A FIRST LOOK AT THE Malaysian Legal System

Wan Arfah Hamzah

OXFORD FAJAR

Oxford Fajar Sdn. Bhd. (008974-T)
(*Formerly known as Penerbit Fajar Bakti Sdn. Bhd.*)

Oxford Fajar Sdn. Bhd. (008974-T)
4 Jalan Pemaju U1/15, Seksyen U1
Hicom-Glenmarie Industrial Park
40150 Shah Alam
Selangor Darul Ehsan

© Oxford Fajar Sdn. Bhd. (008974-T) 2009
First published 2009

ISBN 978 983 45050 0 4

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Perpustakaan Negara Malaysia Cataloguing-in-Publication Data

Wan Arfah Hamzah
A first look at the Malaysian legal system / Wan Arfah Hamzah.
ISBN 978-983-45050-0-4
1. Law--Malaysia. I. Title.
394.595

Impression: 18 17 16 15 14 13 12

Text set in 11 point Sabon by Chitra Computers, India

Printed in Malaysia
Percetakan Jiwabaru Sdn Bhd, Selangor Darul Ehsan

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In memory of

my parents
Tan Sri Wan Hamzah bin Wan Mohamed
and
Puan Sri Esah binti Dato'Abdul Rahman

and

my younger brother
Wan Hussien
whose untimely passing
in the early hours of Sunday 6 April 2008
drove me, frenetically, to complete
the writing of this book
his sudden departure
yet another grievous reminder
that life is lent
on a lease terminable with, or without, notice

PREFACE

This book is designed to provide students embarking upon legal studies (and lay readers) with an introduction to Malaysia's plural legal system.

The book is divided into four parts:

Part 1 unfolds Malaysia's legal history, so crucial to an understanding of the primacy of the common law tradition in the national legal system;

Part 2 explains the legal rules which Malaysian courts refer to, and apply, in resolving disputes. The exposition does not attempt to unravel the substantive content of these rules; this can be found in textbooks on the subjects concerned, eg Constitutional Law, Customary Law or Islamic Law. The chapters on sources of Malaysian Law explain rather how these rules come into being (or, in the case of customary laws, how they survived British colonization and the introduction of English Law), as well as how they are interpreted, applied, and developed;

Part 3 focuses on the primary institutions (ie the courts) and personnel of the law; and

Part 4 outlines the trial process, both civil and criminal, and the schemes for granting legal aid which strive to make the courts accessible to all, regardless of financial means.

The new spelling is used for Malay words except when the old spelling occurs in titles or within quotes. Likewise, the most commonly accepted current spelling for individual names is used, unless spelt differently within quotes. Individual names are cited fully the first time they are mentioned and thereafter shortened to the name or names by which the individual is generally known in Malaysia.

The law is stated as at 1 April 2008.

WAN ARFAH HAMZAH

ACKNOWLEDGEMENTS

I would like to record my gratitude to:

The University of Malaya for allowing me the use of the Tan Sri Ahmad Ibrahim Law Library after my retirement;

Staff of the Tan Sri Ahmad Ibrahim Law Library for being ever willing to help me trace lost or missing items from the racks, always with a smile;

Hajah Rohani Ismail of the *Biro Bantuan Guaman*, Putrajaya for kindly and promptly sending me two booklets and twenty-three pamphlets on the government-funded legal aid scheme;

Puan Nor Hazlina Mohd of the Legal Aid Centre (LAC) in Kuala Lumpur for her kindness in promptly posting me a brochure on the LAC and in sparing precious time to answer my queries on the organizational structure of the same;

Puan Narimah Mohd Arshad for faithfully feeding my hand-written drafts into the computer, with great patience;

My younger sister, Wan Portia, for downloading urgently needed materials; and

last but not least,

My publishers for their understanding and willingness to accede to my request for a month's grace for submitting the finalized manu script of the last two chapters.

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ABBREVIATIONS

AC	Appeal Cases (United Kingdom)
ACA	Anti-Corruption Agency
AIR	All India Reporter
AJCL	American Journal of Comparative Law
ALJR	Australian Law Journal Reports
All ER	All England Law Reports
ALR	Australian Law Reports
AMR	All Malaysia Reports
BBG	*Biro Bantuan Guaman* (Legal Aid Bureau)
c *or* Cap	Chapter
CA	Court of Appeal
CJ	Chief Justice
CLJ	Current Law Journal
CLJ (Rep)	Current Law Journal (Reprint)
CLR	Commonwealth Law Reports (Australia)
Co Rep	Coke, Sir Edward, Reports (United Kingdom)
CPC	Criminal Procedure Code (Act 593)
DLR	Dominion Law Reports (Canada)
ER	English Reports (United Kingdom)
FC	Federal Court
FCJ	Federal Court Judge
FMA	Federation of Malaya Agreement
FMS	Federated Malay States
FMSLR	Federated Malay States Law Reports
HC	High Court
HL	House of Lords
HL Cas	House of Lords Cases (United Kingdom)
ICLQ	International and Comparative Law Quarterly

J	Judge
JC	Judicial Commissioner
JCA	Judge of the Court of Appeal
JMBRAS	Journal of the Malayan Branch of the Royal Asiatic Society
JMCL	Journal of Malaysian and Comparative Law
JSBRAS	Journal of the Straits Branch of the Royal Asiatic Society
Jurnal IKIM	*Jurnal Institut Kefahaman Islam Malaysia*
KB	King's Bench Reports (United Kingdom)
Ky	Kyshe's Law Reports
Ky Ecc	Kyshe's Ecclesiastical Cases
LAC	Legal Aid Centre
Leic SLR	Leicester's Straits Law Reports
LP	Lord President
Mal LR	Malaya Law Review
MC	Malayan Cases by BA Mallal
MCA	Malaysian Chinese Association
MIC	Malaysian Indian Congress
MLJ	Malayan Law Journal
MLJ Rep	Malayan Law Journal Reprint
MLJ Suppl	Malayan Law Journal Supplement
MU	Malayan Union
NCA	Native Court of Appeal
NSWLR	New South Wales Law Reports (Australia)
O	Order
PC	Privy Council
PCA	President of the Court of Appeal
PD	Law Reports, Probate Division (1875–90) (United Kingdom)
PDRM	*Polis DiRaja Malaysia* (Royal Malaysian Police)
QB	Queen's Bench Reports (United Kingdom)
r	Rule
Reg	Regulation
RHC	Rules of the High Court 1980

RCA	Rules of the Court of Appeal 1994
RFC	Rules of the Federal Court 1995
SC	Supreme Court
SCJ	Supreme Court Judge
SCR	Canada Supreme Court Reports
	Supreme Court Reports (1985–95)
	Sarawak Supreme Court Reports (1928–41; 1946–51)
	Sarawak, North Borneo and Brunei Supreme Court Reports (1954–7)
Sub CR	Subordinate Courts Rules 1955
SLR	Singapore Law Reports
SS	Straits Settlements
SSLR	Straits Settlements Law Reports
UEM	United Engineers (Malaysia) Berhad
UMBC	United Malayan Banking Corporation
UMNO	United Malays National Organization
UMS	Unfederated Malay States
UMW	United Motor Works
WLR	Weekly Law Reports (United Kingdom)

PART ONE

INTRODUCTION

A country's legal system reflects its history. In cognizance of this, Part 1 partially unfurls the historical backdrop against which the Malaysian legal system evolved.

Chapter 1 briefly introduces Malaysia and its plural legal system. The political history of Malaysia is summarized in Chapter 2 as a prelude to an outline of the development of its laws prior to the arrival of the British.

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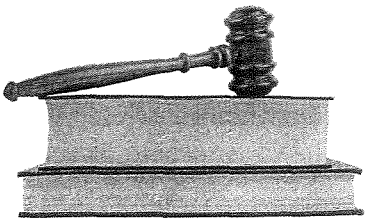

1 AN INTRODUCTION TO THE MALAYSIAN LEGAL SYSTEM

Chapter Objectives

- Provide a general introduction to the system of government in Malaysia
- Give an overview of the Malaysian Legal System

1.1 INTRODUCTION

A federation

MALAYSIA is a federation of thirteen states. Eleven states, namely Johor, Kedah, Kelantan, Melaka, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Selangor and Terengganu, and two federal territories, namely Kuala Lumpur and Putrajaya, are in the Malay Peninsula (Peninsular or West Malaysia). Sabah, Sarawak, and the federal territory of Labuan are in the north-western part of the island of Borneo (East Malaysia). East and West Malaysia are separated by about 650 kilometres of sea—the South China Sea.

Division of legislative and executive powers of the federation

The federation has a strong central government. The legislative and executive powers of the federation are divided between the central and state governments in accordance with Articles 74 and 80, and five lists (Federal, State, Supplement to State List for Sabah and Sarawak, Concurrent and Supplement to Concurrent for Sabah and Sarawak) in the Ninth Schedule of the Federal Constitution.[1] Parliament may legislate on matters in the Federal and Concurrent Lists, while the State Legislative Assemblies may enact legislation on matters in the State and Concurrent Lists. However, the Federal Constitution permits flexibility by authorizing Parliament to legislate on matters in the State List for specific purposes (for example, to implement international agreements and to promote uniformity of law) under Article 76 and, in an emergency, under Article 150.

Most matters that are important to the federation as a whole, such as external affairs, defence, internal security, civil and criminal law

[1] All Articles subsequently mentioned in this section refer to Articles in the Federal Constitution.

and procedure, and the administration of justice are in the Federal List. Islamic law and matters of more local concern, eg land, agriculture, mining, and local government, appear in the State List.

Additional matters of special concern to Sabah and Sarawak such as native law and custom, and ports and harbours are reserved for them in the Supplementary State List. The Concurrent List sets out matters of common concern, eg social welfare, town and country planning, and public health. In case there are both federal and state laws on a matter in this list, Article 75 ensures that federal law shall prevail.

The power to legislate on matters not enumerated in any of the five lists (residual power)—which is negligible as the five lists are extensive—is vested in the states. The power sharing between the central and state governments is unequal, with the balance heavily tilted in favour of the central government.

A secular state

The federation is a secular state (see below, pp 162–3). It is not an Islamic state (an indispensable feature of which is the supremacy of the *Syariah* or Islamic law). In Malaysia the supreme law is the Federal Constitution (Article 4), not the *Syariah* or Islamic law. Far from being the supreme law, Islamic law is not even the basic law of the land, ie the law of general application. The basic law of Malaysia is the common law—the principles of which have their origins in England. Having been displaced as the basic law by the common law of England during British colonization, Islamic (or the Malay–Muslim) law was relegated to the status of personal law of Muslims (personal laws being laws which apply to specific groups of people who are defined according to race or religion or both), confined primarily to family matters.

A constitutional monarchy and a parliamentary democracy

The system of government in Malaysia is based on that in the United Kingdom. Malaysia is a constitutional monarchy and a parliamentary democracy. The Head of State of the federation is the Yang di-Pertuan Agong (Paramount Ruler). The unique feature of the monarchy in Malaysia is that the Yang di-Pertuan Agong is elected by the Rulers of the nine Malay states from their own number every five years so that the office rotates among the Rulers.[2]

The Conference of Rulers

The nine Malay Rulers and the Yang di-Pertua Negeri (Governor) of each of the four states without Rulers (Melaka, Penang, Sabah and Sarawak) constitute the Majlis Raja-Raja (Conference of Rulers). This is the most august body in the federation, serving as a link between the central and state governments at the highest level. It meets about four times a year. Among its functions are the election

[2] A generic term which covers the Yang di-Pertuan Besar in Negeri Sembilan, Raja in Perlis, and Sultan in the other Malay states.

of the Yang di-Pertuan Agong and his deputy (for this purpose only the nine Malay Rulers attend); a discussion on national policy; the granting of consent, or not, to any law; and the giving of advice on appointments that constitutionally require their consent or advice.

The Yang di-Pertuan Agong (Paramount Ruler)

The Yang di-Pertuan Agong is a constitutional head. Under Article 40(1) he acts on ministerial advice except as otherwise provided.[3] He reigns, but does not govern. As Head of State, he is the formal head of each of the three branches of government: the legislature, the executive, and the judiciary. He is a component of Parliament and may not refuse assent to Bills passed by the two Houses of Parliament.[4] As head of the executive, he appoints the Prime Minister and members of the Cabinet, and as head of the judiciary, he appoints the Chief Justice of the Federal Court, the President of the Court of Appeal, the Chief Judge of each of the two High Courts, and all judges of the superior courts.

Parliamentary democracy based on Westminster model

Malaysia practises parliamentary democracy based on the British Westminster model. This means that once every five years, there should be a general election when adult citizens choose who should govern them. The political executive (Cabinet) should come from the majority party in Parliament, is collectively responsible to the people's representatives in Parliament, and must step down on a vote of no-confidence by the Lower House of Parliament. Thus, in Malaysia, as in the United Kingdom, there is no real separation between the legislature and political executive, as there is in the United States of America.

Parliament

The federal legislature, Parliament, comprises three components: the Yang di-Pertuan Agong, Dewan Negara (the Senate, which is the Upper House), and Dewan Rakyat (House of Representatives or the Lower House). The Dewan Rakyat has primacy over the Dewan Negara in composition and functions.

The Dewan Rakyat comprises 222 members elected by adult suffrage from single constituencies delineated on the basis of population and size of territory. The Dewan Negara has seventy members; twenty-six are elected by the State Legislative Assembly (ie two from each of the thirteen constituent states) and forty-four are appointed by the Yang di-Pertuan Agong. The appointed senators represent the federal territories, sectoral groups, and minorities.

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[3] For example, under Art 40(2) the Yang di-Pertuan Agong may act in his discretion in some matters: appointment of a Prime Minister, withholding of consent to a request for premature dissolution of Parliament; the requisitioning of a meeting of the Conference of Rulers concerned solely with the privileges, position, honours and dignities of the Malay Rulers. However, even in these matters, constitutional conventions limit the royal discretion.

[4] In 1994 Art 66 was amended to provide that a Bill becomes law 30 days after it is presented to the Yang di-Pertuan Agong even if it is not assented to by him: Constitution (Amendment) Act 1994 (Act A885).

Intended primarily by the framers of the Federal Constitution to be the defender of state interests and a revisory body, the Dewan Negara originally comprised more elected than appointed members, in the ratio of 22 : 16. The present ratio of 26 : 44—reversed, and grossly so—has crushed any hopes that the Dewan would play an effective role in the legislative process.

The executive

The executive is led by the Prime Minister, who is appointed by the Yang di-Pertuan Agong. The Prime Minister must be a member of the Dewan Rakyat who, in the judgment of the Yang di-Pertuan Agong, is likely to command the confidence of the majority of its members. By convention, the Prime Minister has always been the President of the United Malays National Organization (UMNO), the backbone of the Barisan Nasional (National Front), the coalition which, since independence, has enjoyed a two-thirds majority in the Dewan Rakyat, except in the 1969 and 2008 general elections. Other members of the Cabinet can belong to either Dewan.

The judiciary

The judiciary comprises the Federal Court, the Court of Appeal, two High Courts of coordinate jurisdiction—one for West, the other for East, Malaysia—and the subordinate courts. As the administration of justice is a federal matter, these courts are federal courts vested with civil and criminal jurisdiction, and enforce both federal and state laws (the latter, though, applies only to the state concerned). Conversely, because Islamic law, Malay, and native customary laws are state matters, the *Syariah* Courts (other than those in the federal territories) and the Native Courts in Sabah and Sarawak are state courts.

Prior to 1988, the judicial power (ie the power to hear and determine legal disputes and issues) of the federation was explicitly vested in the judiciary, just as legislative power is vested in the legislature, and executive power in the executive. The Constitution (Amendment) Act 1988 (Act A704), passed at a time when judicial activism incurred the executive's wrath (see below, p 42), deleted from Article 121 the words vesting judicial power in the courts, and gave them only such jurisdiction and powers as may be conferred by federal law, thereby subordinating the judiciary to Parliament![5] Nevertheless, it is arguable that judicial power still reposes in the courts.[6]

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[5] See *Buildcon-Cimaco Concrete Sdn Bhd*, v *Filotek Trading Sdn Bhd* [1999] 4 CLJ 135, 151.

[6] *Sugumar Balakrishnan* v *Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289, 307; *Kok Wah Kuan* v *Public Prosecutor* [2007] 4 CLJ 454, 461–2 (CA); see also Andrew J Harding, 'Islamic Law in Malaysia: Its Impact on Civil Law', in Proceedings of the 9th Malaysian Law Conference, Kuala Lumpur, 10–12 October 1991; Andrew J Harding, *Law, Government and the Constitution in Malaysia*, London: Kluwer Law International, 1996, pp 135–6.

