

- (c) the Chief Registrar or a Senior Assistant Registrar nominated by the Chief Registrar;
- (d) four advocates and solicitors nominated by the Bar Council (section 113).

An advocate and solicitor may make an agreement for remuneration for his client in respect of non-contentious business but such agreement shall not provide for costs lower than that provided by any order made by the Solicitors Costs Committee (section 114).

It is provided that an advocate and solicitor shall be entitled to costs of negotiating a mortgage or charge, to himself either alone or jointly with another person (section 115).

An advocate and solicitor may enter into an agreement for the costs of contentious business but such agreement may only be enforced in the manner set out in section 118 of the Act. The court or a Judge may order the agreement to be cancelled if the substantive terms of the agreement are deemed by the Court or Judge to be unfair or unreasonable (sections 116 and 118).

Where the costs are not agreed, the advocate and solicitor may submit a bill of costs, which may be required to be taxed (section 121).

Part IX deals with the recovery and taxation of costs and in the main re-enacts existing legislation. Part X deals with miscellaneous matters and Part XI with transitional provisions.

Ahmad Ibrahim

CRIMINAL PROCEDURE CODE (Amendment and Extension) Act, 1976 Act A 324

In the past Malaysia had four different Criminal Procedure Codes, the Criminal Procedure Code of the Federated Malay States, the Criminal Procedure Code of the Straits Settlements, the Criminal Procedure Code of Sarawak and the Criminal Procedure Code of Sabah. This Act (which came into force on the 10th January 1976) amends the Criminal Procedure Code of the Federated Malay States and extends the Code as amended to the whole of Malaysia. The Criminal Procedure Codes of the former Straits Settlements, of Sabah and of Sarawak are repealed; and so also are sections 25(2), 26(2), 27(2), 28(2), 29(2) and 30(2) of the Evidence Act, 1950 which refers to Sarawak. It is provided that the Act shall apply to all investigations, inquiries, trials, cases and other proceedings pending on the date of its coming into force in the same manner as it applies to investiga-

about the
knowledge

part of

part of

has been
in, 1961

Offence

t under

advocate

for a
purchaser

of firm
shall

partners

for the
of the

ation
e and
e and
nt so
id to

Bar
or or
the
st of
of the
ply.
the
ex-

tions, inquiries, trials, cases and other proceedings commenced after its coming into force.

The criminal procedure will not however be uniform throughout Malaysia as for the time being the system of trial with assessors is to be retained in Sabah and Sarawak. Chapter XXI of the Code (dealing with trials with the aid of assessors), which by virtue of the Criminal Procedure Code (Amendment) Act, 1957 ceased to be in force with effect from the 1st January 1958, is revived for the purpose of the operation of the Code in Sabah and Sarawak; similarly the references to assessors in Chapter XXIII of the Code is revived for Sabah and Sarawak.

A new section 183A inserted at the beginning of Chapter XXI provides that Chapter XXI shall only apply to Sabah and Sarawak and also provides that Parliament may at any time by resolution passed by both Houses of Parliament declare that the Chapter shall cease to apply to Sabah or to Sarawak or to both and upon the passing of such resolution the Chapter shall cease to apply accordingly. Similarly a new section 234A inserted at the beginning of Chapter XXIII provides that the provisions of the Chapter relating to jurors and juries shall apply to the States of West Malaysia and the provisions relating to assessors shall apply to Sabah and Sarawak. It would appear that it would be necessary to amend this section if the provisions relating to jurors and juries are to apply to Sabah and Sarawak.

It might be noticed that section 3(3) of the Kidnapping Act, 1961, provides that notwithstanding the provisions of any written law to the contrary, every trial under section 3(2) of the Act shall be conducted in accordance with the provisions of Chapter XXI of the Criminal Procedure Code of the Federated Malay States which, for the purpose of such trials, shall apply and have effect throughout the Federation. There is therefore a conflict between section 3(3) of the Kidnapping Act, 1961 and the new section 183A of the Criminal Procedure Code; and perhaps it would have been better if section 183A (1) had been made "Subject to the provisions of any other written law in force".

