders. (PM has instructed the Board to have 14 members).

- Section 14 provides for the powers and functions of the Board.
- Section 15 permits the Board to delegate its powers.
- Section 15 permits the Board to appoint committees & subcommittees of its members.

Any outsiders who are "turut hadir" will have no right to vote. This needs to be amended

- Section 35 permits the Board to make subsidiary legislation which must be gazette in Warta Kerajaan. That will require us to go through the Attorney-General's Chambers. But there will be no need to go through Parliament.

**Institutions of the University: The Senate**

Section 16A constitutes a Senate with the VC as the Chairman and other statutory members. Unlike at other universities there are no elected members.

At UiTM the Senate is not the highest academic body. It merely has the power to make recommendations to the Board and has a right to be consulted by the Board on academic matters. It can appoint committees and subcommittees of its members. It can co-opt members but co-opted members have no right to vote.

**Branch Campuses**

These are provided for in Section 7. UiTM has a branch Campus in each State of the Federation. A Branch in turn has one or more campuses affiliated to it. Selangor for example, has eight campuses in the State of Selangor. The existing practice is to have three different nomenclatures for our campuses:

- UNIVERSITI TEKNOLOGI MARA (to refer to the University)
- UNIVERSITI TEKNOLOGI MARA (Kelantan) (or any other State) to refer to the Branch Campus in Kelantan.
- UNIVERSITI TEKNOLOGI MARA (Kelantan)

Kampus Machang (to refer to an affiliate campus)

**Rector:** Every Branch Campus is headed by a Rector appointed by the Minister. The Rector must act under the direction and control of the Vice-Chancellor.

**New thinking about Branch Campuses**

In the last two years, a number of proposals have been made relating to our branch campuses:

- Proposal that all Branch campuses should be converted to full-fledged Universities carrying the name of UNIVERSITI TEKNOLOGI MARA KELANTAN etc. Thirteen Malay universities should be established on the foundation of UiTM.

This proposal has significant legal and political implications.

- Proposal that Branch campuses should be given a large measure of administrative, academic, financial and commercial autonomy. This proposal is partially accepted and can be implemented internally without any significant legal change.
- Proposal that for purposes of Myra and Times Highree Education Index evaluations, UiTM should farm out "low-level teaching courses" i.e. Diploma courses to the Branch campuses, to its companies, corporations and their subsidiaries and to affiliate colleges. Post-graduate, graduate and professional courses and most of the research and innovation should be at Shah Alam or in Selangor. Data for Myra should be culled from Selangor. This proposal while utilitarian will retard the development of campuses and their staff.

**Schools, Centres, Faculties etc.**

These are approved by the Board under Section 8. A School or Centre is headed by a person appointed by the Vice-Chancellor. The Head is responsible to the Vice-Chancellor. The Head need not be from the Faculty or Centre.

**Alumni Associations**

Subject to the approval of the Board, not less than 30 alumni can establish an association: Section 16B.

**Officers and Staff of the University : Chancellor, Pro-Chancellors**

Under sections 19A and 19B, the YDPA is the Chancellor. Pro-Chancellors are appointed by the Chancellor on the advice of the Minister. Under our Act, only the Chancellor, pro-Chancellor and the Vice Chancellor can confer degrees at a Convocation. Given our large number of graduates and the move to hold convocations at Branch Campuses, there is the need to increase the number of people who can make the awards at convocations. Perhaps the number of Pro-Chancellors should be increased.

**The Minister**

Act 173 permits the Minister to oversee the university on its broad policy and programmes.

- The Board and the VC are appointed and removed by the Minister (Sections 13 and 20). They are responsible to the Minister (Section 29).
- Returns, reports, accounts and information must be submitted to the Minister (Section 30).
- Section 29 gives power to the Minister to issue directions not inconsistent with this Act.
- Section 29A permits the Minister to delegate his powers to the Board.

**Vice Chancellor**

The VC is appointed or removed by the Minister in his discretion (Section 20(1) and (2)). His powers and functions as VC are prescribed in Section 20(4), (5), (6).

- The VC is the chief executive, administrative and academic

officer of the University. Section 20(4)

- He exercises general supervision over the arrangements for education, instruction, training, finance, administration, welfare and discipline in the University.
- He heads the Senate.
- He is the student discipline officer under Act 174.
- He is the staff discipline officer under Act 605
- TNCs, Rectors, the Registrar, the Bursar, Deans and Heads are answerable to him.
- It is his duty to ensure compliance with all UiTM laws: Section 20(5)

### **Deputy Vice-Chancellors**

TNCs are appointed by the Minister after consultation with the VC. They may or may not belong to the university (Section 20(7) & (8)).

### **Rectors**

Every Branch Campus is headed by a Rector appointed by the Minister. The Rector must act under the direction and control of the Vice-Chancellor.

### **The Registrar**

The Registrar is appointed by the LPU (Section 21). He/she is under the control and direction of the VC.

At UiTM, but not in other public universities, the Registrar's post is a permanent, tenured post and not a short term post.

### **The Bursar**

The Bursar is appointed by the LPU (Section 22). He/she is under the control and direction of the VC. As with the Registrar, the UiTM Bursar enjoys a permanent post.

### **Deans and Heads**

A School or Centre is headed by a person appointed by the Vice-Chancellor. The Head is responsible to the Vice-Chancellor. The Head need not be from the Faculty or centre.

### **Other Principal Officers**

These must be appointed by the Board (Section 22A).

### **Finances**

In any organisation, financial control is, or ought to be, of critical importance.

- Section 24 establishes the UiTM Fund to be controlled by the Board.
- Section 25 establishes the UiTM Reserve Fund to be controlled by the Board.
- Section 26 requires that annual estimates must be laid before the LPU by April and from there to the Minister.
- Supplementary estimates may be applied for (Section 26).
- Auditor General audits UiTM accounts (Section 27(2)).

### **Liabilities, Immunities, etc.**

The University, the Board, the VC and the staff are eligible for special protection under the Public Authorities Protection Act (Section 31).

A member of the Board, the VC, DVC, the Senate and a staff of the University cannot be sued in a personal capacity for (i) acts done in good faith (ii) in the discharge of powers or duties and (iii) in a reasonable belief that the act was necessary for the purpose intended (Section 34A).

For purposes of the Penal Code, the Board, VC and all members of the staff are to be regarded as public servants (Section 32). There is an obligation of secrecy (Section 33). The Second Schedule provides disqualification of members of the Board, and conflict of interest etc.

### **Miscellaneous**

Section 2 is the interpretation clause and provides 24 authoritative definitions.

### **ACT 173 & AUKU**

AUKU is not applicable to UiTM which has its own Act. The reason for the exclusion of UiTM from AUKU is that the First Schedule of AUKU in Section 5 prohibits distinction of race and creed. UiTM's "Malay agenda" is not compatible with AUKU.

However the similarities between AUKU and Act 173 on the powers of the University are very substantial. The main differences are as follows:

### **AUKU is more detailed**

It has 42 sections in the main Act; 63 sections in the First Schedule, and 9 sections in the Second Schedule, totaling about 114 sections. UiTM'S Principal Act (Act 173) has 57 sections; 6 sections in the First Schedule; and 10 sections in the Second Schedule – in total 73 sections.

AUKU has been amended in 1971, 1975, 1983, 1996, 2009 and 2012 to democratise and humanise it and to confer some autonomy on universities. The UiTM Act was last amended in 1999.

### **Constitution, Rules and Regulations**

In addition to the parent law, AUKU permits the "AUKU universities" to have other types of internal laws to be called Constitutions, Rules & Regulations for their institutions, officers, Committees and procedures.

UiTM does not have a Constitution, Rules & Regulations though we can if we wished: Act 173 in s.35 permits the Board to make rules. We have not done so yet. UiTM prefers internal rules like Peraturan Akademik that are easily amendable.

### **Exemption from the Act**

AUKU permits the YDPA to exempt a University from any provisions of AUKU. Many universities like USM have drafted their Constitution in such a way as to depart from provisions of AUKU. UiTM has no power to depart from Act 173.

**Appointment of VC and other Senior Officers**

Under Section 4A of AUKU there is a Committee to advise the Minister on top university appointments. UiTM has no such provision and the Minister's discretion is very wide. The VC's tenure, terms and removal are at the Minister's pleasure (Section 20 of Act 173).

**VC's Term of Service**

At USM the VC must be appointed for a minimum of 3 years. At UiTM there is no fixed term and the Minister can revoke the appointment any time (Section 20(2)).

**Registrar & Bursar**

In AUKU universities, these senior officers are to be appointed for a term of 3 years, renewable by the Board. UiTM has no such time limitation. Registrar, Bursar and other principal officers are appointed by the Board on such terms and conditions as the Board determines (Section 21-22A).

**Senate Members on the Board**

In all AUKU universities, one Professor from the Senate sits on the Board. At USM 2 Professors elected by the Senate sit on the Board. UiTM does not have Senate representation on the LPU.

**Senate**

Under AUKU the Senate is very powerful. It is not subordinate to the Board or the VC on academic matters and is the final authority on academic decisions. It has 20 Senators elected by senior academicians. At UiTM the Senate is subordinate to the LPU even on academic matters.

**Committees and Boards**

AUKU universities have the Studies Committee, Selection Committee, Employee Welfare Committee, Student Welfare Committee, Management Committee of the Campus and Management Committee of the Faculty. At UiTM such committees exist administratively.

Secondment of Staff: Under AUKU, Section 4B, Minister has power to transfer or second a staff to another university. UiTM has no such provision.

**Financial Autonomy**

At USM, all self-generated income is exempt from external control. Only grants in aid from parliament are subject to MOF's traditional control. Under Section 4A, UiTM is subject to strict control by MOF on financial matters though our law in Sections 3 & 4 gives us autonomy in other areas.

**Participatory Processes**

- In AUKU universities one academician (two at USM) sit on the Board.
- 20 Senators are elected by the other academicians.
- Staff representatives sit on the Staff Welfare Committee
- Two students elected by the SRC sit on the Student Welfare Committee of the Board
- One Student may sit on the Student Disciplinary Board (USM)
- Management Committee of each Campus exists

- Management Committees of each faculty exists
- Academic Committee of each faculty exists

UiTM has no such democratic provisions.

**Student Rights**

- Student welfare and student discipline are separated and put in different hands (USM)
- Along with the SRC, there is a Student Parliament at USM
- Student Complaints Committee
- Post-Graduate students are enfranchised (USM)

UiTM has not yet adopted these reforms though our new Bill is ready.

**Student Complaints**

In AUKU universities, there is a special committee to look into student complaints. This exists at UiTM administratively.

**Foreign Campuses**

Under AUKU foreign campuses are allowed. UiTM's power in this area was taken away in 1999.

**Accountability**

Whistle blower's clause exists at USM. Likewise an Ombudsman and an Internal Auditor exist at USM.

Only the last exists at UiTM but not under law but as an administrative measure.

Many of the above provisions need to be incorporated into UiTM's Act 173. However, whether these changes will come through an Act of Parliament or some of them will be adopted administratively remains to be seen.

JUSTICE

“O ye who believe! Be ye staunch in justice, witnesses for Allah, even though it be against yourselves or (your) parents or (your) kindred, whether (the case be of) a rich man or a poor man, for Allah is nearer unto both (than ye are). So follow not passion lest ye lapse (from truth) and if ye lapse or fall away, then lo! Allah is ever informed of what ye do”  
*(Holy Qur'an, Surah 4:135).*

ABHORENCE OF MURDER & TERRORISM  
 IN THE HOLY QUR'AN

“If one kills another except as a punishment for murder or if he does so for spreading disorder in the land it shall be as if he has killed all mankind. On the other hand, if one saves the life of a single person it shall be as if he has saved the lives of all mankind”  
*(Holy Qur'an, Surah 5:32).*

# SEPINTAS LALU AKTA 173 (AKTA UNIVERSITI TEKNOLOGI MARA 1976)

Oleh: Musrifah Sapardi\*

## Pengenalan

Universiti Teknologi MARA (UiTM) merupakan salah sebuah institusi pengajian tinggi awam di bawah Kementerian Pendidikan Tinggi. Penubuhannya tertakluk kepada Perkara 153 Perlembagaan Persekutuan dan termaktub di bawah Akta Universiti Teknologi MARA 1976. Ia memberikan pendidikan awam kepada pelajar-pelajar Bumiputera sama ada di kampus utama yang terletak di Shah Alam, mahupun di kampus-kampus cawangan yang terdapat di setiap negeri dan beberapa kolej bersekutu di Malaysia.

Ia merupakan sebuah universiti terbesar di Malaysia dari segi saiz dan enrolmen pelajar dan satu-satunya universiti awam yang menjalankan pengambilan dua kali setahun. Pengambilan pelajar hanya terbuka kepada Bumiputera, tetapi bagi program sarjana, pengambilannya juga terbuka kepada pelajar antarabangsa. Begitu juga bagi program-program persediaan yang dijalankan di Pusat Pendidikan Antarabangsa (INTEC). Walaupun polisi kemasukan pelajar ke INTEC hanya untuk kaum Melayu dan Bumiputera, tetapi INTEC menerima sebilangan pelajar bukan Bumiputera yang khusus ditaja oleh Kerajaan Malaysia.

Menurut Profil Universiti, UiTM telah berkembang pesat sejak penubuhannya pada tahun 1956 dan masih terus berkembang sehingga kini. Dengan tenaga pengajar dan staf pentadbiran melebihi 17,000 orang, UiTM mampu menawarkan lebih daripada 500 program kepada 175,000 pelajar. Melihat kepada penambahan bilangan pelajar yang semakin meningkat, UiTM telah menyiapkan Fasa 2 Universiti pada tahun 2014 untuk menampung pelajar-pelajar di Kampus Puncak Alam, Kampus Samarahan 2 di Sarawak, Kampus Jasin di Melaka, Kampus Pasir Gudang Johor, Kampus Seremban di Negeri Sembilan dan Kampus Tapah 2 di Perak.

## Akta 173

Penubuhan UiTM termaktub di bawah Akta Universiti Teknologi MARA 1976 yang lebih dikenali sebagai Akta 173. Ia mula berkuatkuasa pada 1 Jun 1976 dan mukadimahnyanya menyebut:

“Suatu Akta untuk mengadakan peruntukan bagi menubuh, menyenggara dan mentadbirkan Universiti Teknologi MARA dan lain-lain perkara yang berhubungan dengannya”.

Terdapat 7 Bahagian yang merangkumi 47 Peruntukan di dalam Akta 173 iaitu:

- Bahagian I berkenaan Permulaan;
- Bahagian II mengenai Penubuhan Universiti;
- Bahagian III menyetujui tentang Lembaga Pengarah Universiti (LPU);
- Bahagian IV meliputi Pegawai dan Lain-Lain Kakitangan Universiti;
- Bahagian V ialah tentang Kewangan;
- Bahagian VII berkait dengan (Perkara) Am dan;
- Bahagian VII berkaitan Peralihan.

Akta 173 mempunyai 2 Jadual iaitu:

- (a) Jadual 1 yang melibatkan perenggan 4A(1)(c) iaitu Kuasa UiTM membuat peraturan berkenaan dengan perbadanan.
- (b) Jadual 2 yang melibatkan Seksyen 13 berkenaan Peraturan Lembaga Pengarah Universiti (LPU) dan Keahlian LPU.

## Bahagian I, Akta 173 (Seksyen 1-2)

Bahagian 1 Akta 173 menyatakan secara terperinci tentang permulaan (preliminary) yang merangkumi tajuk ringkas (Seksyen 1-1A) dan ‘*interpretation section*’ daripada abjad ‘a’ hingga ‘v’ di bawah Seksyen 2.

Antaranya:

- “Naib Canselor” bermaksud Naib Canselor Universiti yang dilantik oleh Menteri yang dipertanggungjawabkan atas pendidikan di bawah Seksyen 20(1).
- “Universiti” bermaksud Universiti Teknologi MARA yang telah ditubuhkan di bawah Seksyen 3.
- “Kampus” bermaksud kawasan atau kawasan-kawasan, bersama dengan segala bangunan atau struktur lain di atasnya, yang dipunyai atau digunakan, sama ada

\* Timbalan Penasihat Undang-Undang UiTM dan Professor Madya di Fakulti Undang-Undang UiTM. Kertas kerja ini telah di bantangkan kepada staf pentadbiran UiTM di Dewan Al-Ghazali, Jabatan Pembangunan Sumber Manusia UiTM pada 12 Februari 2015.