Each component state in the federation has its own Head of State (either a Ruler or a Yang di-Pertua Negeri), an elected unicameral legislative assembly and an executive council headed by a Chief Minister called the Menteri Besar (in the Malay states) or Ketua Menteri (in the states which were formerly British colonies). Like the Yang di-Pertuan Agong, each Ruler and Yang di-Pertua Negeri is a constitutional Head of State and acts on the advice of the State Executive Council. The Malay Rulers are heads of Islam in their own states while the Yang di-Pertuan Agong is the head of Islam in the federal territories and in states without a Ruler.

Component states of the federation

Malaysia is unique in withdrawing personal immunity from the Rulers, including the Yang di-Pertuan Agong. A constitutional amendment in 1993 provides that if the Yang di-Pertuan Agong or Ruler is subject to civil or criminal proceedings, the proceedings shall be before a special court of five judges, two of whom shall be appointed by the Majlis Raja-Raja.[7] If found guilty, they may apply to the Majlis for a pardon, reprieve or respite under Article 42(5) of the Federal Constitution and the Majlis may exercise mercy after considering any written opinion of the Attorney General.

1.2 MALAYSIAN LEGAL SYSTEM: AN OVERVIEW

Malaysia is a multi-ethnic, multicultural, and multi-religious country. The national legal system reflects this heterogeneous society which has been influenced and shaped by external as well as indigenous cultures.

Like many Afro-Asian countries which were colonized, Malaysia has a plural legal system, ie a national legal system within which coexist two or more legal traditions.[8] The Malaysian legal system is an integration of the common law, *Syariah* law and customary law traditions.

A plural legal system

The national legal system is based mainly on the common law tradition. The common law and rules of equity of England were received together with British administration when the British came to the Malay Peninsula, first to Penang in 1786. The British occupation of Penang, Singapore, and Melaka—which together became a

National legal system based on the common law tradition

[7] Constitution (Amendment) Act 1993 (Act A848). For details, see Cyrus V Das, 'Democracy and the Role of the Sultanate System in Malaysia: The Role of the Monarchy', *JMCL*, 21 (1994): 97–116; Harding, 'Islamic Law in Malaysia', pp 76–9; HP Lee, *Constitutional Conflicts in Contemporary Malaysia*, Kuala Lumpur: Oxford University Press, 1995, pp 86–99; Shad Saleem Faruqi, 'The Sceptre, the Sword and the Constitution at a Crossroad (A Commentary on the Constitution Bill 1993)', *CLJ*, 1 (1993): xlv–lix.

[8] By legal traditions is meant the heritage of common legal concepts, methodology, institutions, processes, and remedies.

British colony known as the Straits Settlements—was followed by British intervention and indirect rule through treaties of protection in the Malay states, beginning with Perak in 1874.

In Borneo, North Borneo (now Sabah) and Sarawak became British protectorates in 1888 and British colonies in 1946, after being privately administered by the British North Borneo Company and the 'White Rajahs' respectively, following the cession of these territories by the Sultans of Brunei and Sulu to Western adventurers.

The basic law before British colonization

Before the British arrived, the pre-existing law comprised Malay *adat* (customary) law and the customary laws of the various communities. Malay *adat* law was the basic law of the land since the heyday of the Melaka Sultanate in the mid-fifteenth century. It was a composite of indigenous Malay *adat* law with Hindu–Buddhist elements, overlaid with principles of *Syariah* law, which the latter received with the coming of Islam early in the same century.

Introduction of the common law

Common law was introduced to the Straits Settlements through Royal Charters of Justice. Its application was extended to the Malay states through administrative arrangements. Initially introduced indirectly through legislation on specific matters based on British Indian models, and through the British or British-trained Bar and Bench, the reception of the common law was later formalized by a series of enabling legislation, the first enacted in 1937. Common law was received in a similar manner in the Borneo states.

Common law replaced the Malay–Muslim law as the basic law

Common law replaced the Malay–Muslim law as the basic law of the land. The latter was reduced to being the law concerning family and religious matters applicable only to Muslims. It evolved into what is now Islamic law, administered by the *Syariah* courts, a system of state courts which operate parallel to the federal courts administering the common law from 1948 onwards.

Other pre-existing customary laws

The other pre-existing customary laws were of various customary traditions, indigenous and foreign:

- Aboriginal customary law;
- Chinese customary law;
- Hindu customary law; and
- Native customary law of the non-Malay indigenous communities of Sabah and Sarawak.

Preservation of pre-existing customary laws during British colonization

These customary traditions survived British administration. They were accommodated, as it was British policy to apply the common law only in so far as the religions, manners, and customs of the local inhabitants permitted, to prevent the common law from operating unjustly and oppressively. However, the accommodation was eclectic. Customary practices in matters of personal law (family and inheritance) and native land title were more readily recognized

than in other matters, and even then, only if considered not repugnant to equity, justice, and good conscience.

Today, customary laws are in decline. Of Malay *adat* law, only *adat perpatih* (that branch of Malay *adat* law based on the matrilineal tradition) is still practised in Negeri Sembilan. Chinese and Hindu customary forms of marriage may still be celebrated, but the legal aspects of marriage and divorce among non-Muslims are now governed by the Law Reform (Marriage and Divorce) Act 1976 (Act 164). Among other things, this Act introduced a common system of solemnization and registration of marriage, without prejudice, however, to the legality of customary marriages contracted before the Act came into force in 1982. Only the native customary laws applicable to the non-Muslim indigenous communities in Sabah and Sarawak remain vibrant. They are administered by a system of Native Courts in each of these two states.

Declining importance of customary laws

In contrast to customary laws, Islamic law continues to grow in importance. This is due in part to Islamic resurgence in Malaysia[9] and in part to the government policy of absorbing Islamic values in administration,[10] as manifested, for example, in the introduction of Islamic banking and Islamic insurance.

Growing importance of Islamic law

Questions

1. Examine the concept of federation.
   (a) Is Malaysia a true federation?
   (b) What are the merits and demerits of a federation, especially for a country like Malaysia?
2. Examine the popular claim that Malaysia is an Islamic state.
3. (a) What is the doctrine of separation of powers?
   (b) To what extent is that doctrine reflected in the Federal Constitution?

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Basic Reading

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[10] The Islamization policy of promoting the broader objectives of Islam which have universal appeal began with the Third Malaysia Plan (1976–1980). For details, see Mohamad Hashim Kamali, *Islamic Law in Malaysia: Issues and Developments*, Kuala Lumpur: Ilmiah Publishers, 2000, Chapter 8.

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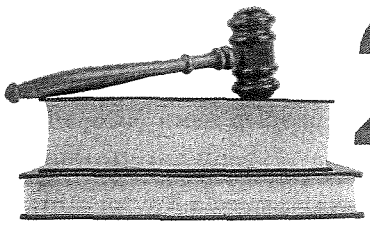

2 THE DEVELOPMENT OF MALAYSIAN LAW

Chapter Objectives

- Sketch the political history of Malaysia
- Outline the development of Malaysian law before the British era

2.1 POLITICAL HISTORY

2.1.1 Prehistoric Period

Strategic location of the Malay Peninsula shaped Malaysia's plural legal system

THE strategic location of the Malay Peninsula is the most important geographical factor shaping the plural society and plural legal system of Malaysia. The peninsula lies truly at the crossroads of monsoons and ancient trade routes linking East and West. It is this location that has, from time immemorial, attracted a succession of peoples, cultures, religions, and trade.

The Malay Peninsula in prehistoric times was allegedly a land bridge between mainland Asia and the lands of the south-west Pacific. It was used by successive generations of prehistoric peoples to travel from the Asian mainland to their eventual homes in Indonesia, Melanesia, and Australia. Although the history of human habitation in South-East Asia is still vague, the skull of a *Homo sapiens* dating back to 35000 BC was discovered in the Niah Caves of Sarawak. In the Malay Peninsula itself, the latest findings point to the archaeological site at Bukit Jawa, in the Lenggong Valley of Ulu Perak, being 74 000 years old.[1]

It is commonly assumed that the earliest inhabitants of the Malay Peninsula were people of the Middle Stone Age—possibly descendants of the Java man—who arrived sometime between 8000 and 2000 BC. They were the Orang Asli (Original People), the ancestors of the Negrito (a nomadic people now confined to the remote interior in the north and east) and the Senoi (a semi-nomadic people

[1] *New Straits Times*, 27 June 2001, p 5.

in the central part of the peninsula). They were followed around 1500 BC by the Orang Melayu Asli (Proto-Malays) whose descendants (among whom are the Temuan, the Semelai, and the Jakun) are found in the south. Sometime between 300 BC and AD 100 came the Proto-Malays who intermarried with peoples from Java and Sumatra, and evolved into the Deutero-Malays, the ancestors of the present Malays. The present Orang Asli (which term now covers all the aborigines of West Malaysia), the Malays, and the indigenous communities of Sabah and Sarawak make up the indigenous peoples of Malaysia.

2.1.2 Historic Period

2.1.2.1 Pre-European Era

Just as the prehistoric period was characterized by outside influences, the historic period likewise was dominated by the effects of external factors on the people and their institutions. Indian and Chinese influences mark the earlier, Muslim and European the later, stages.

2.1.2.2 Hindu–Buddhist Influences

Chinese chronicles report trade between India and China as early as the seventh century BC, suggesting also the possibility of trade with the Malay Peninsula. Archaeological findings also point to commercial exchanges between the inhabitants of the peninsula and traders from China, India, and the Levant in the pre-Christian era. Perhaps the foreign traders were drawn to the peninsula by its reputation as the 'Golden Chersonese' (Land of Gold) in ancient times.

During the 1500 years or so of Indian influence at least thirty Indianized states flourished in the Malay Peninsula—almost all on the east coast. The most important was Langkasuka, situated in present-day Patani. Indian influence did not necessarily come directly from India. It came largely from the Indianized kingdoms in South-East Asia: Funan, established sometime in the first century in the Mekong valley in Cambodia; Champa, which emerged sometime in the third century in southern Vietnam; Sri Vijaya, which probably arose out of the Kingdom of Palembang in south-east Sumatra around the seventh century and which dominated the Sunda and Melaka Straits for four to five centuries; and the Javanese kingdom of Majapahit, which replaced Sri Vijaya in the fourteenth century. These Indianized kingdoms were so powerful that surrounding areas were subjected to their suzerainty and made to pay tribute. Indian influence in the peninsula was pervasive: it

brought not only Hinduism and Buddhism, but also left its mark on language, law, literature, and political institutions. Its influence contributed to and absorbed the indigenous elements and left a legacy, some aspects of which have survived even the coming of Islam.

2.1.2.3 Chinese Influence

Although they came to the Malay Peninsula as early as the Indians, the Chinese were more interested in trade than establishing settlements. China did, however, play a political role in this early period: Chinese protection fended off attacks on the peninsula by its more immediate and aggressive neighbours. The Chinese did not exercise any significant or lasting influence on the peninsula in this early period. Their influence came much later with their large-scale immigration in the nineteenth and twentieth centuries.

2.1.2.4 Islamization and the Melaka Sultanate

The Hindu–Buddhist political control and cultural influence ended with the expansion of Islam into South-East Asia sometime in the thirteenth century. How Islam came to the region and spread is still a matter of speculation, but it is generally believed to have been brought to the Malay Peninsula by Muslim traders, principally from India.

According to history, Melaka was founded around AD 1400 by Parameswara, a refugee prince from Palembang, who married a Muslim princess from Pasai, embraced Islam, and took the name of Megat Iskandar Shah. During the rest of the century, Melaka expanded territorially.

The Melaka Sultanate, a Malay–Muslim empire

At the height of its glory in the mid-fifteenth century, the sultanate covered the whole Malay Peninsula, large parts of Sumatra, and islands south of Singapore. It inherited the commerce of the former Sri Vijaya kingdom and traded not just with its immediate neighbours, but also with China, India, Persia, and Arabia. It became, in the words of a sixteenth-century Portuguese chronicler, Tomé Pires, 'of such importance and profit ... that it has no equal in the world'.[2] But Melaka was not just an internationally known entrepôt; it was also a great Malay–Muslim empire which became the centre for the spread of Malay culture (especially the Malay language) and of Islam to the region. In fact, though the sultanate lasted more than a hundred years and could claim most of the present Malay states in the peninsula as its offshoots, it left a political legacy less permanent than its cultural and religious influence.

[2] *Suma Oriental*, London: Hakluyt Series, 944, Vol 2, p 285.

2.1.3 European Colonialism

The arrival of the Europeans

The Malay Sultanates of Melaka and Brunei broke up with the coming of the Europeans into the region. Melaka fell to the Portuguese under the command of Alfonso de Albuquerque in 1511, and to the Dutch in 1641. The power of Brunei was crippled by the Spaniards in the Philippines and the Dutch in Java until, by the beginning of the nineteenth century, all that remained of that sultanate was its present territory, Sarawak and parts of North Borneo (now Sabah).

Riau–Johor—founded by the last Sultan of Melaka who fled south when defeated by the Portuguese—tried to re-establish control over Melaka but failed, thwarted not only by the European powers but also by its local rivals, in particular Acheh in northern Sumatra. Consequently, the period following the fall of Melaka saw the emergence of sovereign states in the Malay Peninsula.

The arrival of the British

Towards the end of the eighteenth century the British arrived, partly in search of trade—more specifically, settlements to promote their trade with China—and partly, to set up bases from which to prevent French domination of the Indian Ocean. In 1786, the Sultan of Kedah, anxious for military assistance against the Siamese, leased the island of Penang to Captain Francis Light, acting for the English East India Company (EIC). The EIC failed to provide assistance when Siam (as it was then called) attacked Kedah in 1821. When Kedah failed to recapture Penang in 1791, the EIC agreed to pay the Sultan and his successors an annual pension in return for the cession of Penang and Province Wellesley (the strip of territory on the mainland). British colonialism had begun.

Melaka was surrendered by the Dutch to the British in 1795 for reasons connected with the Napoleonic Wars in Europe. Melaka was returned to the Dutch in 1818 but by the Anglo-Dutch Treaty of 1824, it was exchanged for the island of Benkulen in Sumatra.[3] This treaty, which carved the Malay Peninsula and Archipelago into British and Dutch spheres of influence (thus fixing the boundary between what is now Malaysia and Indonesia), simultaneously marked the end of Dutch claims to Melaka.

The British sphere of influence included Singapore. Stamford Raffles, an official of the EIC, was granted by the Temenggung of Riau–Johor the right to establish a trading post on the island in 1819. The founding of Singapore was formalized in 1824 when Sultan Hussain Mohamed Shah of Johor—bypassed by the Dutch but recognized by the British—and the Temenggung agreed to cede

[3] William George Maxwell and William Sumner Gibson (eds), *Treaties and Engagements Affecting the Malay States and Borneo*, London: Jas Truscott & Son Ltd, 1924, pp 8–12.

Singapore to the EIC in return for a pension.[4] Thus, by 1824, the British had in their possession Penang, Melaka, and Singapore. These were combined in 1826 into one administrative entity, the colony of the Straits Settlements.

In the same year the British, in a treaty with Siam, implicitly acknowledged that the northern states of Kedah (including Perlis), Kelantan, and Terengganu were in the Siamese sphere.[5] The rest of the Malay Peninsula was in the British sphere. But for the first three-quarters of the nineteenth century, the British had no reason to follow an expansionist policy.

By the mid-nineteenth century significant changes had taken place in the Malay states, causing a change in British policy. An important factor was an increase in the scale of tin mining, especially in Perak and Selangor. This attracted increasing numbers of Chinese immigrants. These, together with the Indian immigrants who came later to work in the rubber estates, contributed towards creating a plural society and the problems which came with it.

Unlike earlier Chinese immigrants who came in small numbers and adapted to local society, these later immigrants lived apart. They formed their own *kongsi* (associations) and secret societies and did not interact with the locals unless drawn into feuds which frequently broke out among the Malay chiefs. These feuds, over either political power or revenues from tin, and warring Chinese secret societies threatened the stability of the feudal Malay states and trade in the Straits Settlements. Urged by leading merchants in the Straits Settlements, the British Colonial Office—which had controlled these settlements since 1867—directed Sir Andrew Clarke, the new governor of the settlements appointed in 1873, to recommend how peace and order might be restored and to report on the desirability of appointing a British resident adviser in any of the states. The seeds of British intervention in the Malay states were sown.

In 1874, under the 'Pangkor Engagement', Perak agreed, in return for British protection, to accept a British Resident whose advice 'must be asked and acted upon on all questions other than those touching Malay religion and custom'.[6] This phrase or its variation was the basis of the Residential System, the agency through which the British imposed indirect rule. Through similar so-called treaties of protection, the British extended that system to three other states:

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[4] Maxwell and Gibson, *Treaties and Engagements Affecting the Malay States and Borneo*, pp 122–6.

[5] Ibid, pp 77–82.

[6] Ibid, pp 28–9.

Selangor in 1874; Pahang in 1888; and Negeri Sembilan in 1889. In 1895, for efficiency, these four states formed a federation, the Federated Malay States (FMS), with a system of centralized government headed by a British Resident General.