The definition of "advocate" in section 2 of the Code has been amended to give it the meaning assigned by section 3 of the Interpretation Act, 1967; the definition of "Minister" has been deleted; and the words "in Malaya" in reference to the High Court deleted from the definition of court. The definition of "youthful offender" has been amended to be in line with the recent amendment to the Penal Code which raises the age of criminal responsibility from seven years to ten. A new definition of "diplomatic officer" has been added; this is relevant for the new sections 127A and 127B.

Section 5 of the Code has been amended to provide that it is the law of England and not that of Singapore which is to be referred to to fill lacunae in the law of criminal procedure.

Under the former Code section 56 gave power to issue a search warrant to search a house suspected to contain stolen property, forged documents or forged or counterfeited trade marks. This section has now been replaced by a new section taken from the Penal Codes of Sabah and Sarawak which gives power to issue a warrant authorising search for evidence of an offence. It is provided that if a Magistrate, upon information and after such inquiry as he thinks necessary, has reason to believe that anything upon, by or in respect of which an offence has been committed or any evidence or thing which is necessary to the conduct of an investigation into any offence, may be found in any place, he may by warrant, authorise the person to whom it is directed to enter, with such assistance, as may be required, and search the place for any such evidence or thing, and if anything searched for is found, to seize it and bring it before the Magistrate issuing the warrant or some other Magistrate to be dealt with in accordance with law.

A number of amendments has been made in Chapter VIII of the Code dealing with unlawful assemblies. The term "police officer not below the rank of Inspector" is substituted for the term "superior police officer" (which is obsolete) in the list of persons who may order an unlawful assembly to disperse. The former detailed provisions contained in sections 84 to 87 of the Code have now been repealed and replaced by a new section 84 taken from the Penal Codes of Sabah and Sarawak. This provides that if any unlawful assembly is commanded to disperse under section 83 or under section 5 of the Public Order (Preservation) Ordinance, 1958, and does not disperse or if without having been commanded to disperse, it conducts itself in such manner as to show a determination not to disperse, any police officer, any member of the armed forces or any other person acting in aid of a police officer or member of the armed forces may do all things necessary for dispersing the persons so continuing assembled and for apprehending them or any of them, and if any person makes resistance, may use such force as is reasonably necessary for overcoming resistance and shall not be liable in any criminal or civil proceedings for having by the use of such force caused harm or death to any person or damage to any property.

Section 88 of the Code has been repealed and substituted by a new section taken from the Penal Codes of Sabah and Sarawak. It is provided that no prosecution against any Magistrate, police officer or member of the armed forces for any act purporting to be done under Chapter VIII shall be instituted except with the sanction in writing of the Public Prosecutor personally or in Sabah or Sarawak of the Director of Public Prosecutions. Where a prosecution is sanctioned for an act purporting to be done under the Chapter, no Magistrate, police officer, member of the armed forces or person acting in aid of a police officer or member of the armed forces shall, if the Court is satisfied that the act was done in good

warrant
uments
eplaced
& which
of an
d after
ything
or any
igation
thorise
may be
and if
Magis-
ith in

Code
w the
ficer"
awful
ctions
ction
hat if
33 or
, and
se, it
erse,
erson
lo all
d for
nce,
ance
g by
e to

new
ded
r of
VIII
blic
blic
to
the
the
od

faith or it was done by a member of the armed forces, that it was done in obedience to an order which under naval, military or air force law he was bound to obey, be deemed to have thereby committed an offence.

Section 113 of the Code has been repealed and replaced by a new section on the admission of statements in evidence. This follows the provisions of, among others, section 75 of the Internal Security Act, 1960. It is provided that where any person is charged with any offence any statement whether the statement amounts to a confession or not or is oral or in writing, made at any time, whether before or after the person is charged and whether in the course of a police investigation or not and whether or not wholly or partly in answer to questions by that person to or in the hearing of any police officer of or above the rank of Inspector and whether or not interpreted to him by another Police Officer or other person shall be admissible in evidence at his trial and, if the person charged tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit.