- selama-lamanya atau selainnya oleh Universiti.
- “Senat” bermaksud Senat Universiti yang ditubuhkan di bawah Seksyen 16A yang bertujuan untuk menasihati LPU tentang segala perkara berkaitan akademik universiti.
  - “Cawangan” bermaksud cawangan UiTM yang ditubuhkan di bawah Seksyen 7.
  - “Kakitangan” maksudnya:
    - (a) Mana-mana pegawai atau pengkhidmat universiti
    - (b) Mana-mana orang yang dilantik menjadi pensyarah oleh LPU dan termasuklah professor kanan, professor, professor madya, penolong professor, reader, pensyarah kanan, penolong pensyarah, tutor; atau
    - (c) Mana-mana orang yang diguna khidmat oleh Universiti.
  - “Pendaftar” bermaksud pegawai utama Pejabat Pendaftaran Universiti yang dilantik dibawah Seksyen 21 yang mana lantikannya dibuat oleh LPU dengan had-had dan syarat-syarat perkhidmatan yang diluluskan oleh LPU.
  - “Bendahari” bermaksud pegawai utama kewangan Universiti yang dilantik oleh LPU di bawah Seksyen 22 dengan had-had dan syarat-syarat perkhidmatan yang diluluskan oleh LPU.
  - “Pelajar” bermaksud seseorang pelajar berdaftar Universiti yang mengikuti kursus.
  - “Kumpulan Wang” bermaksud wang UiTM yang ditubuhkan di bawah Seksyen 24 yang mana hendaklah ditadbirkan dan dikawal oleh LPU.
  - “Universiti” bermaksud universiti awam atau kolej universiti yang ditubuhkan di bawah Akta Universiti dan Kolej Universiti 1971. Begitu juga universiti atau kolej universiti swasta yang ditubuhkan di bawah Akta Universiti Pendidikan Tinggi Swasta 1996.

## Bahagian II, Akta 173 (Seksyen 3-12)

Bahagian II Akta 173 menyatakan secara terperinci tentang perkara-perkara berikut:

- Pembentukan UiTM seperti yang disebut di bawah Seksyen 3 hingga 12.
- Penubuhan UiTM sebagai sebuah pertubuhan perbadanan yang kekal turun temurun dan mempunyai kuasa penuh untuk mendakwa dan didakwa seperti yang dinyatakan di dalam Seksyen 3(a). Ini bermakna UiTM mempunyai kuasa untuk memulakan saman dan boleh disaman.
- Kuasa-kuasa UiTM yang antara lain menyentuh tentang kursus-kursus pengajaran; menganugerahkan ijazah; melantik dan menaikkan pangkat kakitangannya dan kuasa untuk menjalankan penyelidikan dan pengeluran komersil bagi kemajuan dan penggunaan yang berkesan (Seksyen 4(1)(a)-(l)) iaitu:
  - (a) UiTM mempunyai kuasa untuk menetapkan syarat-syarat dan skim perkhidmatan kakitangannya.
  - (b) Menubuhkan skim pencen, persaraan dsb bagi faedah kakitangan.
  - (c) Memasukkan kontrak
  - (d) Membina kemudahan-kemudahan yang difikirkan perlu oleh universiti
  - (e) Mewujudkan biasiswa atau skim pinjaman untuk kakitangan dan pelajar
  - (f) Mengendalikan dan mempromosikan penyelidikan komersil daripada universiti
  - (g) Memasarkan dan menfrancaiskan perkhidmatan, penyelidikan dan produk daripada universiti
  - (h) Meminta atau menerima bayaran seperti yang ditetapkan oleh LPU
- Kuasa Tambahan kepada UiTM di bawah Seksyen 4A(1) di mana dengan kelulusan daripada Menteri Kewangan, UiTM boleh melaksanakan beberapa perkara seperti menganjurkan penubuhan syarikat di bawah Akta Syarikat 1965 untuk melibatkan diri dalam mana-mana aktiviti yang telah dirancang oleh universiti (Seksyen 4A(b)). Antaranya:
  - (a) Penglibatan UiTM secara pemilikan ekuiti, perkongsian atau usahasama
  - (b) Menubuhkan perbadanan bagi menguruskan apa-apa projek, skim atau perusahaan
  - (c) Membuat pinjaman tertakluk kepada kelulusan Menteri (contohnya, debentur, bon, saham).
  - (d) Membuat pelaburan
  - (e) Pembelian harta
- Meterai Universiti (Common Seal of University) di bawah Seksyen 5.
  - (a) LPU boleh meluluskan penggunaan meterai UiTM
  - (b) Meterai hendaklah disimpan dalam jagaan Naib Canselor
  - (c) Meterai keatas ijazah, diploma dan sijil dihadapan Naib Canselor dan Pendaftar UiTM
  - (d) Meterai menjadi pengiktirafan rasmi dan kehakiman
- Lokasi Universiti dan Cawangan-Cawangannya (Seksyen 6 dan 7).
  - (a) Lokasi UiTM Induk di Shah Alam beserta di bandar-bandar satelit di Selangor
  - (b) Kampus cawangan boleh diwujudkan di negeri-negeri lain dalam Malaysia
  - (c) Perlantikan Rektor-Rektor untuk kampus-kampus cawangan oleh Menteri
  - (d) Lokasi ini boleh digantikan dengan lokasi lain dengan peruntukan khas daripada Menteri

Governan Universiti menyentuh tentang Konsep IU2S yang menyarankan Universiti Induk sebagai Pusat

Pentabiran Universiti. Manakala Kampus Negeri diberikan status autonomi dalam aspek pentadbiran (Autonomous State Administration). UiTM Induk diketuai oleh Presiden/Naib Canselor dan Kampus-Kampus Negeri diketuai oleh Rektor-Rektor. Sejak Jun 2014, 7 buah kampus negeri telah diberikan status autonomi iaitu Perlis, Perak, Terengganu, Sarawak, Melaka, Pulau Pinang dan Pahang.

- Pembahagian Sekolah-Sekolah dan Pusat-Pusat (Seksyen 8)
  - (a) Naib Canselor hendaklah melantik Ketua-Ketua Sekolah/Dekan-Dekan untuk Fakulti-Fakulti dan Pusat-Pusat.
  - (b) Ketua-Ketua Sekolah/Dekan-Dekan hendaklah bertanggungjawab kepada Naib Canselor.
- Pengendalian pengajian dengan mana-mana universiti atau pihak luar dibenarkan asalkan mendapat kelulusan bertulis daripada Menteri Pendidikan Tinggi terlebih dahulu (Seksyen 9)
  - (a) UiTM boleh menjalankan kursus-kursus pengajian bersama dengan mana-mana universiti, IPT atau badan-badan profesional sama ada dalam atau luar negara termasuk juga 'exchange programme'.
  - (b) Walaubagaimanapun ianya tertakluk kepada kelulusan Menteri Pendidikan Tinggi.
- Kuasa Am kepada UiTM untuk menjalankan urusan atau transaksi (Seksyen 10)
  - (a) UiTM mempunyai kuasa untuk memasukkan transaksi yang pada fikirannya boleh memudahkan perjalanan kewajipannya dan juga memberikan manfaat kepada universiti.
- Kuasa untuk menggunakan khidmat ejen (Seksyen 11). Di mana, penggunaan khidmat ejen-ejen dan penasihat-penasihat teknik termasuk peguambela dan peguamcara untuk melaksanakan tanggungjawabnya.
- Kuasa UiTM untuk tugas-tugas tambahan bagi kepentingan universiti.
  - (a) UiTM boleh membelanjakan apa-apa wang lain sebagaimana yang diperuntukkan oleh Menteri kepadanya, dengan syarat bahwa akaun-akaun wang itu hendaklah disimpan berasingan dan terpisah daripada akaun-akaun Kumpulan Wang UiTM seperti yang dinyatakan di dalam Seksyen 24.
  - (b) Dalam melaksanakan tanggungjawab tersebut, UiTM dianggap telah memenuhi keperluan Akta 173.

### Bahagian III, Akta 173 (Seksyen 13-16B)

Bahagian III Akta 173 menyebut tentang Lembaga dan peranannya:

- Seksyen 13(1) menyatakan secara terperinci tentang

keanggotaan Lembaga Pengarah Universiti (LPU) UiTM.

- (a) Pengerusi LPU
- (b) Naib Canselor
- (c) 2 orang wakil kerajaan
- (d) 5 anggota lain (3 daripada sektor swasta)
- (e) Pendaftar sebagai Setiausaha

(\*Perlu dinyatakan di sini bahawa korum bagi mesyuarat adalah sekurang-kurangnya 5 orang ahli.)

- Kuasa dan Tugas Lembaga dinyatakan di dalam Seksyen 14. Lembaga hendaklah menjadi badan eksekutif Universiti. Antara tugasannya termasuk mengelola, mengawal dan mentadbir Universiti.
- Perwakilan Kuasa Lembaga (LPU) kepada mana-mana ahli tetapi tertakluk kepada arahan-arahan dan kawalan Lembaga (Seksyen 15).
- Lembaga boleh melantik Jawatankuasa Lembaga dari kalangan anggota-anggotanya sebagaimana yang difikirkan perlu atau wajar (Seksyen 16).
- Penubuhan Senat Universiti untuk menasihati Lembaga tentang perkara-perkara akademik (Seksyen 16A).

Keahlian Senat:

- (a) Naib Canselor
- (b) Timbalan-Timbalan Naib Canselor
- (c) Dekan-Dekan
- (d) Ketua-Ketua Sekolah / Pusat,
- (e) Wakil Rektor dari Kampus Cawangan
- (f) Staf Akademik Kanan (Profesor)
- (g) Pendaftar sebagai Setiausaha
- (h) Ahli Turut Hadir (Tanpa Kuasa Mengundi)
- Penubuhan Persatuan Alumni UiTM (Seksyen 16B).
  - (a) Ia boleh ditubuhkan dengan kelulusan LPU dan keanggotaan ahli sekurang-kurangnya 30 orang
  - (b) Pertubuhan Alumni hendaklah ditadbir oleh pengurus Perlembagaannya sendiri

(\*Perlu dinyatakan di sini bahawa Seksyen 17-19 Akta 173 sebelum Pindaan 2000 telah dimansuhkan.)

### Bahagian IV, Akta 173 (Seksyen 19A-23)

Bahagian IV, Akta 173 berkenaan Pegawai-Pegawai dan Lain-Lain Kakitangan Universiti. Antaranya menyebut tentang perkara-perkara berikut:

- Peruntukan tentang Canselor UiTM dinyatakan di dalam Seksyen 19A(1). Menurut Seksyen 19A(2), Canselor UiTM ialah Yang DiPertuan Agong (YDPA). Buat masa ini **Duli Yang Maha Mulia Tuanku Al Haj Abdul Halim Mu'adzam Shah Ibni Almarhum Sultan Badlishah** merupakan Canselor UiTM. Diantara tugas

YDPA ialah untuk hadir dan menjalankan tugasnya dalam Majlis Konvokesyen UiTM.

- Peruntukan tentang Pro-Canselor dinyatakan di dalam Seksyen 19B(1). Mereka memegang jawatan atas perkenan YDPA. Pada masa ini, Pro-Canselor UiTM ialah:
  - (a) **YBhg Tan Sri Dato' Seri Utama Haji Arshad Ayub**
  - (b) **YBhg Tan Sri Datuk Seri Panglima Dr Abdul Rahman Arshad**
  - (c) **YBhg Tan Sri Dato' Sri Sallehuddin Mohamed**
  - (d) **YBhg Tan Sri Nuraizah Abdul Hamid**
- Peruntukan tentang Naib Canselor dinyatakan di dalam Seksyen 20(1) dan Timbalan Naib Canselor pula di dalam Seksyen 20(7).
  - (a) Mereka kesemuanya dilantik oleh Menteri.
  - (b) Mereka dikehendakki memegang jawatan tersebut dengan kehendak Menteri.
  - (c) Naib Canselor UiTM pada masa ini ialah **YBhg Profesor Emeritus Dato' Dr Hassan Said**. Naib Canselor UiTM hendaklah bertindak sebagai Ketua Eksekutif, Pentadbir dan Pegawai Akademik Universiti.
  - (d) Timbalan Naib Canselor (TNC).

Menteri boleh melantik beberapa orang TNC selepas berunding dengan Naib Canselor. Menteri juga boleh berunding dengan Naib Canselor untuk menentukan terma dan syarat lantikan TNC. TNC juga boleh menjalankan tugas Naib Canselor semasa ketiadaannya dengan lantikan daripada Menteri. Pada masa ini di UiTM:

TNC (Akademik & Antarabangsa)

**Professor Sr Ir Dr Suhaimi Abdul Talib**

TNC (Hal Ehwal Pelajar)

**Professor Dato' Dr Abdullah Mohammad Said**

TNC (Penyelidikan dan Inovasi)

**Professor Ir Dr Abdul Rahman Omar**

TNC (Jaringan Industri, Masyarakat & Alumni)

- Peruntukan tentang pelantikan Pendaftar di bawah Seksyen 21(1). Pendaftar UiTM dilantik oleh Lembaga Pengarah Universiti. Beliau berperanan sebagai Pegawai utama Pejabat Pendaftar Universiti dan bertanggungjawab kepada Naib Canselor. Pada masa ini Pendaftar UiTM ialah **YBrs Puan Azida Azmi**
- Peruntukan tentang Bendahari tertera di dalam Seksyen 22(2). Bendahari UiTM dilantik oleh Lembaga Pengarah Universiti dan beliau mempunyai tanggungjawab sebagai Pegawai Kewangan Utama di UiTM. Bendahari UiTM. Buat masa ini, **YBrs Dr Mohd Anuar Marzuki** merupakan Pemangku Bendahari UiTM.
- Pelantikan Pegawai Utama di UiTM yang lain ada dinyatakan di dalam Seksyen 22A(1) dan (2). Pihak UiTM menerusi LPU boleh melantik Pegawai Utama yang lain di mana mereka bertanggungjawab terus kepada Naib Canselor. Pihak LPU boleh menetapkan

syarat dan terma perkhidmatan mereka. Sebagai contoh, di UiTM, Pegawai Utama Lain ialah **Professor Emeritus Datuk Dr Shad Saleem Faruqi** yang melaksanakan tugas sebagai Penasihat Undang-Undang Universiti

*\*Nota: Mereka-mereka yang disebutkan di atas merupakan Ahli Jawatankuasa Eksekutif (JKE) Universiti.*

- Perlantikan pegawai (staf) yang lain di bawah Seksyen 23. Pihak LPU boleh melantik mana-mana staf lain untuk menjalankan tugas bagi kepentingan universiti dan bertanggungjawab kepada Naib Canselor. Pada masa ini, pentadbiran tinggi atau 'senior management' di UiTM diterajui oleh **Encik Noor Hidayat Adnan** (Ketua Pustakawan); **Prof. Dr Hadariah Bahron**, PNC (Penyelidikan); **Prof. Dr Roziah Janor**, PNC Institut Kualiti dan Pengembangan Ilmu (InQKA); **Prof. Madya Dr Ismie Roha Mohamed Jais**, Pemangku PNC Institute of Leadership & Quality Management (iLQAM); **Prof. Dr Hj Razmi Chik**, PNC Malaysian Academy of SME & Entrepreneurship Development (MASMED), **Prof. Dato' Dr Abu Bakar Abdul Majeed** PNC Kampus UiTM Sungai Buloh & Selayang dan **Professor Datin Ir. Dr Zainab Mohamad** sebagai PNC (Pembangunan, Pengurusan Fasiliti and ICT).