The other five Malay states, jealous of their sovereignty, remained outside the federation. They were collectively called the Unfederated Malay States (UMS). Johor accepted a treaty of protection in 1885 and eventually a British Adviser in 1914.[7] Under the Bangkok Treaty of 1909, Siam transferred whatever rights or power it had over the northern Malay states to the British.[8] The latter consolidated this by imposing treaties—similar to those concluded with each of the FMS—on the northern states. Later, these states too accepted British Advisers. In contrast to the FMS they enjoyed greater autonomy.

North Borneo (now Sabah) and Sarawak were originally part of the Brunei Sultanate. When James Brooke, an English adventurer, arrived in Sarawak in 1839, the inhabitants were openly rebelling against the governor. A year later, Brooke returned and helped to quash the uprising. He was awarded the governorship of Sarawak for his service. In 1841, he was installed as the Rajah of Sarawak. So began the rule of three generations of 'White Rajahs', lasting more than a hundred years.

Brooke's success in Sarawak inspired other Western adventurers to try their fortune in North Borneo. There, concessions granted to an American adventurer were later acquired by a partnership between an Englishman, Alfred Dent, and the Austrian Consul General in Hong Kong, Baron von Overbeck. The latter negotiated successfully with the Sultan of Brunei for cession of additional territory and with the Sultan of Sulu for cession of his rights in North Borneo. In 1881, Overbeck withdrew from the partnership and Dent transferred his rights to the British North Borneo Company which, formed by Charter, enjoyed the protection of the British Crown. In 1888, the British presence in Borneo was formalized when North Borneo and Sarawak were made British protectorates. Both, however, remained under private administration until ceded to the British Crown in 1946, when they became Crown colonies.

Political organization of British dependent territories in the Malay Peninsula and Archipelago before Japanese invasion

By 1914, when Johor finally succumbed to pressure to accept a British Adviser, British control over the Malay Peninsula was complete. The political organization of British dependent territories in the Malay Peninsula and Archipelago then was as follows:

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[7] Maxwell and Gibson, *Treaties and Engagements Affecting the Malay States and Borneo*, pp 132–4.

[8] Ibid, p 8.

- The Straits Settlements, which were a British colony;
- The FMS and UMS, which were British protected states; and
- Brunei, North Borneo, and Sarawak, which were British protectorates.

2.1.4 The Japanese Invasion and Its Aftermath

The Japanese landed in the Malay Peninsula on 8 December 1941. Kuching in Sarawak fell into Japanese hands on Christmas Day 1941; North Borneo fell by 16 January, and Singapore by 15 February 1942. The Japanese Occupation lasted three-and-a-half years.

After the Japanese surrendered on 14 August 1945, the British re-established their authority in the region as the British Military Administration. Realizing that changing conditions required a more unified system of administration than that which existed before the war, the British incorporated the FMS, UMS, and the Straits Settlements (excluding Singapore) into a unitary state, the Malayan Union (MU), on 1 April 1946.

Formation of the Malayan Union

Singapore was made a Crown colony, as were North Borneo and Sarawak. The MU, which reduced the Malay states to colony status, and the manner in which it was imposed upon the Malay Rulers invoked fierce Malay opposition. The British were forced to abandon the MU scheme. In its place was established the Persekutuan Tanah Melayu (Federation of Malaya) on 1 February 1948.

Formation of Federation of Malaya

2.1.5 Independence

The year 1948 also marked the commencement of the communist insurgency. The 'Emergency', as it was called, lasted twelve years. It cast a pall over constitutional development in the Malay Peninsula, but did not hinder progress towards eventual self-government, as was agreed in the preamble to the Federation of Malaya Agreement 1948.[9]

In 1951, the 'member' or 'quasi-ministerial' system was introduced to prepare some nominated members of the Federal Legislative Council for responsible government. The following year, the Federal Legislative Council was expanded to incorporate these 'members' with portfolios. Finally, in 1955, the first federal elections were held. The Alliance Party of United Malays National Organization (UMNO), Malayan Chinese Association (MCA), and Malayan Indian Congress (MIC) led by Tunku Abdul Rahman (the Tunku) won fifty-one of the fifty-two seats contested. The Tunku was appointed the federation's first Chief Minister.

[9] GN No 5 of 1948 (FM).

Independence of the Federation of Malaya

In 1956, the Tunku led a delegation to London to negotiate for independence. At the London Conference, the basic principles for the granting of independence were agreed to. An independent constitutional commission—the Reid Commission—was appointed to draw up a constitution for an independent federation. The Reid Commission's proposals, as amended, became the constitution for the federation, which proclaimed its independence on 31 August 1957.

2.1.6 Towards Malaysia

The Tunku proposed the formation of Malaysia—a bigger federation comprising Malaya, Singapore, Brunei, North Borneo, and Sarawak—in 1961. The proposal was well received in Malaya, Singapore, and Brunei, but raised doubts in North Borneo and Sarawak. It also invoked protests from Indonesia and the Philippines.

In June 1962, a joint Anglo-Malayan commission—the Cobbold Commission—was dispatched to the Borneo territories to ascertain the views of the people. It reported that the great majority supported incorporation in the proposed federation. A referendum in Singapore, and general elections in North Borneo and Sarawak conducted in the same year all affirmed support for the Malaysia proposal. After months of hard bargaining, Malaya, the United Kingdom, Singapore, North Borneo, and Sarawak finally signed the Malaysia Agreement in London on 9 July 1963.[10] Brunei withdrew at the last minute.

Formation of the Federation of Malaysia

The enlarged federation, scheduled to be formed on 31 August 1963, had its formation deferred to accommodate renewed outbursts of protests from Indonesia and the Philippines. The United Nations Malaysia Mission (a fact-finding mission) was allowed into North Borneo (renamed Sabah) and Sarawak to confirm that the people of these territories genuinely wanted incorporation in Malaysia. That confirmed, Malaysia came into being two days later, on 16 September 1963.

Malaysia had a difficult start. Indonesia and the Philippines continued to oppose its formation. Both countries did not recognize the new federation. Indonesia, ignoring the findings of the United Nations Malaysia Mission, commenced Konfrontasi (Confrontation) and a Ganyang (Crush) Malaysia campaign. Internal friction, especially between the Federation and Singapore, compounded

[10] *Malaysia Agreement Concluded between the Federation of Malaya, Untied Kingdom of Great Britain and Northern Ireland, North Borneo, Sarawak and Singapore*, Kuala Lumpur: Government Printer, 1963; Cmnd 2094, London: HMSO, 1963.

these external problems. On 9 August 1965, Singapore left the Federation to become an independent republic.

2.2 DEVELOPMENT OF THE LAW BEFORE THE BRITISH ERA

2.2.1 Prehistoric Period

Early aboriginal legal system

Not much is known of the early aboriginal legal system. The Proto-Malays were administratively the most advanced. They were headed by a *batin*. Under him was the *jinang* or *menteri* who acted for him when he was incapacitated. A *penglima* exercised authority over more than one village while a *penghulu* administered a single village. Some aspects of this organization or variations of it still survive to this day; the Menteri Besar heads the government in a modern Malay state while the *penghulu* has remained throughout the millennia a key figure in local rural administration.

That the prehistoric settlers brought their own customary laws is clear. Equally clear is that these laws—no doubt modified—have survived: the Aboriginal Peoples Act 1954 (Act 134) (Revised 1974), while making the Commissioner for Aboriginal Affairs responsible for the administration, welfare, and advancement of aborigines, expressly provides that this shall not be deemed to preclude any aboriginal headman from exercising his authority in matters of aboriginal custom and belief, in any aboriginal community or any aboriginal ethnic group.

2.2.2 Historic Period

2.2.2.1 Hindu–Buddhist Influences

Indian or Indianized influence prevailed for over a thousand years. That influence was profound and pervasive. Perhaps the most significant was politico-legal. The primitive political structure of the Proto-Malays was elaborated upon. Under it, Hindu–Buddhist influence spread in all other spheres of life.

The Malay riverine village became a kingdom. At the core of this transformation was the concept of the god-king. The Malay chief was elevated to *devaraja* or semi-divine king who derived his authority from divine powers that transcended the customary laws of the tribe. The god-king, consequently, possessed absolute political and legal authority. Justice was dispensed by the king, advised by learned Brahmans on the right law for each caste. Hindu court ceremonial rituals were adopted and became so deeply imbedded in the Malay states that many of these have survived to this day

despite the advent of Islam. Below the god-king were two officials, who were very important to a riverine kingdom: the *bendahara*, commander of the army who was primarily responsible for the defence of the river, and the *laksamana*, the admiral of the fleet.

Indianized kingdoms in South-East Asia: Hindu-Buddhist influences on pre-existing customary laws

Hindu law, based on the *Dharmasutras* (law books in prose), *Dharmasastra* (law books in verse), commentaries and customary law, was part of an extensive legal system which spread to South-East Asia between the eighth and the fourteenth centuries. Its influence was wide-ranging, covering matters concerning the family and succession, property, contract, crime, procedure, and evidence. Of all its branches, constitutional law and criminal law made the most impact on the states in the region.[11]

Hindu criminal law, based on religion, was harsh. Being sacred law, it never changed from the remote times in which it had evolved. The whole of that law was characterized by the *lex talionis* (law of retaliation, as exemplified by 'an eye for an eye, a tooth for a tooth').[12] However, caste distinctions varied the penalties. Retaliation was carried out only when a member of a lower caste injured someone of a higher caste. In the case of equals, fines were usually imposed on the offenders. Brahmans were practically immune. Treason, perjury, murder, robbery, and most offences involving the use of force were punishable with death. Execution was by impaling, hanging, or drowning. In contrast, the Hindu law concerning sexual offences was far milder—particularly if compared to the *Syariah* law which came later. For example, adultery and seduction of a married woman were punishable with a fine whereas the *Syariah* law prescribed stoning to death for both.

Hindu law was paramount in the beginning of the fifteenth century. The rigid law was superimposed on ancient customs far more lenient. Some elements of the Hindu law persisted right up to the nineteenth century, mitigated by the earlier Proto-Malay customs and later *Syariah* law, but not eradicated.

2.2.2.2 The Melaka Sultanate

At the time of its founding by Parameswara around 1400, Melaka was a little riverine village inhabited by the Orang Asli and Orang Laut (seafaring people, mostly fishermen and pirates). Presumably, Malay *adat* law incorporating Hindu–Buddhist elements was originally applied.

[11] PP Buss-Tjen, 'Malay Law', *American Journal of Comparative Law*, 7 (1958): 264.
[12] Ibid.

One of the greatest achievements of the Melaka Sultanate was the formulation of the concept of a state and its functions.[13] That concept, clearly expressed in the *Sejarah Melayu* (*Malay Annals*),[14] probably had its origins in earlier traditions of government, possibly those of the Sri Vijaya empire. Whatever its origins, that concept became an integral part of the Malay world view and remained basically unchallenged until the nineteenth century. Elements of it can still be discerned today.[15]

The Melaka Sultanate as the Malay-Muslim empire

By 1500, the Melaka Sultanate had an administrative structure that was to be the model for the later Malay states. At the apex was the Sultan. Still wielding absolute power, he was, however, no longer semi-divine. In Islam, he was a *Khalifah*, a vicegerent (representative) of *Allah* (God). While the office of Sultan was held to be sacred, the holder of that office was human. Succession to the throne was also no longer inherited. Instead, the senior officials selected the Sultan. To legitimize his position and prestige, the Sultan claimed descent from a Palembang prince of Bukit Si Guntang Maha Meru (in an area known as 'Melayu', believed to have been in the region of Jambi in Sumatra), and through him to Raja Iskandar Zulkarnain ('Alexander of the Two Horns', ie Alexander the Great).

According to tradition, the status of the Sultan and the inviolability of his person rested upon a covenant between the Sultan and his subjects which may be described in the following terms: 'If a ruler puts any of his subjects to shame, that shall be a sign that his kingdom will be destroyed by *Allah*. Likewise, *Allah* has granted that Malay subjects shall never be disloyal or treacherous to their rulers, even if their rulers inflict injustice upon them'.[16] That covenant emphasized that the Sultan was responsible solely to, and could be punished only by, *Allah*.

The status of the Sultan was further reinforced by the concept of *daulat-derhaka*.[17] *Derhaka* (treason) was considered so odious a crime that the punishments meted out by the forces of *daulat* (sovereignty) were often unusual and, sometimes, gruesome.

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[13] Barbara Watson Andaya and Leonard Y Andaya, *A History of Malaysia*, 2nd edn, London: Palgrave, 2001, p 46.

[14] Perhaps the earliest documentary evidence of Malayan history written in Malay. It is more an account of Malay tradition, legends and fables than a chronology of factual events. It was written in most part before 1536. Its authorship is attributed by some to Tun Sri Lanang and by others, to Tun Bambang.

[15] Mohamed Salleh Abas, 'Traditional Elements of the Malaysian Constitution', in FA Trindade and HP Lee (eds), *The Constitution of Malaysia: Further Perspectives and Developments*, Singapore: Oxford University Press, 1986, pp 1–17.

[16] Paraphrased from Andaya and Andaya, *A History of Malaysia*, p 47.

[17] Ibid.

The exalted position of the Sultan was not licence for arbitrary rule.[18] Tradition required the Sultan to consult those under his authority. The sultan and his ministers had complementary functions: the Sultan to fulfil the sacred and the spiritual, his ministers to administer the mundane.

The most important minister was the *bendahara*, who combined the offices of the modern prime minister, chief justice, and commander-in-chief of the army. Next in prominence was the *temenggung*, who was the chief of police and chief magistrate. Following him was the *laksamana*, the admiral of the fleet. These were the most eminent officials of the realm.

There were other officials. Three deserve mention:

- *penghulu bendahari* or chief secretary of the *bendahara* and treasurer (and, as such, head of the four *shahbandar*);
- *shahbandar* or harbour master. There were four *shahbandar* to attend to four main groups of traders—from China and the Far East; from Java and the Malay Archipelago; from west India (ie the Gujeratis); and from south-east India (ie the Tamils);
- *mandulika* or governor of an isolated outpost, who exercised civil and criminal jurisdiction.

Below these officials were various titled nobles or *orang kaya* (literally, rich person). Little is known about the individual functions of these nobles but, collectively, they were consulted by the Sultan on important decisions affecting the people. A *mesyuarat bicara* (assembly of nobles) would hear all views before deciding by *muafakat* (consensus). Melaka nobility—and Perak nobility later—formed a pyramid of four great, eight lesser, sixteen minor, and thirty-two inferior, chiefs.

Malay customary laws before the coming of Islam

Before the coming of Islam, the law applicable was Malay *adat* law, specifically *adat temenggung* (the branch of Malay *adat* law based on the patrilineal tradition). *Adat temenggung* came from the same cradle as *adat perpatih* (the other branch of Malay *adat* law, based on the matrilineal tradition). However, *adat temenggung* came via Palembang and was so altered under Hindu influence there that it lost much of its original matrilineal elements. The *adat temenggung* was the law of the Sultan and, therefore, autocratic in nature. It was the law later adopted in all the Malay states except Negeri Sembilan (to which *adat perpatih* was brought directly from Minangkabau by Minangkabau settlers). *Adat temenggung* was also the basis of the law contained in most of the Malay legal

[18] Paraphrased from Andaya and Andaya, *A History of Malaysia*, p 49.

codes or digests which were compiled from the mid-fifteenth century onwards to facilitate the uniformity of decisions.[19]

There were two legal digests in the Melaka Sultanate:

(a) *Undang-undang Melaka* (*Laws of Melaka*), also known as *Hukum Kanun Melaka* or *Risalat Hukum Kanun;* and
(b) *Undang-undang Laut Melaka* (*Maritime Laws of Melaka*).

The *Undang-undang Melaka* covered a wide range of constitutional, civil, and criminal matters. There was no clear demarcation between them or between the secular and the religious. The *Undang-undang Laut Melaka*, as its name indicates, covered largely maritime matters. It is not known whether these digests truly represented the laws that existed or contained laws that were actually enforced.

The coming of Islam saw the beginning of attempts to introduce *Syariah* law and to modify Malay *adat* law to accord with Islam—a process which continues to this day. *Syariah* law weakened the force of *adat* law yet was itself modified by the latter, so that what eventually evolved into the Islamic law applicable today is not the same as the pure *Syariah* law applicable in its place of origin.