A number of conditions for the admissibility of such statements are laid down —

- (a) No such statement shall be admissible or used as aforesaid if the making of the statement appears to the court to have been caused by any inducement, threat or promise having reference to the charge proceeding from a person in authority and sufficient in the opinion of the court to give the person charged grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him;
- (b) No such statement shall be admissible or used as aforesaid in the case of a statement made by a person after his arrest, unless the court is satisfied that a caution in the prescribed form was administered to him.

However a statement made by any person before there is time to caution him is not rendered inadmissible in evidence merely by reason of no such caution having been administered if it has been administered as soon as possible.

It is provided that notwithstanding anything to the contrary contained in any written law a person accused of an offence shall not be bound to answer any questions relating to the case after such caution as aforesaid has been administered to him.

It may be noted that although the former section 113(i) has been repealed and replaced, no consequential amendment has been made to section 151B(ii)(a) of the Code.

Subsection (1) of section 114 of the Code (which provides that no police officer or person shall offer any inducement to any person to make a statement) has been repealed. Section 114 therefore now provides that

no police officer or other person shall prevent or discourage by any caution or otherwise any person from making in the course of a police investigation under the Chapter any statement which he may be disposed to make of his own freewill. There appears at first sight to be a contradiction between section 114 and the new section 113 in regard to the giving of the caution. It may be that it should have been subsection (2) of section 114 of the Code which ought to have been repealed and not subsection (1). It may be noted that when the Sarawak Criminal Procedure Code was amended in 1956 (by Ordinance 11 of 1956) it was subsection (2) of section 118 (equivalent to section 114(2) of the Code) which was repealed.

Section 117 of the Code has been amended to provide in effect that if a Magistrate has no jurisdiction to try a case and considers further detention of the person produced before him unnecessary he may order the accused person to be produced before a Magistrate having such jurisdiction or if the case is triable only by the High Court, before himself or another Magistrate having jurisdiction with a view to committal for trial by the High Court.

Section 124 of the Code has been amended to clarify that the offence of having escaped from custody may be inquired into and tried not only by a Court within the local limits of whose jurisdiction the alleged escape occurred but also by a Court within the local limits of whose jurisdiction the person was apprehended after the alleged escape.

Section 127 of the Code has been expanded to provide that whenever any doubt arises as to the court by which any offence should be inquired into or tried the High Court may —

- (a) of its own motion; or
- (b) if a court subordinate to the High Court refers the question to the High Court for its directions; or
- (c) upon application by the Public Prosecutor or the person charged, decide by which court the offence shall be inquired into or tried. The Public Prosecutor and the person charged shall be entitled to be heard before the decision is taken by the High Court.

A new Section 127A has been inserted to give power to the courts to deal with certain offences committed outside Malaysia. It is provided that any offence under Chapter VI of the Penal Code (which deal with offences against the State), any offence under any of the written laws specified in the Schedule to the Extra-Territorial Offences Act, 1976 or any offence under any other written law which is certified by the Attorney-General to affect the security of the Federation committed, as the case may be,

- (a) on the high seas on board any ship or on any aircraft registered in Malaysia;
- (b) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft; or

- (c) by any citizen or any permanent resident in any place without or beyond the limits of Malaysia, may be dealt with as if it had been committed at any place within Malaysia.

This section is complementary to section 22 of the Courts of Judicature Act, 1964 (as amended), section 2(2) of the Subordinate Courts Act, 1948 (as amended), section 2(2) of the Sabah Subordinate Courts Ordinance (as amended) and section 2(2) of the Sarawak Subordinate Courts Ordinance (as amended). The exercise of the jurisdiction in respect of offences committed outside Malaysia is subject to the following conditions —

- (i) No charge as to any such offence shall be inquired into in Malaysia unless a diplomatic officer, if there is one in the territory, in which the offence is alleged to have been committed, certifies that, in his opinion, the charge ought to be inquired into in Malaysia and where there is no such diplomatic officer, the sanction of the Public Prosecutor will be required;
- (ii) any proceedings taken against any person under the section which would be a bar to subsequent proceedings against that person for the same offence if the offence had been committed in Malaysia shall be a bar to further proceedings against him under any written law relating to extradition or the surrender of fugitive criminals in Malaysia in respect of the same offence in any territories beyond the limits of West Malaysia.