#### **Bahagian V, Akta 173 (Seksyen 24-28A)**

Bahagian V Akta 173 menyebut tentang kewangan dan perkara-perkara yang berkaitan dengannya:

- Penubuhan Kumpulan Kewangan UiTM yang dikawal selia oleh LPU dinyatakan di dalam Seksyen 24(1) dan Dana Simpanan pula dinyatakan di bawah Seksyen 24(6). Kumpulan Wang UiTM terdiri daripada:
  - (a) Peruntukan Parlimen
  - (b) Pinjaman daripada Kerajaan
  - (c) Apa-apa pemberian kepada UiTM
  - (d) Hasil pelaburan, subsidi, pajakan, gadaian dan lain-lain

*(\*Kesemua wang yang dibayar kepada UiTM hendaklah dibelanjakan sepertimana yang telah diluluskan oleh Menteri)*

- Kumpulan Wang Rizab dengan syarat digunakan untuk tujuan Universiti sahaja dinyatakan di dalam Seksyen 25
  - (a) UiTM dikehendakki menubuhkan Kumpulan Wang Rizab dan dikawal pembayaran keluar masuk wang oleh LPU
  - (b) Wang ini tidak boleh dibelanjakan bagi maksud lain daripada UiTM
- Anggaran-Anggaran Tahunan Universiti dan pembentangnya kepada Lembaga disebut di dalam Seksyen 26
- Akaun dan Audit pula dinyatakan di dalam Seksyen 27
  - (a) UiTM hendaklah menyediakan penyata-penyata

- akaun bagi tiap-tiap satu tahun kewangan
- (b) Pengauditan hendaklah dibuat oleh Ketua Audit Negara
- (c) YB Menteri hendaklah membentangkan laporan kewangan UiTM dalam sesi di Parlimen
- Hadiah-Hadiah yang diterima dinyatakan di dalam Seksyen 28. LPU boleh menerima apa-apa hadiah/pemberian sebagai bantuan kewangan kepada UiTM
- Surcaj berkaitan isu kewangan sahaja dinyatakan di dalam Seksyen 28A. Di dalam Seksyen ini dinyatakan tentang Kuasa LPU untuk surcaj kakitangan yang bertanggungjawab terhadap kekurangan atau kehilangan wang, sekuriti, simpanan, atau harta UiTM

#### Bahagian VI, Akta 173 (Seksyen 29-35)

Bahagian VI Akta 173 merupakan Bahagian Am yang meliputi perkara-perkara berikut:

- Kuasa Menteri memberi arahan dinyatakan di dalam Seksyen 29
  - (a) LPU dan Naib Canselor bertanggungjawab kepada Menteri
  - (b) Menteri boleh memberikan arahan yang difikirkan perlu dari masa kesemasa kepada LPU dan Naib Canselor
- Perwakilan Kuasa daripada Menteri kepada LPU dinyatakan di dalam Seksyen 29A
  - (a) Menteri boleh mewakilkan kuasa kepada LPU
  - (b) Perwakilan kuasa tersebut boleh dibatalkan oleh Menteri pada bila-bila masa sahaja
- Konvokesyen di sebut di dalam Seksyen 29B
  - (a) Canselor (YDPA) boleh mengarahkan konvokesyen UiTM dijalankan
  - (b) Jika Canselor tiada, istadat konvokesyen UiTM hendaklah dijalankan oleh Pro Canselor atau Naib Canselor
- Perlindungan Pihak Berkuasa Awam dinyatakan di dalam Seksyen 31. Kesemua kaitangan UiTM dilindungi oleh Akta Perlindungan Pihak Berkuasa 1948 (Akta 198) daripada sebarang pendakwaan atau tindakan sivil semasa menjalankan tugas-tugas rasmi.
- Penjawat Awam dinyatakan di dalam Seksyen 32. Kesemua kakitangan UiTM dianggap sebagai penjawat awam mengikut Kanun Keseksaan (*Penal Code*) dalam menjalankan tugas rasmi.
- Tanggungan Kerahsiaan dinyatakan di dalam Seksyen 33
  - (a) Tanggungjawab untuk tidak mendedahkan maklumat universiti
  - (b) Jika disabit kesalahan, boleh dikenakan hukuman
  - (c) Hukuman penjara tidak lebih 6 bulan atau denda tidak lebih RM1,000 atau kedua-duanya sekali
- Tindakan Sivil dinyatakan di dalam Seksyen 34. Mana-mana kakitangan yang diberi kuasa oleh Naib Canselor (termasuk Pejabat Penasihat Undang-Undang) boleh mewakili universiti dalam kes-kes sivil
- Tiada tindakan atau tindakan guaman ke atas kakitangan UiTM yang menjalankan tugas dengan suci hati seperti yang dinyatakan di dalam Seksyen 34A. Perlu diketahui bahawa tindakan undang-undang tidak boleh diambil ke atas semua pegawai utama/ pegawai kanan dan kakitangan UiTM yang menjalankan tugas mereka dengan suci hati (*bona fide or good faith*)
- Penyampaian notis oleh atau kepada UiTM dinyatakan di dalam Seksyen 34B
  - (a) Penyampaian apa-apa notis hendaklah dibuat melalui pos berdaftar
  - (b) Undang-undang kontrak terpakai
  - (c) Notis disifatkan sebagai telah sampai kepada penerima apabila surat tersebut telah diposkan kepadanya
- Kuasa LPU membuat Peraturan dinyatakan di dalam Seksyen 35. LPU boleh menggubal peraturan yang difikirkan perlu bagi maksud penguatkuasaan peruntukan-peruntukan Akta 173.

#### Bahagian VII, Akta 173 (Seksyen 36-47)

Bahagian VI Akta 173 ini menjelaskan tentang Peralihan ITM kepada UiTM yang menyebut perkara-perkara berikut:

- Tafsiran nama UiTM seperti yang dinyatakan di dalam Seksyen 36
- Pemindahan kuasa seperti yang disebut di dalam Seksyen 37. Perkara ini tertakluk kepada peruntukan Akta 173, di mana kesemua kuasa, hak, keistimewaan, kewajipan atau tanggungan diturunkan kepada UiTM
- Pindah milik harta dinyatakan di dalam Seksyen 38. Segala harta ITM sama ada harta alih atau harta tidak alih menjadi harta UiTM
- Kontrak-Kontrak yang sedia ada seperti yang dinyatakan di dalam Seksyen 39. Semua surat ikatan, bon, perjanjian, surat cara, dan perkiraan kerja beralih daripada ITM kepada UiTM
- Penerusan langkah pembicaraan jenayah seperti yang disebut di dalam Seksyen 40. Ini termasuk apa-apa rayuan yang di buat atau keputusan yang di terima.
- Pindah milik wang ada dinyatakan di dalam Seksyen 41
- Penerusan pegawai-pegawai dan penjawat awam dinyatakan di dalam Seksyen 42
- Pelajar-pelajar dinyatakan di dalam Seksyen 43
- Tindakan tatatertib yang belum selesai seperti yang disebut di dalam Seksyen 44
- Kampus-kampus Cawangan UiTM seperti yang dinyatakan di dalam Seksyen 45
- Pembubaran badan pengelolaan (governan) dinyatakan di dalam Seksyen 46
- Kuasa Menteri untuk meminda klausa-klausa di Bahagian VI dengan syarat setiap perintah yang dibuat dibentangkan di Parlimen selepas diwartakan ada dinyatakan di dalam Seksyen 47(1) dan (2).

### Jadual-Jadual di dalam Akta 173

#### Jadual 1 Akta 173 (Perkara 1-6)

- Peraturan Perbadanan
- Kuasa Universiti untuk Meminda
- Badan Korporat
- Cap Meterai

#### Jadual 2 Akta 173 (Perkara 1-10)

Berdasarkan Seksyen 13 Akta 173, Jadual Kedua menjelaskan tentang:

- Peraturan mengenai Lembaga Pengarah Universiti (LPU)
  - (a) Ketika mesyuarat, Pengerusi LPU hendaklah mempengeruskannya
  - (b) Jika Pengerusi tiada, anggota-anggota LPU hendaklah melantik salah seorang daripada mereka menjadi Pengerusi
  - (c) LPU boleh mengundang orang lain untuk menghadiri mesyuarat bagi maksud menasihati dsb (tetapi orang yang diundang tiada hak mengundi).
- Peraturan tentang Keahlian LPU
 

Mereka yang dilantik akan hilang kelayakan jika:

  - (a) Disabitkan kesalahan yang melibatkan fraud, kecurangan atau keburukan akhlak
  - (b) Disabitkan kesalahan rasuah
  - (c) Disabitkan kesalahan yang boleh dihukum penjara selama tempoh yang melebihi 2 tahun
  - (d) Didapati bankrap
  - (e) Diisytiharkan tidak sempurna akal
  - (f) Jika mereka tidak menghadiri mesyuarat Lembaga 3 kali berturut-turut
  - (g) Jika perlantikannya telah dibatalkan

### Kesimpulan

Perlu ditekankan bahawa Akta 173 telah digubal sempena penubuhan UiTM. Penggubalan Akta ini sangat penting kerana ia menyediakan garis panduan untuk penyelenggaraan dan kelancaran pentadbiran serta perkara-perkara lain yang berkaitan dengannya. Akta 173 juga bertindak sebagai perakuan peralihan institusi dari sebuah institut kepada sebuah universiti, berserta kuasa yang diberi untuk membolehkan ia berfungsi seperti universiti-universiti lain, termasuklah penawaran kursus-kursus pengajian dan penganugerahan ijazah pada semua peringkat.

Ketegasan Kerajaan Malaysia berkenaan hak eksklusif orang Melayu dan Bumiputra di UiTM kadang-kala dicabar. Sepatutnya hak keistimewaan ini tidak boleh dicabar kerana ianya termaktub di dalam Perkara 153 Perlembagaan Persekutuan yang antaranya memberi tanggungjawab kepada YDPA untuk menjaga kedudukan keistimewaan orang Melayu dan penduduk asal Malaysia atau Bumiputera. Kerajaan Pusat melindungi kepentingan kumpulan ini dengan mengadakan kuota kemasukan ke

dalam perkhidmatan awam, biasiswa dan pendidikan awam. Ini dianggap sebagai sebahagian daripada kontrak sosial. Menurut Professor Emeritus Tan Sri Dr Khoo Kay Kim ketika di wawancara oleh Bernama (Sept. 2010), *“mereka yang mempertikaikan hak-hak keistimewaan ini adalah mereka yang buta sejarah.”*

Setakat hari ini, terdapat lebih daripada 20 buah Institusi Pengajian Tinggi Awam (IPTA) dan lebih daripada 150 Institusi Pengajian Tinggi Swata (IPTS) yang menawarkan pelbagai kursus kepada semua kaum di negara ini. Hanya satu sahaja daripada institusi-institusi tersebut yang menawarkan program kepada kaum Melayu dan Bumiputera yang merupakan penduduk majoriti di negara ini. Maka, sesiapa yang mempertikaikan hak keistimewaan orang Melayu dan Bumiputera untuk melanjutkan pelajaran ke UiTM bukan sahaja telah melangkai sempadan kaum, malah turut mencabar undang-undang (Fasa-fasa dalam Perkara 153 Perlembagaan Persekutuan). Pertikaian tersebut bukan sahaja bercanggah dengan Perlembagaan, malah menyentuh isu penubuhan UiTM sendiri yang jelas termaktub di dalam Seksyen 1A Akta Universiti Teknologi MARA 1976 (Akta 173) yang pindaannya telah diluluskan oleh Parlimen Malaysia pada tahun 2000 : UiTM Ditubuhkan menurut peruntukan Perkara 153 Perlembagaan Persekutuan.

Salah satu ruang bagi orang Melayu dan Bumiputera untuk memajukan diri ialah dengan melanjutkan pelajaran mereka di institusi-institusi pengajian tinggi sama ada di dalam mahupun luar negara. Kepada mereka yang kurang berkemampuan tetapi memenuhi syarat-syarat yang ditetapkan, mereka boleh memohon untuk menuntut ilmu di UiTM yang mana yuran pengajiannya adalah lebih murah berbanding dengan institusi pengajian tinggi yang lain. Tujuannya untuk memberi peluang kepada mereka bagi mencapai tahap pembelajaran yang lebih tinggi dan menyiapkan mereka untuk kerjaya dalam pelbagai bidang seajar dengan Falsafah UiTM yang menyebut:

***“Kepercayaan bahawa semua manusia mempunyai bakat, minat dan kecenderungan, dan jika diasuh, dididik dan dilatih dengan sempurna melalui pemindahan ilmu pengetahuan dari mana-mana kebudayaan atau tamaddun dunia secara terbuka serta melalui pemindahan dan penerapan nilai-nilai Islam, boleh berperanan dalam membangunkan diri, masyarakat dan negara”***

Akta 173 amat perlu diketahui oleh segenap orang Melayu dan Bumiputera Sabah dan Sarawak dalam memupuk semangat kecintaan ilmu kepada anak bangsa yang pada hakikatnya sehingga kini masih ketinggalan dalam beberapa bidang berbanding bangsa lain di Malaysia.

# THE LAW RELATING TO ORDERS OF SURCHARGE AGAINST PUBLIC SERVANTS AND EMPLOYEES OF STATUTORY BODIES

By: Shad Saleem Faruqi\*

**P**ublic office is a public trust. This is especially so in the matter of handling the nation's or the public's money. The law on surcharge refers to the penalty imposed on a fiduciary for breaching his fiduciary duty.

## Purpose

The purpose of the law on surcharge is to enforce financial responsibility, honesty and efficiency within public services.

Another aim is to compensate the government or a statutory body for losses suffered as a result of an employee's negligence, dereliction of duty, dishonesty, carelessness or inefficiency.

The law empowers the government or a statutory body to initiate proceedings for surcharge in lieu of, or in addition to, disciplinary proceedings.

## Laws applicable

The main laws relating to surcharge are: the Financial Procedure Act 1957 [Act 61], Public Officers (Conduct & Discipline) Regulations 1993 and Statutory Bodies (Discipline & Surcharge) Act 2000 [Act 605].

In addition, most statutory bodies have provisions on surcharge in their parent laws. Some examples of these laws are: Universiti Teknologi MARA Act 1976 [Act 173], Rubber Industry Smallholders Development Authority Act 1972 [Act 85], Lembaga Kemajuan Terengganu Tengah Act 1973 [Act 104], Employees Social Security Act 1969 [Act 4] and Labuan Financial Services Authorities Act 1996 [Act 545].

The surcharge provisions in these laws are presumably superseded by the Statutory Bodies (Discipline & Surcharge) Act 2000 [Act 605] because the latter law is a special piece of legislation on discipline and surcharge applicable to all statutory bodies. However, it will not be surprising if, in case of conflict between Act 605 and a statutory body's parent legislation, someone argues in court that Act 605 is a general law and the statutory authority's own parent law is a special law that should prevail due to the rule "special overrides general".

## Who is liable to an order of surcharge?

Any employee or ex-employee of the federal government, state governments or a statutory body including a university may be subjected to an order of surcharge.

A person who has retired, resigned or been terminated or dismissed may be liable in the same manner as a serving officer: Act 61, s. 18; Act 605, s. 14. The liability is a lifelong liability.

## Who has authority to issue an order of surcharge?

1. In the case of federal or state employees, the appropriate Service Commission after "consultation with the financial authority" may order imposition of the surcharge: Act 61, s. 18.

"Financial authority" is defined in Act 61, s. 3. "Financial authority" in relation to the Federal Consolidated Fund means the Treasury and in relation to the Consolidated Fund of a State means the State Financial authority. "State financial authority" means "the principal officer, by whatever name called, in charge of the financial affairs of a state".

It is also noteworthy that the term "consultation" does not mean "consent". The appropriate Service Commission is the ultimate authority on surcharge matters. It is required, by way of procedure to consult and hear out the appropriate financial authority. However the opinions of the financial authority are not binding.

2. If statutory bodies are involved, then the Board of Directors of a statutory body (and not the Jawatankuasa Tata tertib) is the authority for ordering imposition of the surcharge: Act 605, s. 15.

## Grounds for surcharge

Under Section 19 of Act 61 and Section 14 of Act 605, the following five acts of commission or omission can trigger the law on surcharge. The law for the government and statutory bodies is largely similar.

1. Failure to collect any monies owing to the federal or state government or to the statutory body when it was the officer's responsibility to do the collection. Possible

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examples here are: failure of a university to collect fees from students while permitting them to pursue the academic programme; failure to initiate procedures against violators of scholarship agreements; failure to collect fines; failure to collect fines for late delivery of goods or services: Act 61, s. 18(a); Act 605, section 14(a).