The coming of Islam

The process of Islamization can be seen in the Malay digests. For example, earlier versions of the *Undang-undang Melaka* set out the *adat* law whereas later versions show a mixture of *adat* law and principles of the *Syariah*. The influence of *Syariah* law is evident, particularly in the provision of an alternative to the penalties under *adat* law for every offence. This alternative gave the Sultan the discretion to impose the penalty deemed appropriate, as policy or prejudice dictated. The composite law—Malay *adat* law with Hindu–Buddhist relics and overlaid with *Syariah* principles—contained in these later versions of the *Undang-undang Melaka* was the model for the Malay digests in the later Malay states.[20]

Islamization of Malay customary laws

2.2.2.3 Portuguese Administration

After Alfonso de Albuquerque's conquest of Melaka in 1511, a military and civil administration was established. Melaka was governed by a governor or captain of the fortress (A Famosa, built on a hill overlooking the river). In military matters the governor had

[19] Pahang Digest of 1596; Kedah Digest of 1605; the Ninety-nine Laws of Perak; Selangor Digest and Johor Digest. In contrast, only three *adat perpatih* digests are known, one from each of the following: Sungai Ujong, Perak, and Kuala Pilah.

[20] For details, see Liaw Yock Fang, *Undang-undang Melaka*, The Hague: Martinus Nijhoff, 1976; Muhammad Yusoff Hashim, 'Legal Aspects of Malacca, Johor, Kedah and Perak Sultanates: A Comparative Study', in *Proceedings of the Third Workshop on Malay Sultanates and Malay Culture*, Kuala Lumpur, 1–4 November 1982.

to consult the captain-general of war (commander-in-chief) and the sergeant-major. A council comprising the *ovidor* (chief justice), *viador* (mayor), bishop, and a secretary of state assisted the governor in civil matters. In criminal matters, sentences pronounced by the *ovidor* or magistrates were subject to the governor's confirmation, and executed by his order or that of the *ovidor*.

Seven magistrates were elected annually from the ranks of leading citizens. They formed the *Corpus de Cidade*—a body which managed all matters concerning the walled city of Melaka, and which exercised civil and criminal jurisdiction over all Portuguese inhabitants. Appeal lay to the *ovidor*. In important cases, the governor himself presided over the magistral court.

The Portuguese authorities did not exert their influence over the Malay and other Asian communities who lived outside the city walls. Their interest was in trade, not in political power. Beyond the city walls, much of the former Malay administration was retained. Headmen or *kapitan* for each community were appointed to maintain law and order under the supervision of a Malay *bendahara*, who exercised civil and criminal jurisdiction. A Malay *temenggung* was responsible for the rural districts and a *shahbandar* was put in charge of all non-Portuguese traders.

It is doubtful whether Portuguese law was ever introduced in Melaka. A 1641 Dutch report of Melaka mentioned ordinances issued by the Portuguese administration, but did not state what law they contained.

2.2.2.4 Dutch Administration

The Dutch administration was headed by a governor. He was assisted by a council comprising the collector, the fiscal, the mayor, the upper merchant, and a secretary. A *Politie Raad* (Police Council) formed the executive while the *Raad van Justitie* administered justice. Ecclesiastical matters were managed by a special council. Regulations were issued by the government in Holland, Batavia (Java), and by the local executive.

While Europeans were governed by Dutch laws based on colonial statutes, it is uncertain what law applied to the local and other Asian inhabitants. Like the Portuguese, the Dutch were solely interested in trade. However, Dutch trading interest centred on the spice islands of Maluku and Batavia. The Dutch motive in capturing Melaka was not to directly profit from its use, but rather to incorporate it in a system of trading bases and to deny its use to the Portuguese. Once Melaka was in Dutch hands, their interest in it waned. Consequently, the Dutch never attempted to extend

their political authority beyond the city of Melaka and the adjoining district of Naning. And, as it was Dutch practice in Batavia to leave the local inhabitants to their own laws, unless these clashed with generally accepted principles of justice, it may be assumed the Dutch did likewise in Melaka. This assumption has the support of judicial authority. In *Sahrip* v *Mitchell and Endain*, a case concerning the Malay custom of land tenure in Melaka, Sir Benson Maxwell CJ said:

> The Portugueses while they held Malacca and after them the Dutch, left the Malay custom or *lex non scripta* in force. That it was in force when this Settlement was ceded to the Crown appears to be beyond dispute and that the cession left the law unaltered is equally plain on general principles. *Campbell* v *Hall* 1 Cowp. 204, 209.[21]

Portuguese and Dutch administration in Melaka left the Malay customary law in force

The development of Malaysian law after the arrival of the British is discussed in Chapter 6.

Questions

Discuss the legal legacy of:

(a) the prehistoric period;
(b) the Indianized period;
(c) the Melaka Sultanate; and
(d) the Portuguese and Dutch occupation of Melaka.

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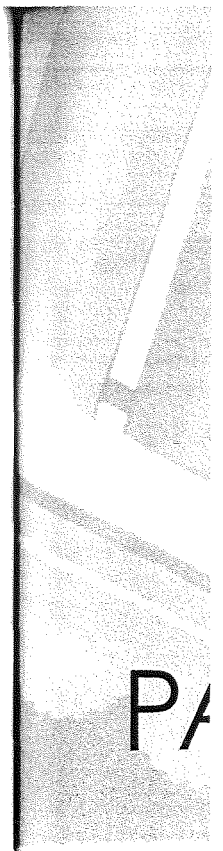

PART TWO

SOURCES OF MALAYSIAN LAW

This part examines the nature of the legal rules that make up the laws of Malaysia. These are the legal rules which Malaysian courts refer to and apply in resolving disputes.

The rules of Malaysian law emanate from various sources. In descending order of importance they are:

- The Federal and State Constitutions;
- Legislation;
- Judicial decisions;
- English law;
- Islamic law; and
- Customary law.

Each of these sources will be discussed further in the following chapters.

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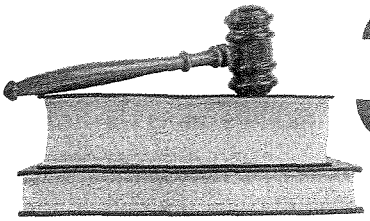

3 THE FEDERAL CONSTITUTION

Chapter Objectives

- Define the term 'constitution'
- Introduce the constitutions in Malaysia
- Sketch the historical background of the Federal Constitution
- Explain the concept of supremacy of the Federal Constitution
- Summarize the trends in constitutional interpretation and the modes of amending the Federal Constitution

3.1 MEANING OF THE TERM 'CONSTITUTION'

THE term 'constitution' is used in two senses:

- The body of legal and non-legal rules concerning the government of a state (original sense).
- A single written document having special legal status, which establishes the state, and sets out the structure and powers of the state (second sense).

The term in both senses applies to the constitutions in Malaysia. In contrast, when speaking of the British Constitution, only the original meaning is applicable. This is because the rules of the British Constitution are not written down in one single document that has special legal status, but are found in various sources. Thus, it is commonly said that the British Constitution is unwritten, whereas the Malaysian Constitutions are written.

3.2 MALAYSIAN CONSTITUTIONS

A Federal Constitution and thirteen State Constitutions

As Malaysia is a federation of thirteen states, it has altogether fourteen constitutions: the Federal Constitution and thirteen State Constitutions. Johor was the first state to have a written constitution, granted in 1895 by Sultan Abu Bakar. Terengganu was granted a written constitution by Sultan Zainal Abidin III in 1911. Each of

the other states in the peninsula, apart from Penang and Melaka, was given one under the terms of the respective State Agreements concluded between the United Kingdom and the Malay Rulers just before the conclusion of the Federation of Malaya Agreement (FMA) in 1948.[1] Penang and Melaka received theirs under the Federation of Malaya Agreement (FMA) 1957.[2] Sabah and Sarawak were each given a new constitution under the Malaysia Agreement 1963.[3]

Each State Constitution is required under Article 71(4) of the Federal Constitution to contain the so-called 'essential provisions' set out in the Eighth Schedule, for harmonious integration with the Federal Constitution. If a State Constitution does not contain these provisions or provisions that are substantially the same, Parliament may legislate to give effect to the prescribed provisions. Thus is ensured not only compliance of State Constitutions with the Federal Constitution, but also uniformity in the State Constitutions concerning the structure of government.

This chapter focuses on the Federal Constitution, which may be described as the charter of the federation. It sets out the structure and powers of the Federal Government and enshrines the fundamental rights of the individual vis-à-vis the federation. It is an elaborate and lengthy document, extending to 183 articles and 13 schedules, and covers matters which in other countries are regulated by ordinary legislation.

3.3 HISTORICAL BACKGROUND

The Federal Constitution embodies British and Indian constitutional concepts, and traditional Malay elements.[4] Though largely based on the Indian Constitution,[5] unlike the latter, the Malaysian Constitution is not a document hammered out by a constitutional assembly comprising representatives of the people. It developed from an earlier constitution drafted by a commission of foreign

[1] GN No 5 of 1948 (FM).

[2] GN No 888/1957.

[3] *Malaysia: Agreement Concluded between the United Kingdom of Great Britain and Northern Ireland, the Federation of Malaya, North Borneo, Sarawak and Singapore,* Kuala Lumpur: Government Printer, 1963; Cmnd 2094, London: HMSO, 1963.

[4] Mohamed Salleh Abas, 'Traditional Elements of the Malaysian Constitution', in FA Trindade and HP Lee (eds), *The Constitution of Malaysia: Further Perspectives and Developments*, Singapore: Oxford University Press, 1986, pp 1–17.

[5] That is, a written constitution with a chapter on fundamental rights, but with a Parliament vested with extensive powers to curtail fundamental rights on grounds permitted by the constitution itself.

experts in constitutional law. Its evolution (and departure) from the original is, however, uniquely Malaysian.

3.3.1 Federation of Malaya

Evolutionary character of the Federal Constitution

The Malaysian Constitution evolved from events of the past, both recent and remote. The very concept of federation has its origin in the Federated Malay States (FMS) established in 1895. The present constitution grew out of the Federation of Malaya Constitution of 1957 (the Merdeka or Independence Constitution) which, in turn, grew out of the FMA 1948 and this, in turn, out of the FMS Agreement 1895.[6] The reasons for the establishment of the Federation of Malaya require a look at the pre-war position of the Malay Peninsula.

Just before the outbreak of the Second World War, the peninsula comprised three groupings: the Straits Settlements, which were a British colony; the FMS and the Unfederated Malay States (UMS), which were British protected states.

After the Japanese surrendered in 1945, British administration was resumed. The British realized that radical reform was necessary. Modern conditions, the interests of the territories and British economic interests called for a more unified system of government than that which existed before the war. To that end, the British proposed the creation of a unitary state, the Malayan Union (MU), with a broad-based MU citizenship, all citizens having equal rights.

To bring about the establishment of the MU the British Government sent Sir Harold MacMichael to Malaya to obtain the cooperation of the Malay Rulers. The latter were compelled to conclude in 1945 the so-called MacMichael Treaties whereby it was agreed that the British should have full power and jurisdiction within each Malay state.

The Straits Settlements were dissolved. Penang and Melaka were grouped with the Malay states to form the MU on 1 April 1946. Singapore, for economic and political reasons, was left out. It became a Crown colony.

The MU was short-lived. It lasted only two years. Strong opposition came from the Malays, who realized that the MacMichael Treaties reduced the status of the Malay states to that of a colony and deprived the Malay Rulers of their sovereignty. Under those

[6] It would be more accurate to point to the Agreement for the Constitution of a Federal Council 1909, the first genuinely federal constitution in Malaysia, rather than the FMS Agreement—a very brief document containing only five articles—which did not establish a federation in the form generally understood by lawyers, ie one which powers are divided between the central and state governments.

treaties, the sole legislative power of the Malay Rulers was confined to Islam. The Malays also opposed the MU citizenship, which raised fear of non-Malay domination. In the eyes of the Malays, the MU proposals would entail the abandonment of the policy of recognizing the Malay states as *Tanah Melayu* (Land of the Malays) and deprive the Malays of their special position and privileges, the preservation of which had been the objective of all preceding agreements.

The opposition forced the British to withhold bringing into force all the provisions of the MU Order-in-Council 1946, which created the MU.[7] In July 1946, a Working Committee of twelve was appointed under the chairmanship of Sir Malcolm MacDonald, the first Governor General of the MU, to work out in detail fresh arrangements which would form the basis of future constitutional developments. The proposals of that Committee, subject to discussions with representatives of the Malay Rulers and of the United Malays National Organization (UMNO),[8] and consultations with representatives of the non-Malays, produced a scheme for a federation acceptable to all concerned.

The British Government and the Malay Rulers concluded the FMA 1948, establishing the Constitution of the Persekutuan Tanah Melayu (Federation of Malaya). As a prelude, each of the Malay Rulers and the British Government concluded separate agreements, providing for the government of the state in accordance with a written constitution (except Johor and Terengganu, which already had written constitutions) and the FMA 1948.

The Federation of Malaya, which came into being on 1 February 1948, comprised all the territories of the former MU except Singapore, which remained a separate Crown colony. Singapore was not included, mainly in deference to the fear of the Malays that they would be outnumbered by Malayan Chinese. A Federal Government was set up in Kuala Lumpur under a British High Commissioner. The main organs were an Executive Council and a Legislative Council in which all races were represented.

The Malay Rulers became members of the *Majlis Raja-Raja Negeri Melayu* (Conference of Rulers) which would meet at least three times a year.[9] Approval of the Majlis was required for any amendment in the constitution or in the immigration laws and for appointments of senior government officials. The Malays were recognized as the indigenous people, and their special position was guaranteed.

[7] No 2 of 1946, *MU Gazette Extraordinary*, 1 April 1946.
[8] Formed in March 1946 expressly to oppose the MU.
[9] An institution which can be traced to the Durbar of Rulers of the FMS.

Citizenship was granted to non-Malays; however, the qualifications were more stringent than those under the MU proposals. These were not well-received by the non-Malays. The qualifications were liberalized later, in 1952, as one of the measures to counteract the communist insurgency, which caused the Emergency to prevail from 1948 to 1960.[10]

The FMA 1948 set the pattern for a federation with a strong, central government.

The federation created by the FMA 1948 was intended to be an interim arrangement. This is clear from the preamble to the agreement, which expressed the desire of the British Government and the Malay Rulers that progress should be made towards eventual self-government. Accordingly, in 1951, a 'member' or 'quasi-ministerial' system was introduced under which nine nominated members of the Federal Legislative Council were made responsible for various ministries or departments. In 1952, the Federal Executive Council was expanded to include all 'members' with portfolios. Finally, in 1955, the first federal elections were held for fifty-two seats on the Federal Legislative Council. The Alliance (of UMNO, MCA,[11] and MIC[12]) won fifty-one of the fifty-two seats and its leader, Tunku Abdul Rahman (the Tunku), became Chief Minister.

Six months later, the Tunku led a Malayan delegation to London to negotiate for independence. The London Conference, lasting three weeks in early 1956, was attended by representatives of the Malay Rulers, the Alliance Government, and the British Government. The basic principles upon which independence could be achieved were agreed on. The conference appointed an independent constitutional commission to draw up a constitution providing for full self-government and independence for the Federation of Malaya by August 1957.

Merdeka Constitution drafted by the Reid Commission

The constitutional commission was headed by Lord Reid, a Lord of Appeal in Ordinary. The Reid Commission comprised a constitutional law expert from each of the following countries: the United Kingdom, Australia, India, and Pakistan.[13]

The Reid Commission's terms of reference were to examine the existing constitutional arrangements throughout the federation and to recommend a federal form of constitution for the whole country,

[10] The Emergency cast a shadow on constitutional development—a dark episode which led to drastic provisions in the Merdeka Constitution to counter subversion and emergency; time has shown that the wide powers given to be legislature and executive have been used extensively to restrict fundamental liberties.

[11] Malayan Chinese Association (MCA), formed in 1949.

[12] Malayan Indian Congress (MIC), formed in 1946.

[13] Sir Ivor Jennings, Sir William McKell, Mr Justice B Malik, and Mr Justice Abdul Hamid, respectively.

based on parliamentary democracy with a bicameral legislature. The proposed constitution was to include provisions for:

- the establishment of a strong central government;
- the safeguarding of the position and prestige of the Malay Rulers as constitutional Rulers of their respective states;
- a constitutional Yang di-Pertuan Besar (Head of State) for the federation, to be chosen from among the Malay Rulers;[14]
- a common nationality for the whole of the federation; and
- the safeguarding of the special position of the Malays and the legitimate interests of the other communities.

The Reid Commission collected data and memoranda from June to October 1956 and held 118 sessions. In making its recommendations the Reid Commission had borne in mind that 'the new provisions must be both practicable in existing circumstances and fair to all sections of the community'.[15] The Reid Commission Report, containing recommendations and a draft constitution, was submitted to the British Government and the Malay Rulers on 21 February 1957.

In the federation the Reid Commission Report was examined by a working party comprising the representatives of the Malay Rulers, the Alliance Government and the British colonial administration. The Reid Commission Report was simultaneously studied in the United Kingdom. After the working party had submitted its recommendations, a delegation led by the Tunku as Chief Minister went to London (13–21 May 1957) to settle unresolved issues. The draft constitution prepared by the Reid Commission was reviewed and amended, in substance and in form.[16] Nevertheless, that draft was the basis for the constitution of the Federation of Malaya, which proclaimed its independence on 31 August 1957.