It is not clear why the term "West Malaysia" is used in this section, especially as it has been the practice to use the term "Peninsular Malaysia" for this part of Malaysia.

A new section 127B provides that wherever any such offence committed outside Malaysia is being inquired into or tried the Public Prosecutor may, if thinks fit, direct that copies of depositions made or exhibits produced before the diplomatic officer in or for the territory in which the offence is alleged to have been committed shall be received as evidence by the court holding the inquiry or trial in any case in which such court could issue a commission for taking evidence as to the matters to which the depositions or exhibits relate.

Section 138 of the Code has been amended in effect to provide an exception to the rule that a person shall be tried before the High Court unless he shall have been committed for trial after a preliminary inquiry under the provisions of Chapter XVII — the exception being where a case has been transferred to the High Court under Chapter XLII of the Code. This amendment is to nullify the effect of the case of *Public Prosecutor v. Fan Yew Teng* (1973) 2 M.L.J.1.

Chapter XXI (Trials before the High Court with the aid of assessors) is as stated earlier applicable only to Sabah and Sarawak. It is provided by an amendment to section 184 (ii) of the Code that the Chief Justice may

after consultation with the Director of Public Prosecutions, by notification in the Gazette order that the trial before the High Court of all offences or of any particular class of offences shall be with the aid of assessors. There is no need now to obtain the approval of the Yang diPertuan Agong.

Section 197 of the Code has been amended to make it no longer necessary for the court to ascertain from each of the assessors the reasons for his opinion and to record such reasons. This has the effect of nullifying the decision in *Loh Kheng Meah v. Public Prosecutor* (1970) 1 MLJ 11.

The references to "assizes" in sections 244(iii), 245, 247 (ii) 248 (a) and 247 (iii) have been deleted or modified.

Section 252 of the Code has been amended to provide that subject to the other provisions of the Code, every person committed for trial shall, unless a Judge otherwise orders, be tried as soon as practicable after the record of the proceedings and the copy thereof have reached the Registrar and the Public Prosecutor respectively. A Judge may however for good cause to be recorded by him in writing, postpone from time to time the trial of any person committed for trial.

Chapter XXX (Appeals to the High Court) has been amended to provide that any reference in the Chapter to a Magistrate or a Magistrate's court shall be deemed to include a reference to a President of a Sessions Court or a Sessions Court, as the case may be. It is a pity that this amendment has been confined to Chapter XXX, as it raises questions as to the applicability for example, of Chapters XV, XVI, XVII, XIX and XXXIII to the Sessions Courts.

The power to order further inquiry in regard to revision has been specifically extended to Sessions Court by an amendment to section 324 of the Code.

Section 376 of the Code relating to the Public Prosecutor has been amended further, to provide that in Sabah and Sarawak, the State Attorney-General in each State shall be the Director of Public Prosecutions in that State and he shall act as Public Prosecutor with all the powers of the Public Prosecutor under the general direction and control of the Attorney-General. It is also provided that the Director of Public Prosecutions in Sabah and Sarawak may, subject to the directions of the Public Prosecutor, appoint Deputy Public Prosecutors for their respective States to act on behalf of the Director of Public Prosecutions. However, the powers vested in and exercisable by the Public Prosecutor or the Director of Public Prosecutions under sections 68(ii), 381, 385 and 386 of the Code may only be exercised by the Public Prosecutor or the Director of Public Prosecutions personally.

A new section 402A has been added to Chapter XXXIX (special provisions relating to evidence) to provide that where in any criminal trial, the accused seeks to put forward a defence of alibi, evidence in support thereof shall not be admitted unless the accused shall have given notice in

writing
comm
place
of the
adres
establi
Crimin
Sec
transf
that
fered
crimin
when
transf
which
pendin
prelim
before
be pr
appea
date
(Trial
Th
the ev
and p
comm
son r
summ
A
secute
to the
case
specif
produ
exerc
ficare
prelim
certif
such
shall
Th
been
in the

writing thereof to the Public Prosecutor at least two days before the commencement of the trial. The notice shall include particulars of the place where the accused claims to have been at the time of the commission of the offence with which he is charged, together with the names and addresses of any witnesses whom he intends to call for the purpose of establishing his alibi. This provision follows section 11 of the English Criminal Justice Act, 1967.