2. Improper payment of public monies or money of the statutory body. For example, if claims are approved or project-payments are authorized without proper scrutiny or supervision or without determining whether contractual obligations have been complied with, or for corrupt motives, these may well be grounds for surcharge. Also if payment of monies was not duly approved: Act 61, s. 18(b); Act 605, section 14(b). Excess payment of salary may be a ground for surcharge.
3. Causing, whether directly or indirectly, any deficiency in or destruction of any money, stamps, securities, stores or other property of the federal or state government or a statutory body: Act 61, s. 18(c).
4. Accounting officer failing to keep proper accounts or records: Act 61, s. 18(d); Act 605, section 14(d). This is likely to include failing to monitor accounts and records.  

“Accounting Officer” under Act 61, s. 3 refers to “every public officer who is charged with the duty of collecting, receiving, or accounting for, or who in fact collects, receives or accounts for, any public money, or who is charged with the duty of disbursing, or who does in fact disburse, any public moneys, and every public officer who is charged with the receipt, custody or disposal of, or the accounting for, public stores or who in fact receives, holds or disposes of public stores”.
5. Failing to make any payments due from the government or the statutory body or university: Act 61, s. 18(e); Act 605, section 14(e). This includes delay in the payment of monies due from the government or the statutory body or the university.

### Procedure for surcharge

The law provides a very brief, rudimentary procedure for initiating surcharge proceedings.

In relation to the government: For the government, there is no requirement under Act 61, section 19 to serve a show cause notice on the person to be surcharged! However, in practice, this is done.

If no notice to show cause is given, the courts will surely strike down the whole exercise as a breach of the common law principle of natural justice which is firmly embedded in our system of procedural justice. All that section 19 of Act 61 requires is that the Chairman of the appropriate Service Commission shall notify the head of the department of the person surcharged and the head will then notify the person surcharged!

In relation to universities: For statutory bodies the law is much more just from the procedural point of view. The Board of Directors of a statutory body shall serve a written notice on the officer concerned: Act 605, section 15. The Officer concerned has 14 days to show cause in writing: Act 605, section 16. No oral hearing is required (but there is no legal bar if the Board of Directors wishes to permit an oral hearing). The Board shall deliberate on the written reply of the officer and make a decision: Act 605, section 16. The decision on the surcharge must be communicated in writing to the officer: Act 605, section 17.

It is humbly submitted that the procedure for imposing surcharge in the public services and statutory bodies (specially the former) is extremely obsolete and not in keeping with modern trends of natural justice.

It must be borne in mind that no one should be deprived of any right or interest or legitimate expectation without a proper “hearing”.

In several cases courts have held that “hearing” to be fair must be oral and not just in writing.

“Hearing” is now regarded by the superior courts as part of the constitutional right to personal liberty (Article 5) and part of the right to equality (Article 8).

Surcharging an employee involves depriving him of part of his salary or pension. Salary and pension are “property” under Article 13 of the Constitution. “Property” cannot be deprived except in accordance with “law”. “Law” is not only statutory law laid down in Act 61 but also includes the Federal Constitution’s chapter on fundamental liberties. “Law” also includes common law rules of natural justice.

From the above it follows that some provisions of Act 61 may be unconstitutional and must be amended to fall in line with modern notions of due process.

Even the law in Act 605 for statutory bodies falls short of the requirements of due process in that there is no statutory provision for a thorough prior investigation. Oral hearing is not allowed. There is no representation by a lawyer or by a friend or colleague of the person to be surcharged.

It is humbly recommended that Act 61 and Act 605 must be amended to mandate a prior statutory investigation in all cases of alleged negligence, default etc. that may lead to a surcharge totaling more than two month’s basic salary.

At the investigation, the “accused” must be heard orally, must be allowed to bring witnesses, cross-examine all official witnesses, have a right to examine incriminating documentary evidence, right to introduce his own documentary evidence in defence, right to request that he be allowed to be represented by a lawyer or a learned friend in the discretion of the Chairman of the Investigation Committee.

Such a procedure for an investigation committee already exists under Act 605 for cases that may lead to dismissal or reduction in rank. The procedural rights in disciplinary cases must be introduced in surcharge cases as well.

At UiTM, though the law (Act 605) does not call for a prior investigation, the practice is that in all surcharge cases, no matter how trivial or serious, a prior, internal investigation is always done. The Legal Office vets the processes and the findings. Only then the Board of Directors examines the file to determine whether there is a prima facie case and whether a notice of show cause must be sent or not.

**No appeal**

No appeal to the Minister or to the courts is allowed. However, the subject of the order can apply to the Board for reconsideration and the Board has the power to (i) withdraw any order (Act 61, s. 20; Act 605, section 18) or (ii) to reduce the amount of surcharge (Act 605, s. 18), or (iii) write-off the loss (Act 61, s. 17).

**Judicial Review**

Despite the absence of appeal, no law can prevent the superior courts from exercising their inherent power of review by way of certiorari, mandamus, injunction and declaration. This means that those conducting surcharge proceedings must be vigilant that judicial questioning cannot be discounted.

**Amount of surcharge**

The amount of surcharge that can be imposed depends on the nature of the act or omission: Act 61, s. 18 and Act 605, s. 14.

Act of Omission	Amount that can be surcharged
1. Under section 14(a), Act 605 for failure to collect monies	Amount not collected
2. Under section 14(b), Act 605 for improper payment.	Amount of improper payment.
3. Under section 14(c), Act 605 for causing loss, destruction etc	Value of the deficiency or value of property destroyed.
4. Under section 14(d), Act 605 for failing to keep accounts	Such sum as the Service Commission or the Board deems fit.
5. Under section 14(e), Act 605 for failing to make or delaying payment	Such sum as the Service Commission or the Board deems fit.

**Recovery of surcharge**

A surcharge is a civil debt owed by the officer to the government or the statutory body or the university: Act 61, s. 21; Act 605, s. 20. It can be recovered in the following ways:

- Deduction from salary by equal monthly installments not exceeding one fourth of the total monthly salary.
- Deduction from pension by equal monthly installments not exceeding one fourth of the total monthly pension.
- Civil suit in a court of law.

**Surcharge does nor bar disciplinary action**

An order of surcharge does not bar concurrent or subsequent disciplinary proceedings: Act 605, section 22.

**Surcharge does nor bar criminal action**

An order of surcharge does not bar concurrent or subsequent criminal proceedings: Act 605, section 22.

This means that on the same set of facts, a person can be (i) surcharged, (ii) subjected to discipline and (iii) prosecuted by the Public Prosecutor for a battery of criminal offences or for corruption. Is this not a violation of the rule against double jeopardy under Article 7(2) of the Federal Constitution?

**Record**

An order of surcharge goes into the personal record of the public servant: Reg. 51(2), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) (Pindaan) 1993.

**Concluding remarks**

Surcharge cases raise broader issues of management, organization, accountability and adequacy of standard operating procedures. For example, the failure to collect moneys that are due or failure to maintain accounts is often caused by frequent transfer of officers and the ignorance of new officers of past transactions.

Hundreds of contracts are signed but there is no emphasis on “contract management”. Instead of continuous monitoring of projects, deadlines and performance, attention is drawn to the project only when things go wrong by which time it is almost too late to give proper notice within time in order to claim compensation. There is absence of the culture of periodic servicing and maintenance.

Loss of government property is endemic. Part of the problem is inadequate security measures and multiple sharing of responsibility. When responsibility is too widely shared, often there is no responsibility.

We need to examine the surcharge issue holistically and to reduce or eliminate the root causes that cause loss of public funds. Officers who are surcharged often claim that they are scapegoats for the failures of the system.

*ENEMIES*

*“Respond to an evil deed with something good and see how someone who is separated from you because of enmity becomes a dear friend”*

*(Holy Qur’an, Surah 41:34).*

# UNDANG-UNDANG DAN TATACARA SURCAJ\*

*Alih bahasa oleh*

Azlina Khalid, Shahrin Nordin, Adlin Samsudin, Nor Azila Maharam dan Nurfarizma Rahayu Mohd Annuar

## Rumusan

Seksyen 14-22 Akta Badan-Badan Berkanun (Tatatertib dan Surcaj) 2000 [Akta 605] mengadakan peruntukan bagi pengenaan surcaj ke atas pegawai-pegawai dan bekas pegawai-pegawai sesuatu badan berkanun.

Seksyen 14 menyatakan alasan-alasan bagi pengenaan surcaj, umumnya, surcaj akan dikenakan jika seseorang itu bertanggungjawab, secara langsung atau tidak langsung, bagi apa-apa kekurangan dalam atau bagi pemusnahan, apa-apa wang, barang-barang simpanan atau harta lain UiTM.

Surcaj boleh dipotong daripada gaji atau pencen: S.20

Surcaj ialah suatu hutang kepada UiTM.

Seksyen 19 menghendaki tiap-tiap surcaj yang dikenakan ke atas seseorang pegawai dicatatkan dalam Rekod Perkhidmatannya.

Pengenaan surcaj ke atas seseorang pegawai tidak akan menghalang permulaan apa-apa tindakan tatatertib terhadapnya. Ini diperuntukkan dalam Seksyen 22.

Pegawai yang akan disurcaj hendaklah diberi peluang untuk didengar (14 hari) dan hendaklah diberitahu secara bertulis mengenai keputusan untuk mengenakan surcaj ke atasnya: Seksyen 15, 16 dan 17.

Tiada hak untuk rayuan. Tetapi Lembaga Pengarah mempunyai kuasa untuk mengurangkan atau menghapuskan surcaj: S.18

## Surcaj - Tujuan Undang-Undang

Undang-undang surcaj adalah bertujuan untuk menguatkuasakan tanggungjawab kewangan, kejujuran dan kecekapan.

Tujuan lain adalah sebagai pampasan kepada pihak universiti untuk kerugian yang ditanggung yang disebabkan oleh kecuaiannya pegawai, kelalaian di dalam menjalankan tugas, ketidakjujuran, kurang berhati-hati dan ketidakcekapan.

Tujuan undang-undang ini adalah untuk memberi kuasa kepada universiti, di mana ianya adalah sebagai gantian atau penambahan kepada prosiding disiplin, untuk memohon Lembaga Pengarah Universiti agar prosiding surcaj dimulakan di bawah peruntukan seksyen 14-22 Akta 605.

## Siapa yang tertakluk kepada perintah Surcaj?

Seseorang yang berkhidmat atau pernah berkhidmat di dalam badan berkanun adalah tertakluk kepada perintah surcaj. Individu yang telah bersara, meletakkan jawatan atau yang telah ditamatkan perkhidmatan juga boleh disurcaj sama cara sepertimana pegawai yang sedang berkhidmat [seksyen 14].

Siapa yang mempunyai kuasa untuk mengeluarkan perintah Surcaj?

Lembaga Pengarah Universiti mempunyai kuasa untuk mengeluarkan perintah surcaj [seksyen 15].

Alasan-alasan bagi Surcaj

Di bawah seksyen 14 tindakan dan/atau peninggalan berikut boleh mencetuskan undang-undang surcaj:

- (1) Kegagalan untuk memungut apa-apa wang yang terhutang kepada universiti jika pegawai tersebut telah dipertanggungjawabkan untuk memungutnya. Sebagai contoh: kegagalan untuk memungut yuran dari pelajar tetapi telah membenarkan mereka untuk meneruskan program pengajian akademik, kegagalan untuk memulakan prosedur terhadap individu yang telah melanggar perjanjian biasiswa, kegagalan untuk mengutip denda [seksyen 14 (a)].
- (2) Pembayaran wang yang tidak sepatutnya [seksyen 14 (b)].
- (3) Sekiranya tuntutan telah diluluskan atau pembayaran projek telah dipersetujui dan diluluskan tanpa penelitian dan pemerhatian dan juga gagal menentukan sama ada obligasi kontrak tersebut telah dipatuhi, motif berunsurkan rasuah, perkara-perkara ini adalah alasan untuk dikenakan surcaj.
- (4) Pembayaran wang yang tidak diluluskan [seksyen 14 (b)].
- (5) Telah menyebabkan secara langsung atau tidak langsung, apa-apa kekurangan atau pemusnahan apa-apa wang [seksyen 14 (c)].
- (6) Pegawai akaun yang telah gagal menyimpan akaun [seksyen 14 (d)].
- (7) Pegawai akaun yang telah gagal memantau akaun dan rekodnya [seksyen 14 (d)].
- (8) Kegagalan untuk membuat pembayaran wang yang dihutang oleh universiti [seksyen 14 (e)].

\*Tatacara ini telah dialihbahasa daripada Bahasa Inggeris kepada Bahasa Malaysia oleh penulis-penulis di atas di Pejabat Penasihat Undang-Undang, UiTM berdasarkan "Guidelines on the Procedure of Surcharge and the Investigation process" yang telah ditulis oleh Professor Emeritus Datuk Dr Shad Saleem Faruqi sebagai panduan untuk surcaj.

- (9) Kelewatan di dalam membuat pembayaran yang dihutang oleh universiti [seksyen 14 (e)].

### Jawatankuasa Penyiasatan

Tiada peruntukan untuk Jawatankuasa Penyiasatan: Di dalam kes-kes disiplin (mengambil kira penamatan atau penurunan pangkat), Jawatankuasa Tatatertib Staff boleh mewujudkan sebuah Jawatankuasa Penyiasatan di bawah peraturan 35(5), 36, 37 dan 38 di bawah Jadual Kedua Akta 605.

Walaupun bagaimanapun, peruntukan untuk surcaj (seksyen-seksyen 14-22) tidak menyatakan tentang Jawatankuasa Penyiasatan. Ini adalah kelemahan yang serius kerana kes-kes surcaj memerlukan penyiasatan yang teliti dan masa yang lama untuk penyiasatan. Di atas sebab ini, ia adalah amalan kebiasaan untuk setiap Kampus, Fakulti, Jabatan atau Unit untuk menjalankan sesi penyiasatan secara sendiri, memberi pandangan dan memajukannya kepada Jawatankuasa Kewangan dan Pembangunan.

Cadangan untuk menubuhkan jawatankuasa tetap khusus untuk mengendalikan penyiasatan Surcaj

Walaupun terdapat beberapa jawatankuasa ad hoc yang mengendalikan penyiasatan untuk kes-kes surcaj, namun jawatankuasa yang sedia ada kurang mahir dan kurang mempunyai kepakaran untuk mengendalikan penyiasatan dan tidak menanyakan soalan yang relevan dan khusus untuk mendapatkan hasil penyiasatan yang tepat dan berkesan. Pihak jawatankuasa ad hoc juga kurang mahir dalam memahami dan mengetahui prosedur yang perlu dipatuhi.

Tambahan pula, terdapat masalah konflik kepentingan (conflict of interest) sekiranya:

- (1) Seseorang Ketua Unit melantik ahli Jawatankuasa Penyiasatan; dan
- (2) Pihak Fakulti, Pusat atau Unit menyiasat dirinya sendiri tanpa maklumbalas dan pengaruh orang luar yang berlaku adil (impartial).

Justeru itu, memandangkan terdapat sebegitu banyak kes-kes surcaj yang perlu dikendalikan, maka ia adalah disarankan agar setiap kampus menubuhkan satu jawatankuasa khas iaitu, Jawatankuasa Penyiasatan Surcaj (atau apa-apa nama lain yang bersesuaian). Ini adalah kerana tidak terdapat peruntukan untuk mengadakan Jawatankuasa Penyiasatan Surcaj di dalam Akta 605. Oleh itu, penubuhan Jawatankuasa Penyiasatan Surcaj perlu dilaksanakan di setiap kampus melalui lantikan pentadbiran.