The Reid Commission proposals were given effect, in the United Kingdom, by the Federation of Malaya Independence Act 1957[17] and an Order-in-Council made thereunder. In the federation, it was effected by the Federation of Malaya Agreement (FMA) 1957, containing in its schedules[18] the Federal Constitution and the Constitutions of Penang and Melaka, the Federal Constitution Ordinance 1957 (No 55 of 1957), and State Enactments in the Malay states.

[14] The nomenclature was later changed to Yang di-Pertuan Agong (Paramount Ruler).

[15] The Rt Hon Lord Reid, *Report of the Federation of Malaya Constitutional Commission 1957*, London: HMSO, 1957 (The Reid Commission Report) para 14, p 8.

[16] The major changes were a diminution of judicial powers and of guarantees for fundamental rights.

[17] 5 & 6 Eliz 2, c 60.

[18] GN 888/1957.

The major achievement of the parties who negotiated for independence, and of the Reid Commission that prepared the draft Independence Constitution, was to define a compromise of the interests of the three main racial groups in the federation. The resulting Merdeka Constitution was thus a social contract between the three races concerned. The Merdeka Constitution has evoked the comment that though it was federal in form, the entity it created was, in reality, unitary rather than federal.[19] Subsequent developments have further concentrated power at the centre.[20]

Merdeka Constitution, a social contract

3.3.2 Federation of Malaysia

The Federation of Malaysia is the Federation of Malaya, enlarged. It was born of an idea conceived by the Tunku in 1961 for close political and economic association between the Federation of Malaya, Singapore, North Borneo, Sarawak, and Brunei.[21] The Malaysia concept was received if not hotly, at least warmly, in Malaya, Singapore, and Brunei. Its realization, however, was beset with difficulties.

Expansion of the Federation of Malaya into the Federation of Malaysia

Initial discussion progressed fairly quickly. Negotiations proceeded at two levels: (1) bilateral negotiations between Malaya and Singapore on a possible merger; and (2) multilateral discussions between the leaders of all the territories that might form Malaysia. At a regional meeting of the Commonwealth Parliamentary Association, held in Singapore in July 1961, the leaders of all the territories concerned approved in principle the Malaysia concept and set up a Malaysian Solidarity Consultative Committee, whose overall objective was to promote that concept. The Consultative Committee, comprising representatives from each of the five territories, was to play an important role in the founding of Malaysia, especially for the Borneo territories. It recommended:

- A commission be formed to ascertain the views of the peoples of North Borneo and Sarawak;
- The Federation of Malaya Constitution be the basis for the Federation of Malaysia Constitution;
- A strong central government responsible for external affairs, defence, and security;

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[19] HE Groves, 'The Constitution of Malaysia—The Malaysia Act', *Mal LR*, 5 (1963): 245; HashimYeop A Sani, *Our Constitution*, Kuala Lumpur: The Law Publishers, 1980, pp 51–2.

[20] RH Hickling, 'The First Five Years of the Federation of Malaya Constitution', Mal LR, 4 (1962): 183, 201–3; Shafruddin Hashim, 'The Constitution and the Federal Idea in Peninsular Malaysia', JMCL, 11 (1984): 137–78.

[21] Expressed in an address on 27 May to the Foreign Correspondents' Association of South-East Asia in Singapore. The idea was not new; it had been broached by the British and various local groups from as early as the end of the nineteenth century.

- Parliamentary representation based not only on the population of a constituency, but also on size of the constituency;
- Special safeguards for North Borneo and Sarawak, especially in immigration matters; and
- Special privileges for the indigenous peoples of the territories.

By August 1961, the Tunku and Chief Minister Lee Kuan Yew had agreed in principle on a merger between Malaya and Singapore. A joint working party was established to frame more detailed proposals. In November 1961, an agreement was reached that Singapore was to become a unit within the proposed federation on special conditions and with greater autonomy than the other units. In return for these concessions, Singapore agreed to a smaller representation in the Federal Parliament, but would retain its own executive government and legislative assembly.[22]

That agreement was followed by the Tunku's trip to London. The Malaysia concept, and the proposed merger between Malaya and Singapore as a first step within the wider association, were accepted in principle by the British Government, provided the United Kingdom retained control over military bases in Singapore and the people of the territories involved supported incorporation in the proposed federation.

A joint British–Malayan Commission of Enquiry headed by Lord Cobbold (Cobbold Commission) was dispatched to the Borneo territories to ascertain the views of the people. The Cobbold Commission was in North Borneo and Sarawak from February till April 1962. It reported in June that some 80 per cent of the peoples in the Borneo territories were in favour of joining Malaysia.[23]

Following meetings in London, the British and Malayan Governments jointly announced on 1 August 1962 that the proposed federation should be established by 31 August 1963 (to coincide with Merdeka Day). An Inter-governmental Committee, representing the United Kingdom, Malaya, North Borneo, and Sarawak, was established to work out the constitutional details, in particular safeguards for the Borneo territories.

Meanwhile, in Singapore, a referendum for the proposed merger with Malaya was held on 1 September 1962. Despite opposition, Chief Minister Lee Kuan Yew secured a large endorsement for the proposed merger on the terms negotiated by the Singapore Government. General elections were held in North Borneo in December

[22] *Memorandum Setting Out Heads of Agreement for a Merger Between the Federation of Malaya and Singapore*, Singapore Parliament, Cmnd 33 of 1961.

[23] *Federation of Malaya, Report of the Commission of Enquiry, North Borneo and Sarawak*, Kuala Lumpur, 1962.

1962 and in Sarawak in August 1963, in which incorporation in the proposed federation was an issue. In Brunei, Sultan Omar Ali Saifuddin's enthusiasm for Brunei's incorporation in Malaysia increased after a rebellion in December 1962 led by Sheikh AM Azahari, who opposed the Malaysia concept and challenged the Sultan's rule. The rebellion was quickly quelled.

The final months of negotiations were marred by internal and external problems. Internally, there was hard bargaining over controversial details concerning the Malaya–Singapore merger and the accession of the Borneo territories. Worse, separate negotiations for Brunei's entry broke down. There were two main dividing issues: the proposed collection and use of Brunei's oil revenues, and the status accorded to the Sultan of Brunei among the Malay Rulers. Unhappy, Brunei refused to join the proposed federation at the last minute.

Externally, opposition to the formation of Malaysia came from two fronts: the Philippines, which claimed North Borneo as a former dependency of Sulu; and Indonesia's President Sukarno, who denounced the Malaysia concept as a British neocolonialist plot.

After months of haggling, the Federation of Malaya, the United Kingdom, North Borneo, Sarawak, and Singapore Governments signed the Malaysia Agreement in London on 9 July 1963.[24] The Malayan Parliament passed the Malaysia Act 1963 (No 26 of 1963) to give effect to that agreement in the federation. That Act effected amendments to the Merdeka Constitution. These changes raised comments that they really brought about a new constitution for a new federation.[25] Essentially, the principle of equality of states underlying the Merdeka Constitution was sacrificed to accommodate the special interests of the newly incorporated states. In reality, the new constitution did not bring the new states into association with the states of the former federation; rather, it brought the new states into association with the former federation itself, such that the new federation really comprised four units: the Federation of Malaya, Sabah, Sarawak, and Singapore.

The Federation of Malaysia, which was scheduled to be born on 31 August 1963, had its birth deferred to mid-September. In deference to renewed outbursts of protests from the Philippines and

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[24] *Malaysia: Agreement Concluded between the United Kingdom of Great Britain and Northern Ireland, the Federation of Malaya, North Borneo, Sarawak and Singapore*, Kuala Lumpur: Government Printer, 1963; Cmnd 2094, London: HMSO, 1963.

[25] Groves, 'The Constitution of Malaysia—the Malaysia Act', p 245; RH Hickling, 'An Overview of the Constitutional Changes in Malaysia: 1957–1977', in RH Hickling, *Essays in Malaysian Law*, Petaling Jaya: Pelanduk Publications, 1991, pp 159–61; Shafruddin Hashim, 'The Constitution and the Federal Idea in Peninsular Malaysia', pp 161–6.

Indonesia following the signing of the Malaysia Agreement, and to an understanding reached between the three countries concerned in meetings at various levels, the Tunku allowed a fact-finding mission (the United Nations Malaysia Mission) to conduct a survey in North Borneo (renamed Sabah) and Sarawak to confirm that the people of these territories supported incorporation in Malaysia, that Malaysia was a major issue in the recent general election, and that the choice of the people was a valid exercise of self-determination. The United Nations Malaysia Mission took three weeks to accomplish its task. It reported to the United Nations Secretary General, who announced on 14 September 1963 that the majority of the people in these territories favoured joining Malaysia.[26]

Just before the Federation of Malaysia was born there was a domestic attempt to abort it. On 10 September 1963, the Government of the State of Kelantan brought an action for a declaration that the Malaysia Agreement and Malaysia Act were void or, alternatively, not binding on the State of Kelantan.[27] The state applied for an interim injunction to prevent implementation of the relevant instruments, pending a full hearing of the matter.

The crux of the state's case was that the agreement and Act would not only abolish the Federation of Malaya, but by forming an enlarged federation, admit three new states on terms differing considerably from those of the founder states without any consultation with the Government of Kelantan. Thomson CJ, on the eve of Malaysia Day, dismissed Kelantan's application. In dismissing the state's arguments, Thomson CJ reasoned that the formation of Malaysia and the enactment of the Malaysia Act by Parliament was not something 'so fundamentally revolutionary as to require fulfilment of a condition which the Constitution itself does not prescribe', ie consult the State of Kelantan, or any other state, provided the letter of the constitution was observed.[28] With that last hurdle cleared, the Federation of Malaysia came into being on 16 September 1963.

Malaysia's difficulties continued after its formation. Indonesia and the Philippines refused to recognize the new federation. Rejecting the findings of the United Nations Malaysia Mission to Borneo, Indonesia commenced Konfrontasi (Confrontation) and a Ganyang (Crush) Malaysia campaign.[29]

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[26] Malaysia, Department of Information, *United Nations Malaysia Mission Report*, Kuala Lumpur, 1963, p vii.

[27] *The Government of the State of Kelantan* v *The Government of the Federation of Malaya & Tunku Abdul Rahman Putra Al-Haj* [1963] MLJ 355 (HC).

[28] The decision of Thomson CJ preceded the 1972 landmark decision of the Indian Supreme Court in *Kesavananda Bharati* v *State of Kerala* AIR 1963 SC 1461 which laid down the basic-structure doctrine: see below, p 44.

[29] Konfrontasi ended only in 1966 with President Sukarno's fall from power.

Internal friction compounded these problems. From the outset there was resentment between the former federation and the newly incorporated states. The resentment was most acute in relations between the federation and Singapore. Each resented the other's attempts to interfere in what they considered as their internal affairs. The roots of the friction were part economic, part political. Singapore's attempts to create, prematurely, a multiracial society of equal opportunity—based purely on meritocracy—exacerbated racial tensions that had erupted in riots between the Chinese and the Malays in Singapore in July and September 1964.

Worsening relations and mounting tensions drove the Tunku to drastic action. Singapore was expelled. The Separation of Singapore Agreement was signed on 7 August 1965.[30] The Malaysian Parliament passed the Constitution and Malaysia (Singapore Amendment) Act 1965 (No 53 of 1965), which came into force on 9 August 1965. On that day, Singapore became an independent republic. Consequent amendments to the Federal Constitution (which could not be implemented by that Act as Parliament was not given time to pass a comprehensive Bill) were later effected by the Constitution (Amendment) Act 1966 (No 59 of 1966).

There has been no territorial change since Singapore left the federation except for internal boundary changes. Wilayah Persekutuan Kuala Lumpur and Putrajaya were carved out of Selangor on 1 February 1974 and 1 February 2001 respectively, and Labuan out of Sabah on 16 April 1984, to be made Federal Territories.[31]

3.4 THE FEDERAL CONSTITUTION

Supremacy of the Federal Constitution

The Federal Constitution is the supreme law of the federation. It is the fundamental law of the land, a kind of 'higher law' which is used as a yardstick with which to measure the validity of all other laws. Any law inconsistent with the Federal Constitution may be challenged in court. As Suffian LP pointed out in *Ah Thian* v *Government of Malaysia*:

> The doctrine of supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State Legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.[32]

The legislature is not the only organ which is subject to the Federal Constitution. The executive and the judiciary are, too. In short,

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[30] *Singapore Government Gazette Extraordinary* No 66 of 1965.

[31] Constitution (Amendment) (No 2) Act 1973 (Act A206); Constitution (Amendment) Act 2001 (Act A1095); and Constitution (Amendment) (No 2) Act 1984 (Act A585), respectively.

[32] [1976] 2 MLJ 112, 113.

all institutions created by the Federal Constitution and deriving their powers from it are subject to its provisions.

The supremacy of the Federal Constitution is set out in Articles 4(1) and 162(6) and s 73 of the Malaysia Act 1963. Article 4(1) states:

> This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

Article 4(1) refers only to laws made after Merdeka Day. Laws made before Merdeka Day are dealt with in Article 162. Under Article 162(6), pre-Merdeka laws shall be applied by a court or tribunal with such modifications as may be necessary to make them accord with the Federal Constitution.[33] There is, therefore, a difference in approach between Articles 4(1) and 162(6). Under the former, any post-Merdeka law which is inconsistent with the Federal Constitution shall be declared void to the extent of the inconsistency; under the latter, any pre-Merdeka law which is inconsistent with the Federal Constitution shall be continued with the necessary modifications to render it consistent with the Federal Constitution.[34] Section 73 of the Malaysia Act 1963 (as effected by Article 159A of the Federal Constitution) refers to pre-Malaysia laws in force on 16 September 1963 in a state which joins Malaysia on that date. The section saves from automatic repeal all pre-Malaysia laws enacted by the state legislature, including those whose subject-matter became a federal matter on that date. Such laws, however, shall continue to apply only within the state concerned.[35]

Article 4(1) has to be read with Article 159, which provides for the amendment of the Federal Constitution. The question that arises is whether the Federal Constitution—the supreme law of the land—which is binding on Parliament may itself be amended by Parliament. The judiciary has held that the word 'law' in Article 4(1) means only ordinary laws enacted by Parliament and excludes laws to amend the constitution enacted under Article 159. Only the former must accord with the Federal Constitution, but the latter need not; otherwise 'no change whatsoever may be made to the Constitution'.[36] Thus, amending legislation is valid, even if inconsistent with the Federal Constitution, so long as it complies with the procedure set out in Article 159.

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[33] *Surinder Singh Kanda* v *The Government of the Federation of Malaya* (1962) 28 MLJ 169 (PC).

[34] *Datuk Seri Samy Vellu* v *Nadarajah* [2001] 1 AMR 1, 19 (HC).

[35] Re *Datuk James Wong Kim Min* [1976] 2 MLJ 245, 246 (FC).

[36] Per Suffian LP in *Phang Chin Hock* v *Public Prosecutor* [1980] 1 MLJ 70, 72 (FC); see also *Loh Kooi Choon* v *Government of Malaysia* [1977] 2 MLJ 187 (FC).

Supremacy of the constitution is maintained by giving to the courts the right to review legislative and executive acts. When a legislative or executive act violates the constitution, the court may declare it *ultra vires* and void. Legislation may be invalidated on one of the following grounds:

1. It relates to a matter concerning which the relevant legislature has no power to make law;[37]
2. It has not been enacted in accordance with the procedure prescribed in the constitution; or
3. It is inconsistent with any provision of the constitution;[38] or
4. In the case of state law, it is inconsistent with federal law.[39]

Any court may declare invalid legislation on grounds 2, 3, and 4. The jurisdiction to declare legislation invalid on ground 1, however, is exclusive to the Federal Court.[40] This is to ensure that a law is declared invalid on this very serious ground only after full consideration by the highest court in the land.[41]

Erosion of the concept of supremacy of the Federal Constitution

Constitutional supremacy purports to apply in Malaysia. In reality, it is eroded by the following factors (which may lead one to believe that, in Malaysia, Parliament is sovereign):

1. The special powers of Parliament to legislate to counter subversion and emergency (the proclamation of which may not be challenged in court) under Articles 149 and 150 respectively; such legislation—with certain specific exceptions[42]—is valid even if inconsistent with the constitution (including provisions guaranteeing fundamental liberties);
2. The ease with which constitutional amendments have been achieved since independence (because the government in power has maintained a two-thirds majority in both Houses of Parliament except in the 1969 and more recently the 2008 general elections); and
3. Judicial attitudes in the interpretation of the constitution.

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[37] For example, *Mamat bin Daud & Ors* v *Government of Malaysia* [1988] 1 MLJ 119 (SC).

[38] For example, *Public Prosecutor* v *Dato' Yap Peng* [1987] 2 MLJ 311 (SC); *Repco Holdings Bhd* v *Public Prosecutor* [1997] 3 MLJ 681 (HC).