Section 417 of the Code has been amended to clarify the powers of transfer of cases exercisable by the High Court, and to provide specifically that the High Court may order any case (inter alia) to be transferred from a criminal court subordinate to it to any other criminal court of equal or superior jurisdiction. It is also provided that when an order is made that any particular criminal case be transferred to and tried before the High Court, the lower court before which the inquiry into or the trial of the offence against the accused is pending shall, without holding a preliminary inquiry or completing the preliminary inquiry, cause the accused person to appear or be brought before the High Court on the date specified in the order or as soon as may be practicable, if no such date is specified. When the accused person appears or is brought before the High Court, the High Court shall fix a date for his trial, which shall be held in accordance with Chapter XX (Trials before the High Court without assessors).

The court to which a case is transferred under section 417 may act on the evidence already recorded in an inquiry or a trial or partly so recorded and partly recorded by itself or it may resummon the witnesses and recommence the inquiry or trial. The Public Prosecutor or the accused person may however apply for the witnesses or any of them to be re-summoned and reheard.

A new section 418A has been added to provide that the Public Prosecutor may in any particular case triable by a criminal court subordinate to the High Court issue a certificate requiring the court before which the case is pending to remove it to the High Court at such place as may be specified in the certificate and to cause the accused person to appear or be produced before the said High Court. The power under the section is exercisable by the Public Prosecutor personally. Upon receipt of the certificate, the court before which the case is triable shall, without holding a preliminary inquiry transmit the case to the High Court mentioned in the certificate and cause the accused person to appear or be brought before such High Court. Thereafter the provisions of sections 417(3)(b) and (4) shall be applied to such case.

The re-enacted section 417 and the new section 418 appear to have been added when the Bill was before the Dewan Rakyat, as they were not in the Bill introduced into Parliament.

Column 7 of the First Schedule to the Code is modified to the extent required to bring the punishments mentioned therein into conformity with the amended punishments prescribed in the Penal Code (Amendment and Extension) Act, 1976 (Act A 327).

It may be noted that by an Order made under section 74 of the Malaysia Act — that is the Modification of Laws (Criminal Procedure) (Sabah and Sarawak) Order 1976 — certain modifications have been made to the Criminal Procedure Code in its application to Sabah and Sarawak. These are mainly transitional provisions until the coming into operation of the Subordinate Courts Act, 1948. In addition it is provided that sections 328–341 (Inquiries of Death) shall not come into operation until a date to be appointed by the Minister. The Minister is also given power to make rules to deal with youthful offenders.

Ahmad Ibrahim

THE PENAL CODE (AMENDMENT AND EXTENSION ACT, 1976) ACT A 327

This Act amends the Penal Code (F.M.S. Cap. 45) and extends it as amended to the whole of Malaysia. It is to come into force on a date to be fixed by the Minister. The Act is a prelude to the issue of a Revised Edition of the Penal Code, which will then be the only Penal Code in Malaysia. At present Sabah and Sarawak have their own Penal Codes.

The Penal Code is extended to extra-territorial offences by a new section which provides that the provision of Chapter VI (which relates to offences against the State) shall apply to any offence committed —

- (a) by any citizen or any permanent resident on the high seas on board any ship or any aircraft whether or not such ship or aircraft is registered in Malaysia;
- (b) by any citizen or any permanent resident in any place without and beyond the limits of Malaysia as if the offence had been committed in Malaysia.

The word "offence" in the new provision is defined as including every act done outside Malaysia, which if done in Malaysia, would be an offence punishable under the Penal Code. The word "permanent resident" has the meaning assigned to it by the Courts of Judicature Act, 1964, that is, a person who has permission granted without limit of time under any Federal Law to reside in Malaysia including a person treated as such under any written law relating to immigration (Section 2(1)).