Cadangan komposisi ahli jawatankuasa penyiasatan surcaj di setiap kampus

Adalah dicadangkan bahawa komposisi ahli Jawatankuasa Penyiasatan Surcaj di setiap kampus terdiri dari tiga (3) orang ahli seperti berikut:

- (1) Ketua Bahagian Pengurusan Harta Benda untuk setiap Kampus sebagai Pengerusi Jawatankuasa;
- (2) Seorang wakil dari setiap Fakulti, Bahagian atau Unit di

tempat kehilangan/kecurian/kerusakan itu berlaku. Ahli yang dilantik ini hendaklah dilantik oleh Ketua Jabatan dan ahli tersebut dikehendaki berlaku adil, tidak boleh terlibat atau mempunyai apa-apa kaitan dengan orang atau perkara yang disiasat dan tidak boleh sama sekali mempunyai kecenderungan/kepincangan (bias) dari segi kewangan atau secara peribadi di dalam kes yang disiasat;

- (3) Seorang ahli yang mempunyai kelayakan undang-undang sama ada dari Pejabat Penasihat Undang-Undang, Fakulti Undang-Undang, Unit Perundangan di setiap Kampus (sekiranya ada) atau seseorang yang mempunyai kelayakan undang-undang yang dilantik oleh Naib Canselor UiTM dan Rektor bagi setiap kampus cawangan.

### Carta Aliran

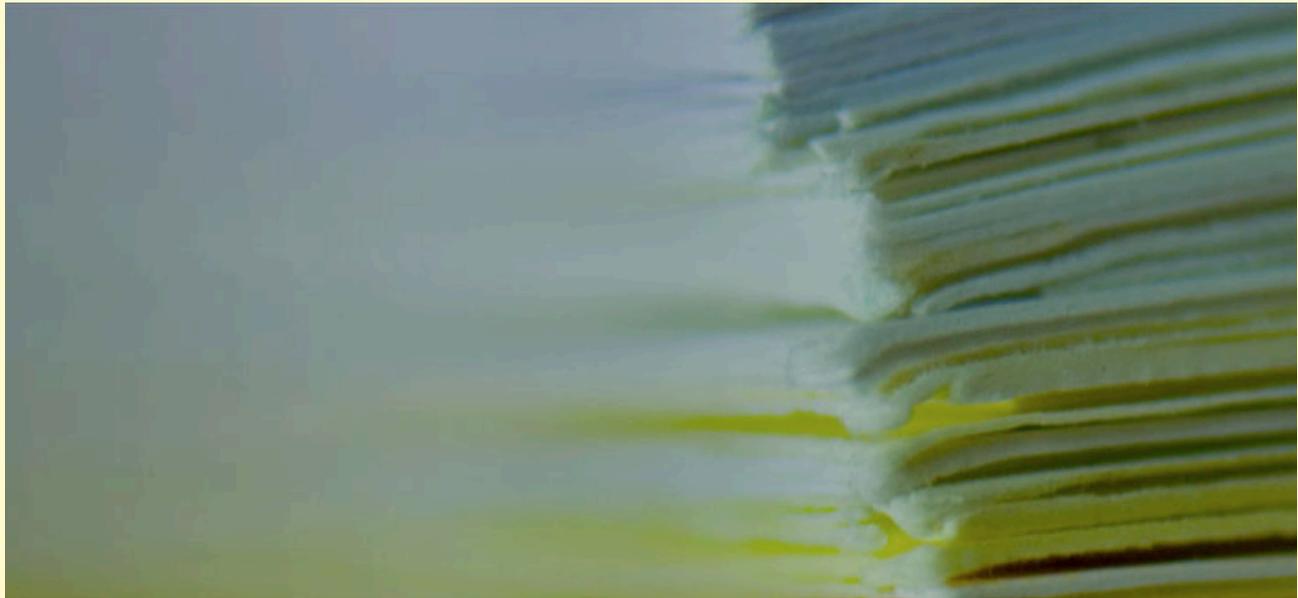
Apabila satu aduan dibuat di mana berlakunya perbuatan atau kecuaihan yang melibatkan peruntukan seksyen 14, prosedur-prosedur berikut mesti dilaksanakan:

- (1) Aduan tersebut mesti dirujuk kepada Jawatankuasa Penyiasatan Surcaj di setiap kampus;
- (2) Jawatankuasa Penyiasatan Surcaj hendaklah menyiasat setiap aduan secara terbuka, adil dan saksama.
- (3) Laporan Jawatankuasa Penyiasatan Surcaj diwajibkan dihantar ke Jawatankuasa Kewangan dan Pembangunan (JKP) untuk rujukan.
- (4) Jawatankuasa Kewangan dan Pembangunan (JKP) hendaklah membuat keputusan samaada untuk melanjutkan laporan tersebut bersama dengan cadangan-cadangan ahli JKP kepada Lembaga Pengarah Universiti (LPU).
- (5) Lembaga Pengarah Universiti (LPU) boleh menghantar kembali laporan penyiasatan tersebut ke Jawatankuasa Kewangan dan Pembangunan (JKP) untuk pertimbangan selanjutnya atau untuk mengarahkan agar penyiasatan lanjut dilakukan.
- (6) Sebaliknya, Lembaga Pengarah Universiti (LPU) boleh membuat keputusan bahawa terdapat kes prima facie dan boleh mengarahkan notis tunjuk sebab secara bertulis kepada seseorang yang diberi notis untuk disurcaj.
- (7) Notis secara bertulis tidak kurang dari empat-belas (14) hari notis wajib diberikan kepada seseorang yang diberi notis untuk disurcaj tersebut. Tiada keperluan untuk mengadakan perbincaraan atau representasi secara lisan tetapi pihak Lembaga Pengarah Universiti (LPU) mempunyai budibicara untuk menubuhkan satu Jawatankuasa Kecil untuk mengadakan perbincaraan.

### Peranan Jawatankuasa Penyiasatan Surcaj

Jawatankuasa Penyiasatan Surcaj berperanan adalah untuk menentukan fakta-fakta kes, menjelaskan isu-isu yang timbul secara terbuka, adil dan saksama dan melaporkan hasil penyiasatan kepada Jawatankuasa Kewangan dan Pembangunan (JKP).

Jawatankuasa Penyiasatan Surcaj tidak boleh sama sekali, mendakwa, membela atau menjatuhkan apa-apa hukuman terhadap staf atau bekas staf yang tertuduh.



### Terma Rujukan

Terma rujukan Jawatankuasa Penyiasatan Surcaj selalunya akan terkandung di dalam surat perlantikan. Sebagai garis panduan umum, fungsi Jawatankuasa Penyiasatan Surcaj bukanlah untuk merangka pertuduhan atau mencadangkan hukuman. Peranan Jawatankuasa Penyiasatan Surcaj bukan juga untuk mendakwa atau membela tertuduh atau menentukan sama ada tertuduh bersalah atau tidak bersalah. Tugas Jawatankuasa Penyiasatan Surcaj adalah:

- (1) Menentukan latar belakang di mana tindakan dan/atau peninggalan telah berlaku.
- (2) Menentukan fakta seperti yang di dakwa atau dinafikan. Kadangkala, terdapat fakta yang bercanggah. Dalam hal yang sedemikian Jawatankuasa boleh, dengan cara yang tidak berat sebelah, membuat kesimpulan terhadap fakta kedua-dua belah pihak.
- (3) Menjelaskan sebarang isu yang dirujuk kepada mereka oleh pihak berkuasa.
- (4) Melaporkan sebarang fakta tambahan yang muncul selepas siasatan.

### Peraturan larangan berat sebelah

Di bawah undang-undang pentadbiran, terdapat prinsip *nemo iudex in causa sua* iaitu tiada sesiapa yang boleh menjadi hakim di dalam kausanya sendiri. Ahli-ahli Jawatankuasa Penyiasatan Surcaj hendaklah tidak mempunyai sebarang kepentingan peribadi atau kewangan. Kepentingan peribadi boleh berpunca dari perhubungan rapat atau perkataan atau perbuatan yang menunjukkan penentuan awal isu ini i.e. di mana seseorang itu tidak mempunyai minda yang terbuka dalam perkara itu. Kepentingan kewangan pula terjadi apabila penyiasat mempunyai kepentingan kewangan di dalam hasil prosiding itu kelak eg. Contohnya di mana beliau sendiri disyaki cuai dan mungkin atas sebab itu berhasrat untuk membuat dapatan yang menyebelahi kepentingan beliau.

### Peraturan pendengaran

Seseorang yang diberi notis untuk disurcaj berhak kepada keadilan dari segi prosedur [Audi Alteram Partem].

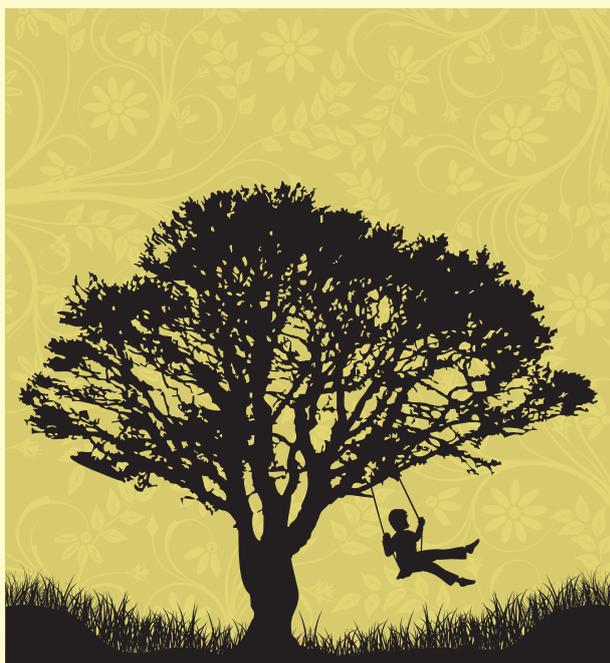
- (1) Beliau hendaklah menerima notis awal bahawa beliau dikehendaki untuk menjawab kemungkinan kes surcaj.
- (2) Beliau hendaklah menerima notis awal mengenai tarikh, masa dan tempat perjumpaan Jawatankuasa Penyiasatan Surcaj.
- (3) Notis hendaklah mencukupi dari segi tempoh masa. Memandangkan undang-undang tidak menyatakan tempoh masanya, notis itu hendaklah "munasabah" mengikut fakta kes. Adalah disyorkan bahawa tempoh notis selama satu atau dua minggu adalah mencukupi.
- (4) Notis hendaklah mencukupi dari segi terma-termannya i.e. ianya hendaklah menyediakan butir-butir perkara yang didakwa yang menjadi asas kepada surcaj. Barangan atau wang yang terlibat, anggaran masa dan tempat berlakunya kecuai yang didakwa serta butir-butir kelakuan atau salahlaku hendaklah dinyatakan.
- (5) Peluang yang adil hendaklah diberi kepada seseorang yang diberi notis untuk disurcaj untuk membela dirinya. Beliau hendaklah dibenarkan untuk hadir secara sendiri di hadapan Jawatankuasa.
- (6) Jika seseorang yang diberi notis untuk disurcaj gagal untuk menghadirkan diri selepas adanya notis yang mencukupi tersebut, Jawatankuasa mempunyai kuasa sama ada untuk membenarkan perlanjutan masa kepada beliau atau meneruskan dengan penyiasatan dalam ketidakhadiran beliau.
- (7) Beliau hendaklah mempunyai hak kepada semua bukti atau laporan yang menunjukkan beliau disabitkan berkenaan kes itu.
- (8) Beliau mempunyai hak untuk membawa saksi-saksinya sendiri.
- (9) Beliau mempunyai hak untuk menyoal balas semua saksi-saksi terhadapnya.

- (10) Tiada hak dibenarkan untuk diwakili oleh peguam. Walaubagaimanapun, dalam kes-kes yang tertentu, seseorang yang diberi notis untuk disurcaj boleh dibenarkan untuk diwakili oleh warga UiTM yang lain yang berhasrat untuk memplidkan kes bagi orang tersebut.

**Prosedur Lembaga Pengarah Universiti untuk penetapan Surcaj**

Sebaik sahaja Lembaga Pengarah Universiti telah menerima pengesyoran daripada Jawatankuasa Kewangan dan Pembangunan berkenaan kes surcaj, keputusan harus dibuat sama ada terdapat kes prima facie untuk dijawab.

- (1) Jika wujud kes prima facie, Lembaga Pengarah Universiti hendaklah menyerahkan notis bertulis kepada seseorang yang diberi notis untuk disurcaj yang berkenaan [seksyen 15].
- (2) Seseorang yang diberi notis untuk disurcaj berkenaan mempunyai tempoh 14 hari untuk memberikan tunjuk sebab secara bertulis [seksyen 16].
- (3) Tiada pendengaran lisan diperlukan (tetapi tiada halangan perundangan sekiranya Lembaga Pengarah Universiti berhasrat untuk membenarkan pendengaran lisan).
- (4) Lembaga Pengarah Universiti hendaklah membuat pertimbangan ke atas jawapan bertulis pegawai berkenaan dan membuat keputusan [seksyen 16].
- (5) Keputusan berkenaan surcaj hendaklah dimaklumkan kepada seseorang yang diberi notis untuk disurcaj berkenaan secara bertulis [seksyen 17].
- (6) Tiada rayuan kepada Menteri atau Mahkamah dibenarkan. Walaubagaimanapun, subjek kepada keputusan tersebut boleh memohon kepada Lembaga Pengarah Universiti untuk pertimbangan semula dan Lembaga mempunyai kuasa untuk:-
  - (i) menarik balik sebarang keputusan [seksyen 18], atau
  - (ii) mengurangkan amaun surcaj.



**Amaun Surcaj**

Amaun surcaj yang boleh dikenakan bergantung kepada sifat perbuatan atau peninggalan tersebut.

Perbuatan atau Peninggalan	Amaun Surcaj
1. Di Bawah Seksyen 14(a)	Amaun yang tidak dikutip
2. Di Bawah Seksyen 14(b)	Amaun pembayaran tidak sepatutnya
3. Di Bawah Seksyen 14(c)	Nilai susut atau nilai aset yang musnah
4. Di Bawah Seksyen 14(d)	Jumlah yang difikirkan sesuai oleh Lembaga
5. Di Bawah Seksyen 14(e)	Jumlah yang difikirkan sesuai oleh Lembaga

**Mendapatkan Surcaj**

Surcaj adalah suatu hutang sivil yang terhutang oleh pegawai kepada universiti [seksyen 20]. Ia boleh didapati melalui cara yang berikut:

- (1) Potongan daripada gaji melalui ansuran bulanan yang sama banyak tidak melebihi satu perempat daripada jumlah gaji.
- (2) Potongan daripada pencen melalui ansuran bulanan yang sama banyak tidak melebihi satu perempat daripada pencen bulanan.
- (3) Saman sivil di mahkamah.

**Surcaj tidak boleh menghalang tindakan tatatertib**

Suatu perintah surcaj tidak menghalang prosiding tatatertib sama ada secara serentak atau yang berikutnya.

**COMPASSION FOR THE POOR**

“And in their (Muslims) wealth there is a recognized right for the needy and the poor”.  
*(Holy Qur’an, Surah 70:24-25).*

**JUSTICE**

“Everyone will be held accountable for his actions, and none bears the burden of another person’s actions”  
*(Holy Qur’an, Surah 6:64).*

# KESILAPAN DALAM PEMBAYARAN (MENURUT SEKSYEN 73 AKTA KONTRAK 1950)

Oleh: Shahrin Nordin\*

## Pendahuluan

Kadang-kadang berlaku keadaan di dalam sesuatu organisasi bahawa terdapat pembayaran yang dibuat secara silap, sedangkan ianya tidak sepatutnya dibuat. Perkara ini boleh berlaku atas beberapa faktor, yang utamanya ialah disumbang oleh pegawai yang terlepas pandang berkenaan pembayaran yang dibuat itu. Insiden sebegini mungkin melibatkan jumlah yang kecil, namun tidak dinafikan bahawa berlaku juga kesilapan atas amaun yang agak besar.

Artikel ini akan berkisar sekitar kesilapan yang dilakukan sama ada ketika mengeluarkan arahan atau kesilapan fakta sehingga menyebabkan pembayaran dibuat, walaupun pada asasnya pembayaran itu tidak sepatutnya dibuat.

Perkongsian selanjutnya akan memberikan sedikit pencerahan dan pemahaman tentang prinsip dan keperluan perundangan berkaitan dengan kesilapan dalam pembayaran ini. Rujukan silang juga turut dibuat dengan beberapa kes mahkamah yang akan menunjukkan pengoperasian prinsip perundangan yang berkaitan.