[39] Article 75. See *City Council of Georgetown* v *Government of the State of Penang* [1967] 1 MLJ 169 (FC).

[40] Article 128(1).

[41] Per Suffian LP in *Ah Thian* v *Government of Malaysia* [1976] 2 MLJ 112, 113.

[42] Concerning Islamic law, Malay custom, native law or custom in Sabah and Sarawak, religion, citizenship, or language: Article 150(6A).

3.5 TRENDS IN CONSTITUTIONAL INTERPRETATION

A written constitution provides the framework of principles for establishing a state and its government. Additionally, it may set forth the fundamental freedoms of the people within the state which, in consequence, become entrenched rights.

The court in a country with a written constitution has more onerous responsibilities than its counterpart in a country without a written constitution. The latter interprets ordinary legislation whereas the former is not only the interpreter but also the defender of the constitution and the guardian of the people's fundamentals rights enshrined therein.

The written constitution is the supreme law of the land. The acts of every organ in the state must comply with its provisions. The task of examining and declaring any act inconsistent with the constitution as unconstitutional, and therefore void, is entrusted to the courts which are supposed to be independent and impartial. In performing this function, ie judicial review, the courts have to interpret the text of the constitution and expound the concepts compressed in concise language.

Alternative approaches to constitutional interpretation

A judge is faced with alternative approaches when interpreting a written constitution. The judge may adopt either a literal or a liberal approach. The literal approach applies the same principles to interpreting a constitution as are applied to the interpretation of ordinary legislation. It is the positivist approach. It stems from the traditional theory that judges do not make law; they merely declare it. The liberal approach, on the other hand, flows from awareness that the function of interpreting a written constitution affects not just people but the entire functioning of the state and governmental policymaking. It also rests on an ideological basis: the court's duty to defend the constitution and protect the people's fundamental rights. The liberal approach seeks to expand the scope of fundamental rights, promote democratic values and adapt the static provisions in a written constitution to the needs of a dynamic society.

The liberal approach entails a creative, not a mechanical, interpretation of the constitution. It involves:

- Interpreting the powers of the government affecting persons restrictively rather than broadly;
- Interpreting the restrictions on governmental power broadly rather than narrowly; and

- Interpreting fundamental rights of the people liberally rather than literally.[43]

The Reid Commission envisaged the courts as the guardian of fundamental liberties enshrined in the Federal Constitution. It gave the courts the right of judicial review and the task of interpreting the Federal Constitution. The recommendations of the Reid Commission appear as Articles 4, 128, and 130.

Judicial oath to 'preserve, protect, and defend' the Federal Constitution

Malaysian judges, upon elevation to the Bench, take an oath to 'preserve, protect, and defend' the constitution.[44] Have the judges lived up to the expectations of the Reid Commission and faithfully fulfilled their oath of office?

Judicial attitudes to constitutional interpretation show the following trends:[45]

1. 1957–1985

1957–1985: Period of judicial restraint

This has been called the period of judicial restraint. Though prepared to strike down executive acts at the non-political level, the judiciary was reluctant to invalidate legislative acts on constitutional grounds.[46] The judiciary adopted a 'hands-off' policy: judges declined jurisdiction in political matters (ie political matters were 'non-justiciable'). The approach to constitutional interpretation was conservative. Judges adopted, generally, the literal method of interpretation at great expense to fundamental liberties. As their decisions were subject to appeal to the Privy Council, the judges preferred to follow decisions of English, rather than Indian, judges (regarding the latter as 'indefatigable idealists').[47] This tendency, though understandable, is ironic.[48] Firstly, because the Malaysian Constitution, although based on the British Westminster model, is closer to the Indian Constitution in form and substance. Secondly,

[43] *Halsbury's Laws of Malaysia*, Vol 2, 2004 Reissue, Singapore: Butterworths Asia, 2004, pp 175–6; 179–80; 236–45.

[44] Article 124 and the Sixth Schedule.

[45] Ahmad Ibrahim, 'Interpreting the Constitution: Some General Principles'; Mohd. Ariff Yusof, 'Emergency Powers and the Rule of Law', *JMCL*, 10 (1983): 87; CV Das, 'Constitutional Supremacy, Emergency Powers and Judicial Attitudes', *JMCL*, 10 (1983): 69; AJ Harding, 'The 1988 Constitutional Crisis in Malaysia', *ICLQ*, 39 (1990): 71–80; Tommy Thomas, 'The Role of the Judiciary'; and Shad S Faruqi, 'Role of the Judiciary: The Courts and the Constitution', in ALIRAN (ed), *Reflections on the Malaysian Constitution*, Penang: Aliran Kesedaran Negara, 1987, pp 109–13.

[46] [... only seven statutory provisions have been struck down by the courts as unconstitutional; of these three were reinstated on appeal, one was struck down by the Privy Council and three of the cases were decided ... in the period (1985–88) in which the judges incurred the wrath of the executive.] Harding, 'The 1988 Constitutional Crisis in Malaysia', p 71.

[47] Per Ong Hock Thye CJ (Malaya) in *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129, 141.

[48] Another reason why Malaysian judges then followed English precedents almost exclusively is because most of them received their legal training in the United Kingdom and, therefore, were more familiar with parliamentary sovereignty than constitutional supremacy.

in the United Kingdom, it was and is (at least until the coming into force of the Human Rights Act 1998)[49] Parliament, not the constitution, which is sovereign.

The conservative (described euphemistically as 'pragmatic') approach may be illustrated in the context of constitutional amendments. The judiciary avoided determining, definitively, whether there are implied limitations on the power of constitutional amendment. In India, the Supreme Court held in the case of *Kesavananda Bharati* v *State of Kerala* AIR 1963 SC 1461 that Parliament did not have the power to amend the constitution so as to destroy its basic structure.

Before that landmark decision, Thomson CJ, in the *Government of the State of Kelantan* v *The Government of the Federation of Malaya & Tunku Abdul Rahman Putra Al-Haj*, in *obiter*, had left open the door to the adoption of the basic-structure doctrine when he envisaged Parliament enacting amendments 'so fundamentally revolutionary as to require fulfilment of a condition which the Constitution itself does not prescribe'.[50]

However, in *Loh Kooi Choon* v *Government of Malaysia*, Raja Azlan Shah FJ, having held that an entrenched fundamental right could be abridged (including retrospectively), in *obiter*, rejected the basic-structure doctrine. The learned judge castigated it as '[conceding] to the court a more potent power of constitutional amendment through judicial legislation than the organ formally and clearly chosen by the Constitution ...'.[51] Three years later, in *Phang Chin Hock* v *Public Prosecutor*, the Federal Court, having decided that Parliament has the power to pass an amendment Act that is inconsistent with the constitution, held it unnecessary to decide on the applicability of the basic-structure doctrine.[52]

2. 1985–1996

1985–1996: Thwarted attempt to 'chart a new judicial course'

After the final breakaway from the Privy Council, the Malaysian judiciary, conscious of the responsibility of determining the course of legal development, attempted to 'chart a new judicial course'.[53] The judiciary proceeded, cautiously, to give meaning to the concept of constitutional supremacy and develop a Malaysian public law by drawing upon precedents other than English. Unfortunately, its

[49] c 42; it came into force on 3 October 2000.

[50] [1963] MLJ 355, 359 (HC); see above, p 38.

[51] [1977] 2 MLJ 187, 190 (FC).

[52] [1980] 1 MLJ 70 (FC). To similar effect is the decision in *Mark Koding* v *Public Prosecutor* [1982] 2 MLJ 120 (FC).

[53] Tun Mohamed Salleh Abas in the Sir John Galaway Foster Memorial Lecture, University College London, 4 November 1988, reproduced in Salleh Abas, *The Role of the Independent Judiciary*, Kuala Lumpur: Promarketing Publications, 1989, p 49.

tentative attempts invoked the wrath of the executive and triggered a constitutional crisis with tragic consequences to itself.[54]

3. Post-1996

Post-1996: Tentative stirrings of judicial activism

Since 1996, however, there have been stirrings of judicial activism. These are largely due (but not confined) to the decisions of the Court of Appeal in a series of cases in which administrative law principles, such as natural justice and reasonableness, are elevated to constitutional status, by being treated as aspects of Articles 5(1) (Right to life and personal liberty) and 8(1) (Equality before the law) of the Federal Constitution.[55]

Adopting a liberal approach to constitutional interpretation, the Court of Appeal held that the expression 'life' in Article 5(1) does not refer to mere existence. It includes all aspects that are an integral part of life itself and all matters that from the quality of life, such as the right to employment, the right to live in a reasonably healthy and pollution-free environment, access to justice, and the right to judicial review of administrative actions. Article 8(1), which houses the due process and equal treatment requirement, is equated with fairness. Fairness is held to be twin-faceted:

- Procedural fairness, which requires the adoption of a fair procedure going well beyond the opportunity to be heard and the rule against bias; and
- Substantive fairness which, as a general rule, calls for reasoned decisions to be given in all cases where the rights of a person are adversely affected by a decision of a public decision maker, and for punishment (if imposed) to be fair and just, and proportionate to the wrongdoing complained of.

Whether these stirrings of judicial activism—long overdue—will be sustained remains to be seen. The Federal Court has not always accepted the liberal approach taken by the Court of Appeal in interpreting the constitution. See, for example, the Federal Court decisions in *Pihak Berkuasa Negeri Sabah* v *Sugumar Balakrishnan*

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[54] The judicial crisis of 1988 led to the dismissal of the then Lord President of the Supreme Court and two Supreme Court judges, and left in its wake a judiciary without reputation and public confidence. See, for details, Harding, 'The 1988 Constitutional Crisis in Malaysia'; HP Lee, *Constitutional Conflicts in Contemporary Malaysia*, Kuala Lumpur: Oxford University Press, 1955, pp 43–77.

[55] *Tan Teck Seng* v *Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; *Hong Leong Equipment Sdn Bhd* v *Liew Fook Chuan & Another Appeal* [1996] 1 MLJ 481; *Sugumar Balakrishnan* v *Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289; *Deputy Chief Police Officer of Perak* v *Ramesh Thangaraju* [2001] 1 CLJ 245; see also Gopal Sri Ram, JCA, 'The Role of Judges and Lawyers in Evolving a Human Rights Jurisprudence', paper presented at the 11th Malaysian Law Conference, Kuala Lumpur, 8–10 November 2001, *Halsbury's Laws of Malaysia*, pp 175; 179–81; 236–45.

& Another Appeal [2002] 4 CLJ 105 and *Danaharta Urus Sdn Bhd* v *Kekatong Sdn Bhd* [2004] 1 CLJ 701. In *Sugumar Balakrishnan* the Federal Court disagreed with the Court of Appeal that (1) Article 8(1) (which imposes a duty upon a public decision maker to act fairly) empowers courts to review not only the decision making process but the decision itself; and that consequently an ouster clause (no matter how widely worded) would only exclude judicial review of decisions made in accordance with the law;[56] and (2) the words 'personal liberty' in Article 5(1) are as dynamic a concept as the word 'life' in the same Article and, therefore, should not be restricted to mere existence but should instead be generously interpreted to include all those facets that are an integral part of life and those matters which go to form the quality of life. In *Kekatong Sdn Bhd* the Federal Court reversed the decision of the Court of Appeal. The Federal Court held that the right of access to justice is not a guaranteed fundamental right because it is not absolute but qualified as it can be modified at any time by an Act of Parliament.

Judicial attitudes to constitutional interpretation: three main principles

Three main principles may be discerned from the judicial attitudes to constitutional interpretation outlined above:[57]

1. The constitution must be interpreted within its four walls and not in the light of analogies drawn from other countries. Its provisions must be read in the context of the entire constitution and in the prevailing circumstances of Malaysia. Authorities from other common law countries which interpret identical or similar provisions are merely persuasive.[58]
2. The constitution must be interpreted broadly, 'with less rigidity and more generosity' than ordinary legislation, so as to avoid 'the austerity of tabulated legalism'.[59]
3. There is a strong presumption that a statute is constitutionally valid—the burden of proof lies with the party alleging it is not and the court will lean in favour of an interpretation which renders the statute consistent with the constitution.[60]

[56] In so disagreeing, the Federal Court disagreed also with its own earlier decision in *Rama Chandran* v *Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145.

[57] AJ Harding, *Law, Government and the Constitution in Malaysia*, London: Kluwer Law International, 1996, pp 132–3.

[58] Per Thomson CJ in *The Government of Kelantan* v *The Government of the Federation of Malaya & Tunku Abdul Rahman Putra Al-Haj* [1963] MLJ 355, 358, quoting Lord Radcliffe in *Alhaji Adegbenro* v *Chief Akintola* [1963] 3 WLR 63, 73; followed in subsequent cases, eg *Loh Kooi Choon* v *Government of Malaysia* [1977] 2 MLJ 187, 188–9; and *Hong Leong Equipment Sdn Bhd* v *Liew Fook Chuan and Another Appeal* [1996] 1 MLJ 481, 531.

[59] 'A constitution is *sui generis*, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation', per Raja Azlan Shah Ag LP in *Dato' Menteri Othman bin Baginda & Anor* v *Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 (FC).

[60] Per Abdoolcader J in *Public Prosecutor* v *Datuk Haji Harun bin Idris* [1976] 2 MLJ 116, 117; followed in *Public Prosecutor* v *Pung Chen Choon* [1994] 1 MLJ 566, 576 (SC).

3.6 MODES OF CONSTITUTIONAL AMENDMENT

A written constitution that is immutable may become useless with the passing of time. Changing social, political, and economic conditions will require changes to the constitution. Realizing this, the Reid Commission recommended a method which 'should be neither so difficult as to produce frustration nor so easy as to weaken seriously the safeguards which the constitution provides'.[61]

The Reid Commission recommended that:

> Amendments should be made by Act of Parliament provided that an Act to amend the Constitution must be passed in each House by a majority of at least two-thirds of the members voting. In this matter the House of Representatives should not have power to overrule the Senate. We think that this is a sufficient safeguard for the States because the majority of members of the Senate will represent the States ....[62] (Emphasis added.)

The recommendation of the Reid Commission, considered too easy, was revised to provide for the votes of not less than two-thirds of the total number of members of each Dewan. As revised, the recommendation became part of what is now Article 159 of the Federal Constitution.

The Federal Constitution, after the formation of Malaysia, provides for its amendment in Articles 159 and 161E. These set out four different modes of amendment, according to the provision which is sought to be amended. They are discussed below.

These four modes prescribed in the constitution itself are formal methods of amendment. In such a method the words in a constitutional provision undergo a change. In addition to formal modes, there are informal modes of amendment. Judicial interpretation, where the words in a constitutional provision do not change but their meaning undergoes a change resulting from interpretation by the court, is an informal mode of amendment. Another is through the evolution of constitutional conventions.

Informal modes of amendment

1. Amendments requiring a two-thirds majority

Most provisions of the constitution can be amended by a Bill enacted for that purpose and which is supported by not less than two-thirds of the total number of members of each Dewan on its second and third readings.[63] This may be considered as the common method of amendment.

Formal modes of amendment

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[61] Reid Commission Report, para 80, p 33.
[62] Ibid.
[63] Art 159(3).

2. Amendments requiring a simple majority

Certain provisions of the constitution can be amended by an ordinary Bill, which is supported by a simple majority of members present and voting in each Dewan. These provisions are set out in Article 159(4). They cover some matters of considerable importance, eg:

- The admission of any state to the federation;[64]
- The composition of the Dewan Negara, and the rules concerning the election and retirement of its members;[65]
- Restriction of freedom of movement within the federation, and of freedom of speech, assembly, and association;[66] and
- Creation of inferior courts, and the jurisdiction and powers of the High Courts and inferior courts.[67]

3. Amendments requiring the consent of the Majlis Raja-Raja

The amendments of a number of provisions require, in addition to a two-thirds majority, the consent of the Majlis Raja-Raja.[68] These provisions, considered the most important in the constitution, concern what are called 'sensitive issues': the Majlis Raja-Raja itself, the precedence of Rulers and Governors, the federal guarantee concerning the institution and succession of Rulers, the special position and privileges of the Malays and natives of Sabah and Sarawak, legitimate interests of the other communities, and citizenship. The spectrum of provisions was expanded in 1971[69] to include provisions concerning restrictions on freedom of speech in the interest of internal security and public order,[70] and any law passed thereunder prohibiting the questioning (but not the implementation) of any of the so-called 'sensitive issues'. A law altering the boundaries of a state also requires the consent of the Majlis Raja-Raja, in addition to the consent of the state itself.[71]

4. Amendments requiring the consent of the Yang di-Pertua Negeri (Governor) of Sabah and Sarawak

Constitutional amendments affecting special 'safeguards' arranged for Sabah and Sarawak upon their accession and enumerated in

[64] Art 2.
[65] Art 45(4); Sch 7.
[66] Arts 9(2), 9(3), 10(2), and 10(3).
[67] Art 121(1).
[68] Art 159(5).
[69] Constitution (Amendment) Act 1971 (Act A30 of 1971).
[70] Art 10(4).
[71] In the form of legislation passed by the State Legislative Assembly.

Article 161E require, in addition to a two-thirds majority, the consent of the Yang di-Pertua Negeri of either or both of these states, as the case may be. These 'safeguards' concern citizenship; the constitution and jurisdiction of the High Court in Sabah and Sarawak, and the appointment, removal, and suspension of its judges; state legislative and executive powers and federal–state financial arrangements; religion; the national language and the special treatment of natives of the states; and entry and residence in the state.

Part played by states in amendment process

With the exception of Sabah and Sarawak as explained above, the states play no part in the amendment process (other than an amendment altering state boundaries). This is shown clearly in the *Government of the State of Kelantan* v *The Government of the Federation of Malaya & Tunku Abdul Rahman Putra Al-Haj*,[72] a decision which ignored the nature of the Merdeka Constitution as an agreement not only between the three major races in the country, but also between the federation and its component states.

The Reid Commission, as quoted above, envisaged the Dewan Negara as the defender of the states against amendments adverse to their interests. As will be explained in Chapter 4, the Dewan Negara has only 'delaying' powers in the enactment of ordinary legislation.[73] However, in the case of a Bill amending the constitution, the Dewan Negara has the power of veto. The role assigned to that Dewan, however, has been rendered ineffective by modifications to its composition. The Merdeka Constitution provided for twenty-two indirectly elected senators (ie two from each State, there being eleven States then) and sixteen appointed senators. This initial ratio of 22 : 16, however, has been altered through several constitutional amendments, from 1963 to 2001, such that today the ratio stands at 26 : 44. The amendments modifying the composition of the Dewan Negara run counter to the recommendations of the Reid Commission, as incorporated in what is now Article 45(4) of the Federal Constitution. That Article authorizes Parliament to increase to three the number of senators to be elected for each State; to provide for direct elections to the Dewan Negara; and to decrease, or even abolish, appointed senators.

In its first fifty years, the Federal Constitution was amended no less than forty times in minor and major aspects. The effects of some of these have caused concern.[74] Nevertheless, Malaysians can

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[72] See above, p 38.

[73] Art 68.

[74] See eg HP Lee, 'The Process of Constitutional Change in Malaysia', in Mohamed Suffian et al, *The Constitution of Malaysia: Its Development: 1957–1977*, Kuala Lumpur: Oxford University Press, 1978, pp 369–412; HP Lee, *Constitutional Conflicts in Contemporary Malaysia*; Shafruddin Hashim, 'The Constitution and the Federal Idea in Peninsular Malaysia', pp 158–72.

take comfort in the fact that despite crises and emergencies the Federal Constitution, albeit dented, has survived. And, it may yet survive the next fifty years provided Malaysians honour and respect the social contract so painstakingly put together by the parties who negotiated for independence.

Questions

1. (a) Do written and unwritten constitutions exist in reality?
   (b) Assuming the answer is in the negative, what is the real difference between a country which purports to have a written constitution and one which purports to have an unwritten constitution?
2. (a) Examine the concept of constitutional supremacy.
   (b) Article 4(1) of the Constitution of the Federation of Malaysia declares:

   'This Constitution is the supreme law of the Federation....'

   Consider the validity of this declaration in the light of past and current political, social, and legal developments in Malaysia.
3. Discuss the modes by which the Federal Constitution may be amended.

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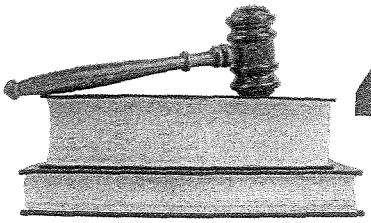


4 LEGISLATION

Chapter Objectives

- Define legislation
- Summarize the legislation in force in Malaysia
- Outline the legislative process at the federal level
- Look at Malaysian subsidiary legislation
- Discuss the principles of statutory interpretation applicable

4.1 DEFINITION OF LEGISLATION

Two types of legislation

LEGISLATION is the law enacted by the legislature, and by bodies and persons authorized by the legislature. Legislation enacted by the legislature is referred to as primary legislation; that made under power delegated by the legislature is called delegated or subsidiary or subordinate legislation.

In Malaysia, the power to enact law is vested in Parliament at the federal level and the State Legislative Assembly at the state level. As Malaysia has a written constitution which is the supreme law of the federation, Parliament and the State Legislative Assembly are not supreme. They can enact law only within the limits and in the manner prescribed by the Federal and State Constitutions. The distribution of legislative powers between them is set out in Chapter 1, Part VI of the Federal Constitution.

Laws enacted by Parliament are called Acts, but those laws enacted by the federal legislature between 1 April 1946 and 10 September 1959 are called Ordinances. Laws enacted by the State Legislative Assemblies are referred to as Enactments, except in Sarawak where they are known as Ordinances. Laws promulgated by the Yang di-Pertuan Agong during an emergency proclaimed under Article 150 of the Federal Constitution are also called Ordinances.

There are four types of Acts:

1. Principal Act, which is the most common;

Four types of Acts

2. Amendment Act, which makes changes to a principal Act (in addition, when a principal Act is heavily amended over the years, the Percetakan Nasional—formerly called the Government Printer—may print new copies or reprints of the Act);
3. Revised Act, which results from changes (restricted to technical, grammatical, and typographical changes that do not affect the substance of the law) made by the Commissioner of Law Revision under powers conferred upon him in the Revision of Laws Act 1968 (Act 1); eg the Civil Law Act 1956 (Act 67) (Revised 1972); and
4. Consolidated Act, which brings together in a simple Act two or more Acts on a specific subject-matter which had been passed over a period of time; eg the Interpretation Acts 1948 and 1967 (Act 388) (Consolidated and Revised 1989).

4.2 LEGISLATION IN FORCE IN MALAYSIA

Malaysia has one of the most complex networks of legislation because it is a federation of thirteen states and has undergone various political as well as constitutional changes in its history. Briefly, the legislation currently in force may be classified as follows:

1. Pre-war Ordinances of the former Straits Settlements;
2. Pre-war Enactments of the Federated Malay States (FMS) and pre-war Enactments of each component state of the FMS;
3. Pre-war Enactments of each of the Unfederated Malay States (UMS);
4. Malayan Union Ordinances;
5. Enactments of the nine Malay states and the two former Straits Settlements from 1 February 1948 until 31 August 1957;
6. Federation of Malaya Ordinances from 31 August 1957 until 10 September 1959, enacted under Article 164 of the Federal Constitution (now repealed);
7. Enactments of the component states of the Federation of Malaya since 31 August 1957;
8. Acts of Parliament since 10 September 1959;
9. Ordinances of North Borneo and Sarawak pre-16 September 1963;
10. Enactments of Sabah and Ordinances of Sarawak after 16 September 1963; and

11. Emergency Ordinances promulgated by the Yang di-Pertuan Agong under Article 150 of the Federal Constitution.

Legislation enacted prior to 31 August 1957 continued to be in force after that date, until repealed by the relevant authority, with such modifications as may be made by any court or tribunal as may be necessary to bring it into accord with the provisions of the Federal Constitution, and subject to any amendments made by federal or state law (Article 162 of the Federal Constitution).

4.3 LEGISLATIVE PROCESS

The legislative authority of the federation is vested in Parliament

Article 44 of the Federal Constitution vests the legislative authority of Malaysia in Parliament, comprising the Yang di-Pertuan Agong and the two Houses of Parliament, ie the Dewan Negara (Senate) and the Dewan Rakyat (House of Representatives).

Briefly, legislation is enacted by Parliament by introducing a Bill, which is passed by both Dewans and assented to by the Yang di-Pertuan Agong.

There are three types of Bills:

Three types of Bills

1. Public Bill
   Public bills include bills on matters of general public interest such as national defence, public order, and taxation. Public Bills concerning money must be initiated by the government; otherwise, they may be sponsored either by the government (as represented by the Minister responsible) or by private members of Parliament. In Malaysia, practically all Bills introduced into Parliament (and State Legislative Assemblies) which have successfully become law are government Bills. Only twice have Private Member's Bills been introduced, unsuccessfully: (a) by Dr Lim Chong Eu in 1966 to amend the Federal Constitution; and (b) by Tengku Razaleigh Hamzah in 1988 to amend the Societies Act 1966 to reinstate the United Malays National Organization (UMNO) following its deregistration after being declared illegal by the High Court.
2. Private Bill
   These are Bills which deal with matters of local or private concern.
3. Hybrid Bill
   Hybrid Bills are Bills concerning matters of public interest which may affect adversely, or otherwise, the interests of some private bodies or persons.

A Bill may originate in either Dewan, although it most often originates in the Dewan Rakyat. Bills concerning tax or expenditure (money or Supply Bills) must originate in the Dewan Rakyat.

The legislative process outlined below focuses on government Bills that originate in the Dewan Rakyat. There are two main stages in the process: pre-Parliamentary and Parliamentary.

4.3.1 Pre-Parliamentary Stage

This covers, in effect, the proposal, consultation, and drafting stage. Proposal for legislation may come from various sources, for example, the election manifesto of the political party that becomes the government, policy decisions of a ministry or government department, recommendations of a Royal Commission or from pressure groups. Wherever the proposal comes from, it has to be accepted in principle by the Cabinet. A long series of discussions follow within and between the relevant government authorities involved. Experts and interested outside bodies may be consulted. If the proposal is particularly important, there may even be public discussion in the media. When the outlines have been worked out, the proposal is sent to the Parliamentary draftsperson in the Attorney General's Chambers to be put into legal language and form: the proposal becomes a 'Bill'. After approval by the Cabinet, the Bill is ready to be introduced into Parliament.

4.3.2 Parliamentary Stage

The procedure is set out in Chapter 5, Part IV of the Federal Constitution and in the Standing Orders of both Dewans. It is essentially based on the procedure in the British Parliament.

A government Bill is introduced into Parliament by the Minister responsible for the subject-matter. When it has been passed, after debate and voting, by Dewan Rakyat, it is referred to the Dewan Negara where it goes through the same processes.

In each Dewan, the Bill goes through four stages:

A Bill goes through 4 stages in each Dewan

- First Reading;
- Second Reading;
- Committee Stage; and
- Third Reading.

4.3.2.1 First Reading

This is a mere formality and may take place even if the Bill has not been printed and circulated. All that happens is that the Minister presents the Bill by having its short title read by the clerk of the Dewan.

4.3.2.2 Second Reading

This can occur only when the Bill is printed and circulated. It is the most important stage. Here the Minister outlines the main principles of the Bill. A debate on the principles (and only on the principles, not the details) ensues. If the Bill receives the requisite number of votes (either a simple majority of members present and voting or a two-thirds majority of the total number of members of the Dewan in accordance with the requirements of the Federal Constitution), it proceeds to the Committee stage.

4.3.2.3 Committee Stage

Most Bills are automatically referred to the Committee of the Whole House, ie at the end of the Second Reading the Dewan, without the necessity of a motion. In the past, very rarely was a Bill referred to an ad hoc Select Committee (which has the power to obtain the views of the public). This occurred when the Dewan agreed to a motion to that effect, moved by any member after the Second Reading. Since independence, only five Bills have been committed to Select Committees, among them the Law Reform (Marriage and Divorce) Bill in 1974 and the Dangerous Drugs (Special Preventive Measures)(Amendment) Bill in 1984. However, in May 2004 the government announced that in line with its policy of a transparent, accountable and open administration, it is moving towards the establishment of Select Committees for very important Bills that are related to public interest. In July of that year, more than two decades after the establishment of the last Select Committee, the government set up a Select Committee to gather public opinion on proposed amendments to the Penal and Criminal Procedure Codes.

Reference to a committee is to enable the details of the Bill to be discussed in a less formal manner. The detailed discussion proceeds in a definite order: clauses in the order in which they appear, the schedules (if any), and the preamble (if any). Amendments may be made, but these are rare. At the end of the discussion, the Minister moves a motion to report the Bill (with or without amendments) to the Dewan. If the motion is accepted the Dewan resumes sitting.

4.3.2.4 Third Reading

The Bill is reviewed. A debate, if any, centres only on general principles. Substantive amendments are not allowed except, with the permission of the Speaker, to correct errors or oversights. If passed in this reading, the Bill is sent to the Dewan Negara.

When the Bill is passed with or without amendments by the Dewan Negara, it is returned to the Dewan Rakyat. Any disagreements between the two Dewans over any amendments are resolved by the appointment of a joint committee of both Dewans under Article 66(3) of the Federal Constitution. The Dewan Negara has no power to veto, reject, or insist on its amendments to a Bill passed by the Dewan Rakyat. Under Article 68 of the Federal Constitution, the power of the Dewan Negara is restricted to delaying the passage of the Bill—one month if it is a Money Bill and twelve months if it is a non-Money Bill. If the Dewan Negara does not pass the Bill or persists to disagree with the Dewan Rakyat on its proposed amendments, the Bill will be presented for Royal Assent at the end of the specified period. The only exception is a Bill amending the Federal Constitution. Such a Bill is required by the constitution to be decided by the requisite majority in each Dewan. Thus, such a Bill cannot be presented for the Royal Assent until it has been passed by both Dewan.

4.3.2.5 Royal Assent

A Bill passed by both Dewans is presented to the Yang di-Pertuan Agong for his assent

When the Bill is passed by both Dewans, it is presented to the Yang di-Pertuan Agong for his assent. Under Article 66(4) of the Federal Constitution, as amended by the Constitution (Amendment) Act 1994 (Act A885), the Yang di-Pertuan Agong shall, within thirty days after it is presented to him, assent to the Bill by causing the Public Seal to be affixed thereto. Where assent is not effected within the specified time, the Bill becomes law as if it had been assented to. Once the Bill is given the Royal Assent, it becomes an Act.

4.3.2.6 Publication

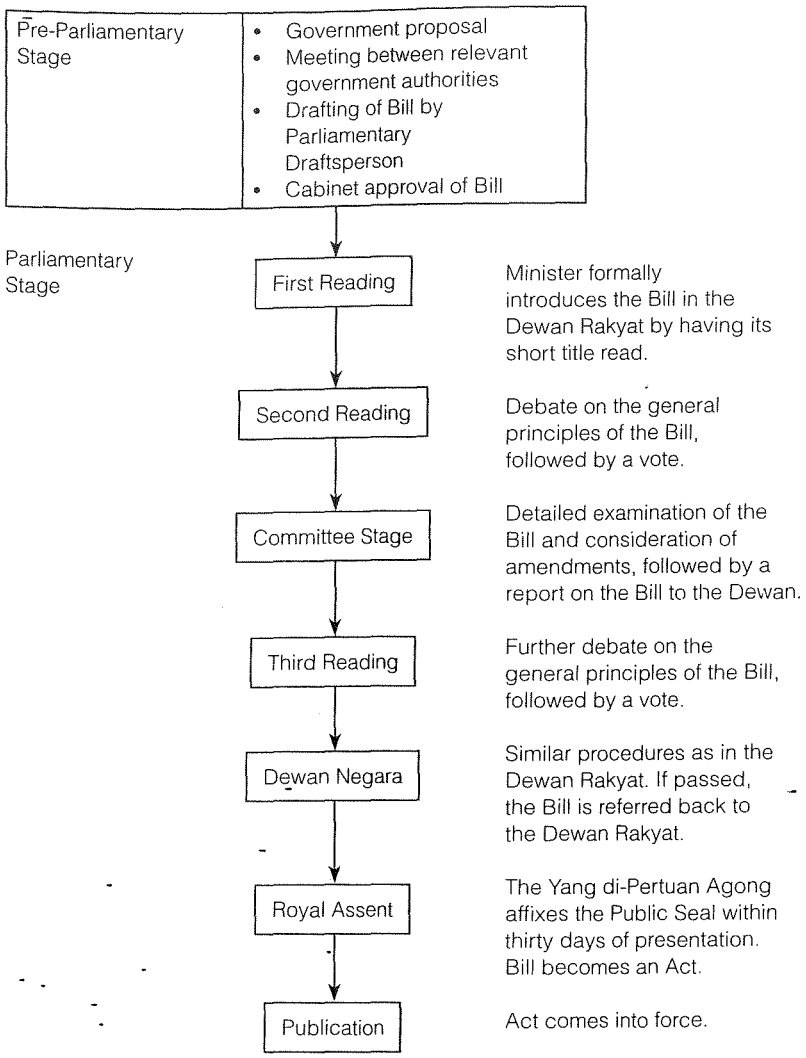
An Act cannot come into force until it is published

An Act of Parliament cannot come into force until it is published (subject, however, to the power of Parliament to give an Act retrospective effect). Publication is done in the *Warta Kerajaan Malaysia* (Federal *Gazette*). Acts enacted since the coming into force of the Revision of Laws Act 1968 (Act 1), ie 1 January 1969, are published in the *Tambahan Akta* (Acts Supplement) in two categories:

(i) Acts that are considered as principal laws and intended to be permanent; and
(ii) Amending Acts, Supply Acts, and Acts intended to be of a temporary nature.