## Undang-Undang Secara Am

Peruntukan undang-undang yang relevan berkaitan dengan kesilapan pembayaran ini adalah seperti yang terkandung di dalam seksyen 73 Akta Kontrak 1950. Seksyen 73 berkenaan menyatakan bahawa:-

*“A person to whom money has been paid, or anything delivered by mistake or under coercion, must repay or return it.”*

Daripada pembacaan secara literal, tanggungjawab untuk memulangkan akibat dari kesilapan yang berlaku hanya akan bermula sekiranya keseluruhan intipati di bawah seksyen 73 telah wujud, iaitu:-

- (a) Pembayar (Payor);
- (b) Penerima bayaran (Payee);
- (c) Bayaran yang dibuat (Payment made); dan
- (d) Kesilapan (Mistake).

Ini bermakna seseorang yang menerima bayaran secara silap, mempunyai tanggungjawab untuk memulangkannya bukan sahaja selaras dengan kehendak sesyen 73 Akta Kontrak 1950, akan tetapi ianya juga bersandarkan kepada klausa tindakan duit yang diperolehi dan diterima (money had and received) dan unjust enrichment. Di dalam kes *Green Continental Furniture (M) Sdn Bhd v. Tenaga Nasional Bhd* [2011] 9 CLJ 92, Zamani A. Rahim, PK menyatakan bahawa:-

“Bayaran yang telah dibuat adalah lebih daripada bayaran yang sepatutnya. Defendan tidak berhak kepada wang yang terlebih bayar ini dan dari segi undang-undang semulajadi dan ekuiti, adalah tidak adil atau ‘unconscionable’ untuk defendan tidak mengembalikan wang tersebut kepada plaintif. Sebaliknya, dengan menyimpan wang yang terlebih bayaran tersebut, defendan memperoleh ‘unjust enrichment’. Maka, defendan mempunyai obligasi untuk memulangkan wang berlebihan yang telah diterimanya. Defendan tidak memplid atau mengemukakan apa-apa keterangan bahawa defendan telah mengubah kedudukan. Oleh itu, tidak ada prejudis atau ketidakadilan sekiranya defendan dikehendaki untuk memulangkan wang yang terlebih bayar tersebut.”

## Pengaplikasian Di Dalam Kes

Di dalam kes *Green Continental Furniture* tersebut, Plaintiff telah membuat bayaran bil elektrik kepada Defendan berdasarkan Tarif B yang lebih tinggi kadar bayarannya daripada Tarif D. Plaintiff telah hanya dikenakan bil oleh Defendan berdasarkan Tarif D sejak bulan Julai 2004. Plaintiff menuntut perbezaan bayaran yang dibuat di antara Tarif B dan Tarif D yang berjumlah sebanyak RM307,485.45 atas dasar telah terlebih bayar akibat kesilapan.

Di dalam kes tersebut, Mahkamah telah membenarkan tuntutan Plaintiff dan memutuskan bahawa:-

“Maka, Tarif yang sepatutnya dikenakan terhadap plaintif adalah Tarif D dan bukannya Tarif B. Penggunaan Tarif B terhadap plaintif adalah suatu kesilapan dan oleh itu, perbezaan di antara jumlah wang yang berdasarkan Tarif B yang sebenarnya telah dibayar oleh plaintif dan wang yang

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sepatutnya dibayar berdasarkan Tarif D adalah wang yang terlebih bayar oleh plaintif disebabkan kesilapan.

Berkenaan s. 73, persoalan yang perlu dipertimbangkan dalam menentukan sama ada terdapat kesilapan atau pembayaran wang akibat kesilapan adalah sama ada pembayaran tersebut adalah kena dibayar mengikut undang-undang (“legally due”). Oleh itu, sekiranya apa yang dinyatakan dalam kontrak tidak mengikut undang-undang, maka ia masih boleh terjumlah kepada kesilapan yang membawa kepada pemakaian s. 73.”

Prinsip “*money had and received*” dan “*unjust enrichment*” juga telah digunakan di dalam kes lain Bumiputra Commerce Bank Bhd v. Siti Fatimah Mohd Zain [2011] 2 CLJ 545, di mana Harmindar Singh Dhaliwal PK, telah menjelaskan bahawa:-

*“It is noteworthy that as money paid under a mistake is repayable as money had and received, the claim for restitution is founded upon the principle of unjust enrichment. This development of the restitutionary claim of moneys had and received through unjust enrichment was probably inspired by the speech of Lord Mansfield in the case of Moses v. Macferlan which I had alluded to earlier. In this regard, it would also be obligatory to refer to, as a starting point on the subject, the speech of Lord Wright in Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32 at p 61:*

*It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from another, which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.”*

Di dalam kes yang berlainan iaitu Affin Bank Bhd v. MMJ Exchange Sdn Bhd & Anor [2011] 9 CLJ 721, tuntutan bagi bayaran balik yang dibuat atas kesilapan ini boleh dipatahkan sekiranya wujud tiga keadaan seperti yang dinyatakan oleh Hakimnya iaitu Mary Lim, H, iaitu:-

- (i) Jika duit yang diberi secara tersilap itu sememangnya akan dipegang oleh penerimanya di dalam keadaan yang lain;
- (ii) Jika terdapat balasan (consideration) yang baik dan mencukupi; atau
- (iii) Jika terdapat perubahan secara bona fide kedudukan si penerima wang itu.

Bagi keadaan pengecualian yang ketiga itu, iaitu perubahan kedudukan penerima secara bona fide, ianya perlu berlaku tanpa ada sebarang tindakan untuk membuat semakan lanjut kepada pembayar bagi bayaran yang diterima. Dalam hal ini, si penerima yang telah ada pengetahuan tentang bayaran misteri yang diterima, mempunyai tanggungjawab untuk menyemak dan mengesahkan dengan si pembayar akan butiran bayaran tersebut. Tanggungjawab untuk memeriksa jika tidak dilaksanakan akan menggagalkan pembelaan si penerima. Inilah yang telah ditegaskan oleh

Harminder Singh Dhaliwal PK, di dalam kes Siti Fatimah Mohd Zain (supra), yang mana rujukan telah dibuat kepada kes Niru Battery Manufacturing Co v. Milestone Trading Ltd [2003] EWCA Civ 1446 yang menyatakan:-

*“in order to defeat the defence of change in position it was not necessary to show that the recipient had been dishonest, merely that he had not acted in good faith; that a person who had or thought he had a good reason to believe that a payment had been made to him by mistake failed to act in good faith if he paid the money away without making enquiries of the payer.”*

Di dalam menerima sebarang bayaran secara tersilap, si penerima mungkin menyatakan bahawa mereka adalah pihak yang tidak bersalah di dalam pembayaran tersebut. Bagaimanapun, hujahan ketidakbersalahan si penerima ini tidaklah boleh dijadikan sebagai suatu pembelaan, kerana si penerima itu sendiri tidak berhak kepada bayaran tersebut di bawah seksyen 73. Di dalam kes Phileo Allied Bank (M) Sdn Bhd v. Shahrul Bahthiar Tumpang & Ors. [2008] 9 CLJ 344, Abdul Wahab Patail H, ada menyebut bahawa:-

*“Pursuant to s. 73 of the Contracts Act 1950, the defendants being persons who in the circumstances were persons to whom money has been paid or anything delivered by mistake, must repay or return it. Nothing in the said s. 73 provides an exception to an innocent party. Thus, even if the defendants were innocent and were themselves the victims of a fraudulent scheme, the nature of the payment or delivery to them by the plaintiff remained the same, and pursuant to s. 73 the plaintiff was entitled to repayment or return of it.”*

Mungkin juga boleh dibangkitkan oleh si penerima bahawa kesilapan pembayaran tersebut adalah merupakan kecaiaan di pihak pembayar, maka si pembayar perlulah menanggung risiko atas kecaiaan mereka sendiri. Namun begitu, hujahan sebegini masih tidak menafikan kausa tindakan “*unjust enrichment*”, dan dengan itu adalah sesuatu yang tidak wajar untuk si penerima menerima sesuatu manfaat secara tidak sah (*unjust*). Pendekatan ini dipercerahkan di dalam kes Bank Bumiputra Malaysia Bhd v. Hashbudin Hashim [1998] 2 CLJ Supp 332 yang ada digariskan bahawa:-

*“By virtue of s. 73 of the Act, a person to whom money has been paid by mistake must return it. The appellant bank was, prima facie, entitled to recover the payment from the respondent. Neither of its knowledge of the insufficient fund in the customer’s account to cover the cheque nor of its negligence in paying the cheque to the respondent was a bar to its claim under s. 73 of the Act and under the common law on “money had and received”.*

*The provisions of s. 73 of the Act are very clear and without any exception, ie, that the payee must repay the money which has been paid by mistake. It is settled law that in an action for the recovery of money paid under mistake, the bank’s negligence is irrelevant.”*

Di dalam kes Hashbudin Hashim (supra) ini, pihak bank, secara cuai, telah menunaikan cek dan membayar responden amaun cek sebanyak RM25,000.00 sedangkan cek tersebut telah pun diarahkan untuk diberhentikan bayarannya oleh pengeluar cek. Responden menghujahkan bahawa bayaran itu sememangnya dibuat atas balasan daripada transaksi



di antara beliau dan pengeluar cek menuntut daripada responden. Walaubagaimanapun, Mahkamah menyatakan bahawa cek yang telah diarahkan untuk diberhentikan bayaran tidak boleh ditunaikan dan sekiranya ditunaikan juga ianya telah dibuat secara silap. Walaupun terdapat kecuiaan di pihak bank, namun mahkamah membenarkan tuntutan oleh pihak bank dan pihak responden tetap perlu mengembalikan wang yang diterimanya atas autoriti seksyen 73, tanpa mengira sama ada terdapat kecuiaan atau tidak di pihak pembayar.

Nada yang sama turut diulangi di dalam kes *Green Continental Furniture* (supra), di mana telah ditegaskan bahawa:-

“Seksyen 73 adalah terpakai tidak kira sama ada kesilapan tersebut adalah kesilapan defendan, kesilapan plaintif atau kesilapan kedua-dua pihak. Apa yang penting adalah terdapat kesilapan yang menyebabkan berlakunya pembayaran wang yang sebenarnya tidak kena dibayar di bawah undang-undang. Maka, jikapun plaintif cuai dalam mengemukakan lesen pengilangan, kecuiaan itu tidak menjadi alasan untuk menafikan plaintif haknya di bawah s. 73 untuk mendapat kembali wang terlebih bayar.”

Perlu diambil perhatian juga bahawa sebarang pembayaran yang tersilap perlu dikembalikan kepada si pembayar tanpa mengira sama ada kesilapan tersebut berpunca dari kesilapan fakta mahupun kesilapan perundangan. Selagi mana bayaran itu tidak sepatutnya dibayar dan tidak sepatutnya diterima oleh si penerima, selagi itulah si penerima bertanggungjawab untuk memulangkan bayaran tersebut. Zulkefli Makinudin HB(Malaya) telah pun mengutarakan prinsip ini dan menegaskan berkenaan perkara yang sama di dalam kes *Malayan Banking Bhd v. Ching Suit Fee* [2012] 3 CLJ 606, iaitu:-

*“Section 73 of the Contracts Act 1950 applies both to mistake of*

*fact as well as mistake of law. The Privy Council in the case of Shiba Prasad Singh v. Chandra Nandi [1949] LR 76 IA 244 when construing payment by mistake under s. 72 of the Indian Contracts Act which is in pari materia with our s. 73 stated that it must refer to a payment which was not due and which could not have been enforced. The mistake is in thinking that the money paid was due when in fact it was not due. In the Singapore case of F.C. Seck Trading as Oversea Structural Company v. Wong And Lee [1940] 1 LNS 19 it was held on appeal by the High Court that the court has the power to relieve against mistake of law as well as against mistake of fact if there is any equitable ground for doing so.”*

### Kesimpulan

Jika diperhatikan, prinsip perundangan di bawah seksyen 73 Akta Kontrak 1950 ini adalah jelas dan *straight forward*. Iaitu sebarang terimaan wang secara silap tetap perlu dikembalikan oleh si penerima. Asas pembayaran bukan sahaja atas autoriti seksyen 73 tersebut, akan tetapi juga atas prinsip *unjust enrichment* dan *money had and received* yang tidak membenarkan sebarang wang diterima secara tersilap.

### JUSTICE

**“Never let your enmity for anyone lead you into the sin of deviating from justice. Always be just: that is the closest to being God-fearing”  
(Holy Qur’an, Surah 5:8).**

# RIGHT TO ORAL HEARING IN STAFF DISCIPLINARY PROCEEDING

By: Shahrin Nordin<sup>6</sup>

## Introduction

Staff disciplinary matters for statutory body are governed primarily under the Statutory Bodies (Discipline and Surcharge) Act 2000. It provides overall procedure on the running of a staff disciplinary proceedings.

Right to be heard is undeniably an important component of natural justice that must exist and be sufficiently accorded to the accused staff. Question arose as to the existence of right to oral hearing, namely whether such right must be accorded to the accused staff or not.

This article will share some light on the exercisability of such right in the context of the Statutory Bodies (Discipline and Surcharge) Act 2000 and also in the light of the case of *Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor* [2012] 1 CLJ 448.

## Yusof Sudin's case

In an article entitled *Disciplinary Proceedings Against Public Officers and the Right to be Heard under the Federal Constitution of Malaysia* [2012] 5 MLJ clxxix which is taken from a speech delivered by Tan Sri Dato' Seri Zulkefli Ahmad Makinuddin, CJ (Malaya) on 21.5.2012 at Seoul, Korea, it was highlighted that the right for oral hearing should be given in staff disciplinary proceeding, only if the followings surface, namely:-

- (a) There is a specific request for oral hearing;
- (b) The officer has submitted representation which is exculpatory in nature; and
- (c) There are two sets/versions of facts/evidence which are contrasting to each other as produced by the officer and the charge sheet.

The principle outlined above originates from the Federal Court case of *Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor* [2012] 1 CLJ 448 (FC) and statutory provisions of O.26 of General Order 1980 and article 135(2) of the Federal Constitution were invoked.

It should be noted that *Yusof Sudin's* case involves

disciplinary case of a policeman which was dismissed on charges of corruption, dereliction of duties and inaction of some police responsibilities. In this case, during the disciplinary proceeding process, the appellant has requested for an oral hearing to be convened should his written representation deemed insufficient. The appellant was dismissed and hence argument was raised that his right to oral hearing was denied.

Eventual decision in that case is that the Federal Court has allowed the appellant's appeal and he be reinstated to his former post.

The relevant excerpt from the case states that :-

"The position would be that when there is a request by the public officer for an oral hearing after he had denied all the charges and appears to have exculpated himself by furnishing credible evidence in his representation letter, then by virtue of O. 26(5) of the General Orders 1980, the officer should be afforded an oral hearing to satisfy the requirement of art. 135(2) of the Federal Constitution which states that a reasonable opportunity of being heard be given before any member of such a service could be dismissed or reduced in rank. It would become all the more necessary for the oral hearing or enquiry to be held if there is no evidence to contradict the public officer's exculpatory statement. On this point it is to be stated that oral hearing should be granted when there is a request and when the Disciplinary Committee is faced with two (2) sets of facts, documents and evidence, that is, the investigation report from the Investigating Authority and that of the officer's representation letter which is exculpatory in nature. A Disciplinary Committee can only come to a fair conclusion between these two (2) versions upon hearing further evidence."

## Entailing Cases

Later, the case of *Suruhanjaya Perkhidmatan Awam v. Hajah Marina Haji Mustafa* [2015] 1 LNS 105 (CoA), has refined further the application of the above principle, wherein Abdul Wahab JCA has stated that :-

"In *Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor* [2012] 1 CLJ 448 FC, the Federal Court by majority

<sup>6</sup>Legal Officer, Office of Legal Advisor, UiTM.

decision held :

... The words used, that “... the officer should be afforded an oral hearing to satisfy the requirement of art. 135(2) ...” warrant attention for the reason that the words “should be” were used rather than “must be”.

We observed further that Article 135(2) speaks of being given a reasonable opportunity of being heard, but did not specify it must be an oral hearing.

We perused her 50 pages representation to appreciate as to why an oral preliminary hearing was needed. It was very detailed and specific. We found no reasons set out to form any basis for the request in the cover letter for an oral preliminary hearing.

We concluded that no basis was demonstrated for the necessity for a preliminary oral hearing in order to complete her representations over and above what she had put in writing.”

From Hajah Marina’s case, it is clear that the Court of Appeal treats that the right to oral hearing is not a mandatory right, but instead it is purely at the discretion of the Disciplinary Authority. This is based on two reasons, namely:-

- (a) The principle outlined earlier by Yusof Sudin’s case does not use the word “must”, but rather the word “should” was used. Hence, the right is not mandatory, but rather discretionary; and
- (b) In exercising its’ discretion the Court of Appeal has to be minded with the issue whether oral hearing is a real necessity to ascertain truth. Should the written representation is itself sufficient and provides clarity and no ambiguity, then oral hearing can dispensed with. Nevertheless, should the written representation is insufficient in its clarity, then the Disciplinary Authority would be at liberty to call for oral hearing.

### Statutory Body’s Context

The only avenue for oral hearing for statutory body is when investigation committee is established under regulations 34(2) and 35(5) of the Second Schedule and regulation 10 of the Third Schedule of the Statutory Bodies (Discipline and Surcharge) Act 2000 and accused staff is called for his testimony and cross-examination purpose. It is noted also that convening an investigation committee can only be done if the disciplinary committee feels that there is a need for further clarification, and hence right to be heard may not be given as of right but rather depending the discretionary satisfaction of the disciplinary committee.

The impact onto the government statutory body from the above article and Yusof Sudin’s case is possibly naught. This is due to the following reasons:-

- (a) Yusof Sudin’s case is a case based on old facts.

Hence, reliance was made onto the repealed provision of O.26(5) of General Order 1980. New regulations have been in place as contained in Public Officers (Conduct and Discipline) Regulations 1993 [PUA 395/1993] which comes into operation since 15.12.1993. On that note, Yusof Sudin’s case should not be an authoritative decision over other different regulations.

- (b) The principle laid down on oral hearing was established by Yusof Sudin’s case based on the provisions of O.26 of General Order 1980 and article 135(2) of the Federal Constitution which are applicable strictly on public service only. Public service has been clearly described by article 132(1) of the Federal Constitution to include 7 types of service only, and statutory body is not included.
- (c) As far as statutory body is concerned, the applicable provision is embedded in the Statutory Body (Discipline and Surcharge) Act 2000. Hence, Yusof Sudin’s ruling which originates from different set of law cannot be said to be binding upon statutory body.
- (d) As far as Najar Singh v. Government of Malaysia [1976] 1 MLJ 203 (PC)’ case is concerned, it still remains as a good law. Natural justice is sufficiently served if reasonable opportunity has been accorded. Reasonable opportunity here does not necessarily means oral hearing. Written representation itself is considered sufficient.
- (e) Statutory Body (Discipline and Surcharge) Act 2000 does not indicate requirement of hearing to be made orally. The relevant provision as contained in section 11 of the Act 605 and regulations 32(1) and 34(1) of Second Schedule are also silent on such requirement.
- (f) The only avenue for oral hearing is during investigation process under regulations 34(2), 35(5) of the Second Schedule and regulation 10 of the Third Schedule of the Statutory Body (Discipline and Surcharge) Act 2000. Nevertheless, such opportunity is only available if Disciplinary Committee feels the need to have further explanation, clarification of recommendation.

### Conclusion

It is undeniable that the trend in administrative law gearing towards upholding natural justice for the aggrieved person, notwithstanding that the relevant written law is silent on that. But, as far as statutory body is concerned, it is still unsafe to follow the reasoning from Yusof Sudin’s case based on the above-deliberated reasons and also due to differences of governing laws on the staff disciplinary matter.

# DISTRESS PROCEEDINGS UNDER DISTRESS ACT 1951 IN MALAYSIA

By: Nurfarizma Rahayu Mohd Annuar\*

**F**requent issue in tenancy is where tenants are in rent arrears or overdue rental and reluctant to vacate the premises. Therefore, it is important that the landlord has the awareness relating to their rights and handling the situation in an effective lawful practice. For this occurrence, the landlord has to decide whether he wants to continue to let the premise to the tenant or to terminate the tenancy.

If the landlord does not wish to continue with the tenancy, he may proceed with the termination of the tenancy as stipulated in the agreement. The termination starts with the issuance of termination notice to the tenant. The notice shall notify the tenant that the landlord desires to terminate the tenancy and requires the tenant to surrender the vacant possession of the demised premises within specified time stated in the tenancy agreement. If the tenant refuses to pay the rental arrears although there is a proper termination, the landlord has the right to sue the tenant. However, if the landlord decides to continue the tenancy, then the landlord may apply for the warrant of distress. Distress proceeding is one of the landlord's remedies for non-payment of rental by tenant whereby this action allows the tenant's goods to be seized and to be sold for payment of rental arrears.

The distress proceeding does not terminate the tenancy, therefore if the tenant repeatedly defaulted in the payment of rental then the landlord will have to reapply for another distress proceeding. Distress action under Distress Act 1951 is one of the legal remedy for the landlord to recover the rental arrears from the tenant. Meanwhile Section 7(2) of the Specific Relief Act 1950 specifically requires landlord to obtain a court order before they can recover possession of the property from the tenant.

Under Section 5(1) of the Distress Act, a landlord is permitted to apply ex parte in writing to a Judge or Registrar for the issue of warrant of distress to recover the rent due and payable to the landlord by a tenant of any premises for a period not exceeding twelve (12) completed months of the tenancy preceding the date of the application. As the writ of distress is an ex parte application, it is taken out without the knowledge of the tenant which it allows the landlord with the assistance of a bailiff to distrain or seize any moveable property on the premises and later auction off the tenants property to recover the overdue rental. Under Section 7 of the Distress Act, before a warrant of distress is issued the court may require the applicant (landlord) to pay the fees and expenses for the bailiff.

Section 5(3) of the Distress Act provides the rental arrears may be distrained after determination of tenancy provided that the tenant

is still in occupation of the premises and the goods or properties of tenant are still in the premises. There are circumstances whereby the landlord takes action into his own hands by going to the premise and seal the property without obtaining for a distress order from the court. This action is illegal and might cause the landlord to be charged as a trespasser or for unlawful detention. Section 4 of the Distress Act provides that no landlord shall distrain for rent except in the manner provided by the Act. Section 8 of the Distress Act provides the property seizable under a warrant of distress shall not include:

- (a) Things in actual use in the hands of a person at the time of the seizure;
- (b) Tools and implements not in use, where there is other moveable property in or upon the house or premises sufficient to cover the amount and costs;
- (c) The tenant's necessary wearing apparel and necessary bedding for himself and his family;
- (d) Goods in the possession of the tenant for the purpose of being carried, wrought, worked up, or otherwise dealt with in the course of his ordinary trade or business;
- (e) Goods belonging to guests at an inn;
- (f) Goods in the custody of law;
- (g) Property of any Government, property vested in any local authority for local authority purposes, and property vested for public purposes in any person or body of persons, whether incorporated or not, which the Minister may by notification in the Gazette declare to be exempted from distress proceedings.

Section 20(1) of the Distress Act also gives priority to landlord for payment of six (6) months rental over the arrears owed by the tenant to other judgment creditors who may have attached the property of the tenant for the recovery of judgment sums before the landlord. However, this priority is subject to any prior claims by the Federal Government or any State Government.

In sum, it can be said that distress action is a straightforward proceeding and a remedy for landlord to recover rental arrears. A writ of distress does not terminate the tenancy, therefore if the tenant later on fails to pay the rental, the landlord may have to file again the distress action to recover the arrears. However, regardless that there are problems such as costly and lengthy action especially if the tenant contests the action, distress proceeding is an option for landlord to recover arrears of rental from a tenant.

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# AN INTRODUCTION TO PUBLIC PRIVATE PARTNERSHIP (PPP) AND PRIVATE FINANCE INITIATIVE (PFI)

By: Rasanubari Asmarah Said\* and Adlin Samsudin\*\*

## Background

PFI was initially developed in Australia and United Kingdom as a mean to deliver public sector infrastructure or services by using private sector capacity and public resources. PFI expanded in the United Kingdom in 1996. The main factor for this growth was because the UK government was under pressure to reduce public debt but at the same time, there was a high demand for better services in public assets such as hospitals, schools and roads.

In Malaysia, PPP/PFI was introduced under the Ninth Malaysia Plan (2006-2010) as another mode of government project procurement and to enhance the effectiveness of the privatization program. The implementation of PPP/PFI was accelerated in the current Tenth Malaysian Plan (2011-2015) which aimed to improve the living standards of Malaysians<sup>1</sup>. The Tenth Malaysia Plan allocated RM20 billion to a facilitation fund to assist private sector involvement in PPP projects.<sup>2</sup>

## What is PPP and PFI?

Public Private Partnership (PPP) is a partnership between the public sector or government and one or more private sector with the purpose of providing a public service, infrastructure or funding a project. The private party not only provides the public service or infrastructure but also assumes substantial financial, technical and operational risk in the project. Private Finance Initiative (PFI) is also a procurement method for procuring services and infrastructure using private funding. It is a form of a PPP. The

differences between PPP and PFI are subtle and in other parts of the world, the two terms are often used interchangeably.<sup>3</sup>

The implementation of projects through PPP method include:

- Build – Lease – Transfer (BLT)
  - Build – Lease – Maintain – Transfer (BLMT)
  - Build – Lease – Maintain – Operate – Transfer (BLMOT)
  - Build – Operate – Transfer (BOT)
  - Build – Operate – Own (BOO)
  - Land swap (the exchange of land)
  - Management contract
  - Corporation<sup>4</sup>
- } PFI
- } Privatisation

In a PPP project, the private sector is responsible for financing and managing a package of capital investment and services including construction, management, maintenance, refurbishment and replacement of public sector assets. The private party raises funds to finance the assets and provides public infrastructure based services. The public sector then compensates the private sector through lease rental throughout a concession period of 20 to 30 years. The lease rental payments guarantee a total return of the concessionaire's capital investment expenditures. However, payments for services such as maintenance services are based on Key Performance Indicator (KPI) for the services.<sup>5</sup>

In some PPP projects such as Highways and public transport such as LRT, the private party receives payment from the public users directly. In most PPP projects, the assets are transferred to the public sector at the end of the concession period.

## Legal Framework and Administration

An innovation of the PPP system is the creation of permanent government units tasked with overseeing and managing the use of PPPs<sup>6</sup>. In Malaysia, such a unit is the Public-Private Partnership Unit (Unit Kerjasama Awam Swasta (UKAS), formerly known as 3PU) under the Prime Minister's Department. UKAS is the

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<sup>1</sup>Nooriha Abdullah, Azlinor Sufian, Darinka Asenova and Stephen J.Bailey (2014), *PPP/PFI in Malaysian Development Plans: Purpose, Structure, Implementation, Financing and Risk Transfer*. Proceedings of 5th Asia-Pacific Business Research Conference 17-18 February 2014, Hotel, Kuala Lumpur. ISBN: 978-1-922069-44-3

<sup>2</sup>Khairuddin Abdul Rashid (2012). *Understanding Malaysia's public private partnership, Taking Stock of PPP and PFI Around the World*. Certified Accountants Educational Trust (London)

<sup>3</sup>UKAS (Public Private Partnership Unit) (2009), *Garispanduan Kerjasama Awam Swasta (Guidelines on Public Private Partnership)* (Prime Minister's Department)

<sup>4</sup>Ibid

<sup>5</sup>Nooriha Abdullah, Azlinor Sufian, Darinka Asenova and Stephen J.Bailey (2014), *PPP/PFI in Malaysian Development Plans: Purpose, Structure, Implementation, Financing and Risk Transfer*. Proceedings of 5th Asia-Pacific Business Research Conference 17-18 February 2014, Hotel, Kuala Lumpur. ISBN: 978-1-922069-44-3

<sup>6</sup>Seongwoo Son (2012). *Legal Analysis on Public-Private Partnerships regarding Model PPP Rules*. The United Nations Commission on International Trade Law (UNCITRAL)

central agency tasked with the planning, evaluating, coordinating, negotiating and monitoring of PPPs. The main functions of UKAS are:

- To act as secretariat to the PPP Committee responsible for evaluating PPP projects
- To negotiate terms and conditions of agreements
- To supervise the Facilitation Fund<sup>7</sup>
- To coordinate and monitor implementation of PPP projects and Facilitation Fund

The implementation of PPPs is governed by the Privatisation Master Plan and the PPP Guidelines 2009 which were published by UKAS. There is no specific statute formulated to govern PPP and all decisions regarding PPP/PFI are ultimately decided by the Cabinet.

### Why PPP/PFI?

The main factor for procurement using PPP/PFI is the lack of public funds to meet demands in public services and infrastructure. The keystone behind the philosophy of PFI as a procurement method is that the public sector will be able to:

- Form a long-term operational and managerial relationship with the private sector in the development and delivery of public services and infrastructure;
- Harness private sector knowledge and expertise to improve and enhance public services;
- Reduce the required public sector borrowing requirement;
- Deliver value for money public service and infrastructure; and transfer risk away from the public sector to the more manageable private sector.<sup>8</sup>

Value for Money (VfM) is the main driver for implementing PPP projects and can be defined as 'the optimal combination of whole life cost and quality to meet the users' requirements'.<sup>9</sup>

### Model of PFI in UiTM

For PFI projects awarded to UiTM as the user, the model used is by Build, Lease, Maintain and Transfer (BLMT). In this model of PFI, the private sector i.e. a concession company designs, finances and constructs the facilities and infrastructure on public land which has been leased to UiTM. On completion of the facilities and infrastructure, the said land is subleased to the concession company by

UiTM. Simultaneously, the company subleases the land and infrastructure back to UiTM to enable UiTM to use the facilities and infrastructure. These subleases will last for the whole concession period of 20 years.

During the concession period, UiTM/the Government pays the concession company lease rental for the use of the facilities and infrastructure. The concession company also maintains the facilities and infrastructure during the concession period. For their maintenance services, UiTM/the Government pays the concession company the maintenance services charges and life cycle cost. The maintenance services charges are paid according to the level of service provided by the concession company which must meet KPIs determined by UiTM. This ensures that an accepted level of service is always delivered by the concession company. At the end of the concession period, the facilities and infrastructure is transferred back to UiTM.

### Conclusion

PPP is a useful concept in pursuing development plans when insufficient funds or debt might otherwise hinder such plans. The PPP concept has been used by both developed and developing countries with the view of providing better public infrastructure and services and improving the standard of living of its citizens.

However, the key to the success of such PPP projects is the cooperation and smart partnership of the private and public sector as well as proper implementation and management by the public sector. Even though the concept of PPP allocates an equally shared risk between the private and public sector, in reality the government's risk in losing public confidence is greater if PFI projects in Malaysia fail to achieve its intended purpose.

A good example is the situation in UK where PFI in the UK came under intense criticism by the opposition, the public, the media and financial experts. PFI in the UK were blamed for putting the UK in huge debt. It was recently revealed that PFIs have caused the UK to owe more than £222 billion to banks and businesses due to increase in the cost of servicing the PFIs.<sup>10</sup>

<sup>7</sup>Khairuddin Abdul Rashid (2012). *Understanding Malaysia's public private partnership, Taking Stock of PPP and PFI Around the World*. Certified Accountants Educational Trust (London)

<sup>8</sup>Shamsida Hj Saidin Khaderi, Sr Dr Hamimah Adnan, Anis Szira Bakri, (2008). *Risk Management Perception for Private Finance Initiative (PFI) Project In Malaysia Construction Industry*. Universiti Teknologi MARA.

<sup>9</sup>UKAS (Public Private Partnership Unit) (2009), *Garis Panduan Kerjasama Awam Swasta (Guidelines on Public Private Partnership)* (Prime Minister's Department)

<sup>10</sup>Jonathan Owen, *Crippling PFI deals leave Britain £222bn in Debt*, The Independent, 12 April 2015, <http://www.independent.co.uk/money/loans-credit/crippling-pfi-deals-leave-britain-222bn-in-debt-10170214.html>

# Law and Language – Some Thoughts for Language Courses for Law Students

By: Shad Saleem Faruqi\*

## Introduction

**T**he link between law and literature is well known. The two constitute an intersecting circle.

The law, as David Mellinkoff says, is a profession of words. Language is the essential tool of a lawyer and of every legal enterprise. “Words are the raw material of the legal profession and the assiduous study of words and the proper use of words has always been part of the lawyer’s most desirable accomplishments”.<sup>1</sup>

The success or failure of a lawyer and a judge is “determined by the skill and art of their persuasive communication. Lawyers and judges have become “word merchants” in the best sense. The successful advocate should be able to synthesize a complex legal precedent in a few pithy sentences and articulate a point of view within the sweep of a compelling sentence”.<sup>2</sup>

In civil and criminal disputes that are played out daily in the courts, human passions and tragedies are paraded in a public place and determined by the vehicle of words.

Likewise, authors, novelists, dramatists and literary critics breathe new life into words and phrases, interpret or infuse meanings that are not so apparent and draw conclusions that require imagination and creativity of the highest order.

Obviously lawyers and litterateurs work a similar craft. Their business is human drama. Their tools are words and ideas.

However, I must also say that despite the similarity between the roles of the lawyer and the linguist, the interdisciplinary connection between law and language is not adequately studied.

## Law & Language are interesting circles

Law cannot be interpreted or understood in isolation. It must be plugged into a large cultural, philosophical or social science context to give it value and meaning.

Law is linked with many factors and forces in society. Criminal law, family law, contract and employment law re-enact the dramas of real life. Likewise, literature personifies life. It provides insights into the human condition.

All law faculties must, therefore, offer an optional, interdisciplinary course in “Literature and the Humanities” to enable law students to learn about human nature, compassion, empathy or other humanistic qualities that are crucial to competent lawyering or judging. As someone said poetically:

The law the lawyers know about  
Is property and land;  
But why the leaves are on the trees,  
And why the winds disturb the seas,  
Why honey is the food of bees,...  
They do not understand.<sup>3</sup>

The content of this course can vary and can be based on literary texts, whether fictional, dramatic, cinematic or poetic.

## Fluidity of legal and literary languages

There is mutability of meanings in all texts whether literary or legal.

Writers and interpreters of literature play fast and loose with words and add colours and depth to the literary canvas.

Lawyers do the same. Their pledge to promote simplicity, clarity and certainty cannot deny the existentialist reality of the open-texture, glorious uncertainty and fluidity of legal language. As Justice Holmes once said, “a word is not a crystal, transparent and unchanging, it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and time in which it is used”. The power of the lawyer is indeed founded in the uncertainty of the law.

\* Emeritus Professor of Law and Legal Advisor to UiTM.

<sup>1</sup> Lord Birkett, Foreword, L. Blom-Cooper, *The Law as Literature*, 1961, ix

<sup>2</sup> David Shrager and Elizabeth Frost, *The Quotable Lawyer*, Aditya Books, 1992, p. vii

<sup>3</sup> H.D.C. Pepler, in WH Davies, *Shorter Lyrics of the Twentieth Century (1900-22)* (1922). Quoted in Ronald Irving, ‘The Law is as Ass’, *duckworth*, 1999, p. 53.

Take for example, Article 5(1) of the Federal Constitution: “No person shall be deprived of his life or personal liberty save in accordance with law”. The simple words “person”, “life”, “personal liberty” and “law” are loaded with moral and political meanings and scintillatingly rich and beautiful interpretations are possible.

The recognition of the fluidity of legal language, the mutability of meaning in all texts whether literary or legal, and the many possibilities of interpretation will indicate how much lawyers and linguists share a common ability to interpret words creatively, socially, morally and contextually. The Anglo-American jurist, Ronald Dworkin argues that the meaning of legal texts like any other genre of literature can only be discovered through interpretation.

### **Interpretation is an art, not a science**

Interpretations of law as the interpretation of literature are creative tasks. The golden rule of interpretation is that there are no golden rules. “The law is not a series of calculating machines where definitions and answers come tumbling out when the right levers are pushed”.<sup>4</sup> With ease, lawyers can twist words and meaning as they please. No poet ever interpreted nature as freely as a lawyer interprets the truth!

Likewise a literary critic can embellish or diminish a written work by his creative interpretation. It is amazing how even a nursery rhyme like “Jack and Jill went up the hill...” can be given Freudian interpretations!

The vast possibilities and openness of interpretation techniques give to lawyers and judges a power over our lives that are generally not acknowledged. Benjamin Hoadly said of this power: “Whosoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law-giver to all intents and purposes and not the person who first wrote or spoke them”.

### **Content of Language courses for law students**

A good language course for law students must contain the following elements:

**Inclusion of a few great literary classics:** Given law’s link with life and literature’s supreme ability to mirror life, it is important that law staff and students must have some immersion in the outstanding literature of the age. Being steeped in literary works, especially those that have legal themes will sharpen lawyering skills for court room dramas.

**Inclusion of some beautiful legal literature:** An ideal course in language for law students should be built around beautiful or elegant pieces of legal writing from some masters of the craft. Law as literature is a rare phenomenon but not unknown. There are many court judgments, legal essays, autobiographies of law persons and books on legal quotations that distil the best in legal literature. There is a great deal of legal prose whose eloquence can set fire to reason. As Joseph Baron says: “Even as there are laws of poetry, so there is poetry in law”.

Witness for example the following definition of a Constitution:

“A Constitution is our document of destiny, our chart and compass, our sail and anchor, our armour of defence against the passions, prejudices and vicissitudes of politics. The Constitution is the guardian of our rights and the source of our freedoms”.<sup>5</sup>

Take this comment on a dissenting judgment:

“Dissents are appeals to the brooding spirit of the law, to the intelligence of another day”<sup>6</sup>

When in the slavery case of *Somerset v Stewart* (1772) Lord Mansfield intoned that “the air of England has long been too pure for a slave, and every man is free who breathes it” he was not only contributing to the law but also to legal prose. He enriched the annals of law as well as literature.

In the storied halls of the American courts, the writings of Justice Brandeis, Justice Cardozo, Judge Hand, Justice Frankfurter, Oliver Wendell Holmes, Justice Jackson and Justice Brennan are good examples of eloquent legal prose. In the UK Lord Denning wrote clearly and picturesquely. In India Justice Bhagwati wrote with passion. At home, Tun Suffian wrote with incredible simplicity and clarity. Justice Abdoocader fascinated with his ability to write a single sentence covering half a page and yet keep us engaged in his argument. Justice Azlan Shah (as HRH Sultan Azlan Shah was then) is known for his quotable quotes on the Constitution and the need to tame absolute power.

**Teaching of good legal writing:** George Orwell once wrote that “good prose is like a window pane”. I suppose what he meant is that when people read good writing they see whatever the author was trying to convey. Legal writing must emulate this advice. Good legal writing or legal oratory must exhibit some essential qualities.<sup>7</sup>

<sup>4</sup>William O Douglas, “The Dissent, A Safeguard of Democracy”, 32 Journal of The American Judicial Society, 105 (1948)

<sup>5</sup>Refer to chapter 2 of Shad Saleem Faruqi, Document of Destiny: The Constitution of the Federation of Malaysia”, 2008

<sup>6</sup>Irving Kaufman, “Keeping Politics out of the Court”, New York Times, December 9, 1984.

<sup>7</sup>Adapted from Mark K Osbeck, “Elegant Expressions: Reflecting on the Nature of Great Legal Writing”, available at [http://works.bepress.com/mark\\_osbeck/1](http://works.bepress.com/mark_osbeck/1). See also Pamela Samuelson, “Good Legal Writing: Of Orwell and Window Panes”, 46 University of Pittsburgh Law Review 149 (Fall 1984)

1. It must be clear. To achieve this aim the following elements must be present –
  - We must have a point or a thesis
  - We must get to the point
  - We must adopt a structure – an introduction, background, facts, court decisions, analysis, policy implications and conclusion.
2. It must be concise.
3. It must be logically consistent and coherent with the whole body of law.
4. It must be engaging
5. It must be elegant. It must be beautifully written and aesthetic in nature. Elegance adds value to writing for the same reason that beauty is valuable in any human endeavour. Elegance may be rare but is not unknown. And, like all arts, it can be cultivated. One has to write from the heart. Only then will the words carry the colour and warmth of their birthplace. Perhaps some law teachers and language lecturers must come together to prepare an anthology of beautiful legal prose.

Regrettably, university-level language courses for law students in Malaysia rarely inculcate these qualities. Much of the time and efforts of the lecturers are spent in remedying seminal flaws of grammar and construction that should have been corrected at primary or secondary level.

**Teaching law students to write simply:** Lawyers are, on the one hand, among the most eloquent users of the English language while on the other its most notorious abusers. Most lawyers seem incapable of writing an ordinary, comprehensible sentence in a contract, deed or will. The joke is that the minute you read something that you can't understand, you can almost be sure it was drawn up by a lawyer!

Law faculties should take a stand on this issue. They should cease to be blind mistresses of the legal profession and should resist imitating the legal verbosity and technicality of legal jargon. The language course in law faculties should encourage law students and legal draftsmen to break free of the tradition of verbosity, technicality, convoluted legalese, legal claptrap and gobbledygook. Almost everything can be said plainly and effectively without resorting to words like “thereto”, “hereunto”, “theretofore”, “thereof” or “to wit” or by relying on Latin or French which could be easily translated into English or Malay. Take for example the words of a will:

“I, Helen Hoover, of the town of Goleta, County of Santa

Barbara and State of California, do hereby make, publish and declare this as and for my Last Will and Testament, hereby revoking all wills and codicils thereto heretofore by me made”.

The whole thing could more simply read: “I declare that this is my will and revoke any previous wills”.

**Relying on humour to polish up language skills:** The law is normally no laughing matter. Actually it teems with humour. The English judge Lord Evershed, discussing a standard form of contract, is reported to have said: “This contract is so one-sided that I am astonished to find it written on both sides of the paper”.<sup>8</sup>

Or witness this comment on a piece of land legislation:

The law doth punish man or woman  
That steals the goose from off the common,  
But lets the greater felon loose,  
That steals the common from the goose.<sup>9</sup>

Norman Mailer wrote in the Observer “You don't know a woman till you've met her in court”.<sup>10</sup> Tommy Manville, American millionaire remarked after his thirteenth divorce “She cried and the judge wiped away her tears with my cheque book”.<sup>11</sup>

And here is from the records of the Aetna Insurance company: “Gentlemen: I had an accident yesterday. I consider that neither vehicle was to blame but if either were to blame, it was the other one”.<sup>12</sup>

A Florida Ordinance required dancers to cover their buttocks. So it deemed it prudent to define buttocks as precisely as it could. Here is the definition of a buttock:

“The area at the rear of the human body (sometimes referred to as the gluteus maximus) which lies between two imaginary lines running parallel to the ground when a person is standing, the first or top of such lines being one-half inch below the top of the vertical cleavage of the nates (i.e. the prominence formed by the muscles running from the back of the hip to the back of the leg) and the second or bottom line being one-half inch above the lowest point of the curvature of the fleshy protuberance (sometimes referred to as the gluteal fold) and between two imaginary lines, one on each side of the body ...”

As you can see, teaching law is not all dreary and dull! Much depends on who is teaching it and what is being taught.

<sup>8</sup>Ronald Irving, ‘The law is a Ass’, Duckworth, 1999, p. 55

<sup>9</sup>Ronald Irving, ‘The law is a Ass’, Duckworth, 1999, 48

<sup>10</sup>Supra 67

<sup>11</sup>ibid

<sup>12</sup>Ronald Irving, ‘the law is a Ass’, Duckworth, 1999, p. 68

# GALLERY



*From left to right:*

Pn Nurfarizma Rahayu Mohd Anuar, Cik Nor Azila Maharam, Pn Azlena Khalid, Datuk Professor Emeritus Dr Shad Saleem Faruqi (Penasihat Undang-Undang UiTM, Professor Madya Datin Dr Musrifah Sapardi, Pn Rasanubari Asmaramah Said, En Shahrin Nordin



Legal Advisor of UiTM with Legal Officers from PPUU and all UiTM branches at "Seminar Undang-Undang Seluruh Sistem UiTM" in front of Canseleri Tuanku Sirajuddin, UiTM Shah Alam

*From left (first row):* Rasanubari Asmaramah, Nurfarizma Rahayu Mohd Anuar, Adlin Samsudin, Nor Azila Maharam, Shahrin Nordin, Y.Bhg. Datin Dr Musrifah Sapardi, Y.Bhg. Prof. Emeritus Datuk Dr. Hj. Shad Saleem Faruqi, Syatirah binti Abu Bakar, Abidah bt Hj Mat Taib, Noraini Ismail, Suria Fadhillah Md Pauzi, Hazlina Mohd Padil

*From left (second row):* Dr. Mohd Nasir b. Abdul Hamid, Habibun Nisa binti Mohamed Ajmal, Angayar Kani a/p Ramaiah, Dr. Nor Fadzliana Nawi, Prof Madya Hajah Baduyah Obeng, Dr Rusnadewi Bt Abdul Rashid, Marziana Abd Malib, Salmiah Salleh, Jusniza Abd Jamal, Farihana Abdul Razak, Noorimah Misnan, Afidah Osman

*From left (third row):* Ahmad Shukree Mhd Salleh, Mohd Basir bin Suleiman, Mohd Rizal Mohd Abdan, Mohd Zuhelmey Abdullah, Ashran Bin Haji Idris, Mohd Hafiz Ramlee, Mohammad Khair Mohd Seni, Azhan Bin Jalaludin, Ahmad Zainudin Hassan, Khairul Anuar Abdul Hadi,



**Staf PPUU UiTM Shah Alam**

*Front from left:* En Jamal Ismail, En Shahrin Nordin, Pn Napsiah Sahlan, Pn Mariam Abu Mansor, Pn Azlena Khalid, Emeritus Professor Datuk Dr Shad Saleem Faruqi, Associate Professor Datin Dr Musrifah Sapardi, Cik Nor Azila Maharam, Pn Zuhaini Zulkiflee, Pn Nurfarizma Rahayu Mohd Annuar, Pn Rasanubari Asmaramah Said, Pn Noor Aini Masri and Pn Adlin Samsudin

*From left (back row):* En Mohd Afandi Mohammad Fadzil and En Abdul Rahman Ali



**Annual Meeting of Members of Council of Legal Advisors of all Public Universities in Malaysia hosted by PPUU, UiTM at De Palma Hotel, Shah Alam**

*From left to right (front row):* Mohd Aizat bin Azmi, Muhammad Adil bin Ahmad Tajuddin, Muhammad Azrul Hazerin bin Abdul Razak, Mohd Izwan bin Hamdan, Azhar bin Mohamed, Y.Bhg. Emeritus Professor Datuk Dr. Hj. Shad Saleem Faruqi, Shahrin Nordin, Mohamad bin Mos, Muhammad Hafizuddin bin Zakaria, Abdul Karim bin Abdul Aziz

*From left to right (second row) :* Zunika binti Sulaiman, Zuraida binti Zakaria, Farah Deena binti Md. Rapee, Y. Bhg. Datin Hajah Wan Maizurina binti Wan Othman, Norain Rusyilawati binti Aziz, Muniroh binti Abdul Razak, Nur Hidayah binti Zakaria, Dr. Salawati Mat Basir,

*From left to right (third row):* Salwani binti Mahasan, Nordiana binti Nordin, Etty Widayu binti Samsungei, Puan Rasanubari Asmaramah binti Said, Siti Norashikin binti Mohd Yunus, Nurfarizma Rahayu binti Mohd Annuar, Nariza binti Mohd Elias, Nor Azila Maharam,

*From left to right (fourth row):* Liyana Al-Hany binti Abdul Halim, Noraini binti Idris, Azlena Khalid, Y.Bhg. Datin Dr Musrifah Sapardi, Siti Maryam binti Othman, Lily Farizon binti Karim

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“Worship nothing but Allah; be good to your parents, relatives, the orphan and the poor. Speak nicely to people and be constant in prayer, and give charity”

(Holy Qur’an, Surah 2:83).

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