Acts in the first category are numbered in sequence without reference to the year of their enactment (prior to 1 January 1969, a new series of numbers was given to Acts enacted in each year).

Figure 4.1 Procedure for the Enactment of an Act of Parliament



Nevertheless, the short title to an Act bears reference to the year of enactment, for example, Revision of Laws Act 1968. Acts in the second category are each given a serial number with the prefix 'A' preceding it.

An Act comes into force on a prescribed date or, where no date is prescribed, the date immediately following the date of its publication in the *Gazette*. Acts are published in Malay and in English. The Malay text is the authoritative text unless otherwise prescribed.

4.4 SUBSIDIARY LEGISLATION

In line with a universal trend, Malaysia has a voluminous amount of subsidiary legislation. Subsidiary (or subordinate or delegated) legislation is law made through powers delegated by the legislature to a body or person via an enabling or parent statute. In Malaysia, s 3 of the Interpretation Acts 1948 and 1967 (Act 388)(Consolidated and Revised 1989) defines such legislation as 'any proclamation, rule, regulation, order, notification, by-law or other instrument made under any Act, Ordinance or other lawful authority and having legislative effect'.

4.4.1 Reasons for Subsidiary Legislation

The primary factors for the phenomenal popularity of subsidiary legislation are that modern governments are multifunctional and modern legislatures work under severe limitations. The legislature has to delegate its law-making power for the following reasons:

Rationale for subsidiary legislation

1. The legislature has insufficient time to enact all the legislation, detailed in every aspect, required in a modern society;
2. Much modern legislation is highly technical and is best left to experts or administrators on the job who are well versed with the technicalities involved; and
3. The legislature is not continuously in session and its legislative procedures are cumbersome. Delegation is necessary in situations where laws need to be made quickly, such as in emergencies, or to be amended or repealed quickly. For instance, s 22 of the Interpretation Acts 1948 and 1967 provides that 'subsidiary legislation may at any time be amended, varied, added to, revoked, suspended or revived by the person or authority by which it was made or, if that person or authority has been lawfully replaced by another person or authority, by that other person or authority'.

4.4.2 Controls over Subsidiary Legislation

Controls over subsidiary legislation are necessary because its existence contravenes the separation of powers doctrine

Subsidiary legislation is an indispensable tool of modern government but it has raised widespread concern. This is because subsidiary legislation is essentially legislation made by the executive, and executive law-making is inconsistent with the separation of powers doctrine. Moreover, such law-making by administrators who are neither elected nor directly accountable to the legislature or the public is vulnerable to abuse, for example, lack of prior discussion and consultation, and excess of the power delegated or subdelegation to other persons or bodies where the legislature has

not clearly identified the recipient of the delegated power. Recognition of the need to protect the public from such abuse necessitates controls over subsidiary legislation. The main controls are outlined below.

4.4.2.1 Judicial Control

Judicial control or review is the most important of the controls. In Malaysia, the foundations for such review lie in ss 23(1) and 87(d) of the Interpretation Acts 1948 and 1967 which, in effect, lay down the principle that any subsidiary legislation which is inconsistent with an Act of Parliament or State Enactment (including the enabling statute) shall be void to the extent of the inconsistency.

The courts have control over subsidiary legislation through judicial review. When in an action, a defence is raised by the accused or defendant or a challenge is made by an aggrieved person concerning the validity of the subsidiary legislation, the courts may declare the exercise of the delegated power and the subsidiary legislation void under the *ultra vires* doctrine on either one of two grounds:

- Substantive; or
- Procedural.

In substantive *ultra vires*, the recipient of the delegated power has made law beyond the limits of the power conferred either in terms of the subject-matter, purposes, or circumstances authorized by the enabling statute. For example, in *Major Phang Yat Foo* v *Brigadier General Dato' Yahya bin Yusof & Anor* [1990] 1 MLJ 252, the respondent, the convening authority of a court martial, purporting to act under r 63(3) of the Armed Forces (Court Martial) Rules 1976, disapproved of, and dissolved, the decision of the court martial and made an order for a fresh court martial to be convened and for the applicant to be retried on the same charges.

In an application by the applicant for an order of certiorari to quash the respondent's decision and an order prohibiting the respondent from thus proceeding, the High Court ruled that r 63(3) was void to the extent that it confers jurisdiction on the convening authority to approve or disapprove a decision of a court martial contrary to s 119 of the Armed Forces Act 1972 (Act 77). That section authorizes the Minister of Defence to make only rules of procedure relating to investigation and trial of offences by court martial.

In procedural *ultra vires*, the recipient of the delegated power has failed to follow a mandatory procedure laid down in the enabling statute, for example, to give notice to affected parties to allow them to make objections before granting planning permission. In *Datin*

Azizah bte Abdul Ghani v *Dewan Bandaraya Kuala Lumpur* [1992] 2 MLJ 393 concerning a developing order made under s 22 of the Federal Territory (Planning) Act 1982 (Act 267), granting planning permission for the building of two blocks of apartments on a piece of land in an exclusive residential area, the Supreme Court quashed the order as on the facts, no notice of the application for planning permission as required under r 5 of the Planning (Development) Rules of 1970 (which continues in force as if made under the 1982 Act) had been sent to the appellant. A notice had been sent to her but, due to the negligence of the officer concerned, to the wrong address.

4.4.2.2 Legislative Control

There are several means by which the legislature exercises control over subsidiary legislation. The legislature which grants the delegated powers by an enabling statute may repeal the statute or revoke or vary the delegated powers.

An enabling statute may require legislation made under it to be laid before the legislature, either for the legislature's information or confirmation. In Malaysia, 'laying provisions' are not very common. Examples of a simple laying formula are to be found in s 83(3) of the Trade Marks Act 1976 (Act 175), which requires subsidiary legislation made thereunder to be laid before both Dewan, and s 58(4), Trade Unions Act 1959 (Act 262) (Revised 1981), which requires the subsidiary legislation to be laid before the Dewan Rakyat only. The laying procedure for confirmation by the legislature may be by way of a negative or affirmative resolution. In the negative resolution procedure, the subsidiary legislation is effective unless the legislature passes a resolution annulling it. An example is contained in s 19(3) of the Control of Imported Publications Act 1958 (Act No 44 of 1958). The alternative, the affirmative resolution procedure, is the more effective method of control: the subsidiary legislation ceases to have effect unless, within the prescribed period, the legislature passes a resolution affirming it. Section 15(1) of the Sales Tax Act 1972 (Act 64) bears an example.

Another possible method of control practised in England is to establish Scrutiny Committees which keep under review all delegated legislation and report their findings to Parliament. So far, the Malaysian Parliament has not developed any such mechanism, thus leaving a gap in the legislative control of subsidiary legislation.[1]

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[1] MP Jain, *Administrative Law of Malaysia and Singapore*, 3rd edn, Kuala Lumpur: Malayan Law Journal, 1997, p 147.

4.4.2.3 Other Controls

Two other controls are consultation and publication.

1. Consultation

In Malaysia, there is no general statutory provision making prior consultation a formal requirement for the making of subsidiary legislation. Particular enabling Acts may make prior consultation mandatory, but these are few in number. An example is s 36(1) of the Financial Procedure Act 1957 (Act 61) (Revised 1972), which authorizes the Yang di-Pertuan Agong to make regulations after consulting the Commodities Trading Commission. Though prior consultation as a legal requirement has not yet developed, consultation as a matter of administrative practice does take place on a discretionary and ad hoc basis.[2]

2. Publication

Likewise, there is no general statutory provision requiring the publication of subsidiary legislation in Malaysia. Particular enabling statutes may require publication though this is not the norm. Where an enabling statute makes publication mandatory, non-compliance renders the subsidiary legislation void. At the federal level, subsidiary legislation which is required to be published is published in Malay and English in two parts of the *Gazette*:

- *Tambahan Perundangan 'A'* (Legislative Supplement 'A') which contains all proclamations, rules, regulations, orders, and by-laws; and
- *Tambahan Perundangan 'B'* (Legislative Supplement 'B') which contains all other subsidiary legislation.

The subsidiary legislation is serially numbered with either the prefix PU (A) or PU(B), depending on the part of the *Gazette* it is published in.[3]

Under s 19(1) of the Interpretation Acts 1948 and 1967, subsidiary legislation commences on the date prescribed, or where no date is prescribed, the date immediately following the date of its publication in the *Gazette Supplement*. Under s 19(2), the subsidiary legislation 'shall come into operation immediately on the expiration of the day preceding [its] commencement'. The implications arising from these provisions appear to be:

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[2] Jain, *Administrative Law of Malaysia and Singapore*, pp 164–5.

[3] PU stands for *Pemberitahuan Undangan*. Before 1966 the abbreviation LN, which stands for Legislative Notification, was used. From 1966 to 1968 there was only one series of *Pemberitahuan Undangan*. It was only from 1 January 1969 that two series A and B were published.

- where no date is prescribed for the commencement of the subsidiary legislation, publication in the *Gazette Supplement* is essential for its effectuation;
- where a date is prescribed for its commencement, publication is not a condition for its commencement as under s 19(1), the date prescribed shall be the date of its commencement; and
- the authority making subsidiary legislation may bring it into immediate effect as soon as it is made without any publication.

The last implication, if correct, leads to harsh consequences. Mitigating it is the proviso to s 20, which states that no person is to be liable to any penalty in respect of any act done before the date on which the subsidiary legislation was published. While this proviso protects a person from criminal liability, it does not protect him from civil liability, for violation of an unpublished regulation.[4]

4.5 STATUTORY INTERPRETATION

The task of judges in statutory interpretation is to ascertain the intention of the legislature. In this task, judges in Malaysia are assisted by statutory and common law rules.

Judges interpret statutes to ascertain the intention of Parliament

4.5.1 Statutory Rules

There are three statutes on statutory interpretation in Malaysia.

1. Interpretation Acts 1948 and 1967 (Act 388)(Consolidated and Revised 1989) which came into force on 19 October 1989 and which constitutes a consolidation of three superseded statutes:
   - Interpretation and General Clauses Ordinance 1948 (MU Ordinance No 7 of 1948) which applied to all laws in Peninsular Malaysia in force before 18 May 1967, including any such laws which had been extended to Sabah and Sarawak;
   - Interpretation Act 1967 (Act No 23 of 1967) which applies to all Acts of Parliament passed on or after 18 May 1967, subsidiary legislation made thereunder and revised versions by any federal laws, whether that law was made before or after 18 May 1967, provided the revised versions were prepared and published under the Revision of Laws Act 1968 (Act 1); and

[4] Jain, *Administrative Law of Malaysia and Singapore*, pp 154–5.

- Interpretation (States of West Malaysia) Act 1967 (Act No 57 of 1967) which was enacted under Article 76(1)(b) of the Federal Constitution to promote uniformity of the laws and which applied only to those states which had adopted uniform laws.

2. Interpretation and General Clauses Enactment of Sabah (No 34 of 1963), applicable to all Sabah enactments in force at its commencement and to all subsequent enactments.
3. Interpretation Ordinance of Sarawak 1953 (Cap 1), applicable to all ordinances in force at its commencement and all subsequent ordinances, unless otherwise indicated.

These statutes, among other things, define common terms and phrases, for example:

- masculine gender includes the feminine;
- singular includes plural, and vice versa;
- 'person' includes corporation;

and give general directions. For example, s 17A of the Interpretation Acts 1948 and 1967 directs that in the interpretation of a statutory provision, a construction that would promote the purpose (whether expressly stated or not) underlying the statute shall be preferred to a construction that would not. However, to understand the provisions of the three Malaysian statutes on interpretation, it is necessary to know the common law rules.

In addition to the statutes on interpretation, most statutes have a 'definition section' (usually s 2) defining terms used in the statute.

4.5.2 Common Law Rules

The principles evolved by the courts in England in interpreting statutes are adopted and applied with local modifications by the Malaysian courts in interpreting local legislation. These principles incorporate:

- so-called 'rules' of statutory interpretation;
- language rules;
- internal and external aids to interpretation.

The so-called 'rules' are the primary aids to statutory interpretation; the rest are secondary aids.

4.5.2.1 'Rules' of Statutory Interpretation

Approaches to statutory interpretation

Traditionally, there are three 'rules' or canons of statutory interpretation, each of which evolved during different phases of English legal history. They are not rules in the strict sense because they have no binding force and there is no obligation upon judges to apply

these or, when applying them, to do so in any order of priority. They are only guidelines for judges, hence it would be more helpful to regard them as approaches.[5] Which approach is adopted in a particular case depends on the individual judge's belief concerning the judicial function. The literal approach stems from the traditional theory that judges do not make law; they merely declare it. If a literal construction of the words in a statutory provision leads to an absurdity or injustice, it is the duty of Parliament, not the court, to amend the statute. The purposive approach, on the other hand, seeks to give effect to the purpose underlying the statute as perceived by the court. It may involve reading words into a statutory provision. It requires a judge to take on a creative function.

1. Mischief Rule

This is the oldest approach, dating from *Heydon's case* (1584) 3 Co Rep 7. It was laid down in that case that for the true interpretation of statutes, the court has to consider:

- what was the common law before the Act;[6]
- what was the mischief and defect for which the common law did not provide a remedy;
- what remedy had Parliament decided upon to cure the mischief; and
- what was the true reason for the remedy.

The duty of the court then is to make such a construction as shall suppress the mischief and advance the remedy.

The rule in *Heydon's case*, as it is sometimes called, was explicitly adopted in *Hong Leong Equipment Sdn Bhd* v *Liew Fook Chuan and Another Appeal* [1996] 1 MLJ 481, which concerned the interpretation of s 30(3) of the Industrial Relations Act 1967 (Act 177) (Revised 1976). That section confers upon the Minister of Labour and Manpower the discretion whether or not to refer an industrial dispute to the Industrial Court. One of the issues was whether in exercising his discretion, the Minister made a decision in a legal sense and was, therefore, subject to judicial review. The Court of Appeal decided in the affirmative. Gopal Sri Ram JCA, delivering the main judgment, approached the task of interpretation by examining the position at common law and the legislative history of the Act, an approach taken, in express terms, from *Heydon's case*.

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[5] See for example *Citibank Bhd* v *Mohamad Khalid Farzalur Rahaman & Ors* [2000] 3 CLJ 739, 746 (CA).

[6] Although in the early stages of its development, the mischief rule enabled a court to refer only to the common law position at the time of the passing of an Act to determine the object of that Act; later cases allowed a court to examine the entire state of the law (including statutes) previous to the passing of an Act to discover the mischief which that Act was intended to remedy: ibid., p 748.

That approach showed s 20 to be a remedial provision in an Act which is itself a piece of benevolent social legislation. The Act was intended by Parliament to elevate the weak and subordinate position of a workman at common law to a much stronger position. Parliament wanted to alter the employer–workman relationship, which was a consensual one, capable of termination by the employer at will, to one which gives the workman security of tenure by equating the right to employment with a proprietary right that may not be forfeited, except for just cause. In consequence, s 20 must be given a broad and liberal interpretation, one that would advance rather than thwart the purpose for which Parliament enacted the Act.

2. Literal Rule

This has been the dominant approach in the past one hundred years or so. It developed in England in the early nineteenth century. One of the main reasons for its adoption is said to be the length of legislation by comparison with earlier times. If legislation is drafted at length and in detail, this suggests that the legislature has expressed its intention fully in the words used and there is no need to imply any additional meaning. According to this approach, then, the words in a statute must be given their literal or grammatical (in simple language, plain or ordinary) meaning (and technical words, their ordinary, technical meaning), whatever the outcome. In the words of Lord Esher in *R* v *Judge of City of London Court* [1892] 1 QB 273, 290:

> ... If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The court has nothing to do with the question whether the legislature has committed an absurdity.

This approach (and its effect) was starkly illustrated in *Public Prosecutor* v *Chin Kim Foo*.[7] The copyright in the sound recordings of two titles, which were first published in Malaysia on 14 and 18 July 1988 respectively, was infringed on 19 July 1988. The defendant contended that copyright only subsisted from 1 January 1989, ie the beginning of the calendar year following the year in which the sound recordings were first published. That submission was based on s 19 of the Copyright Act 1987 (Act 332):

> Copyright in a sound recording shall subsist until fifty years from the beginning of the calendar year next following the year in which the recording was first published.

The Sessions Court accepted that submission. On a literal reading of s 19, the court held there was no copyright until 1 January 1989.

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[7] Unreported; see LT Khaw, 'Copyright Now You Have It, Now You don't', *MLJ*, 1(1995): lxxvii.

The learned judge acknowledged that such an interpretation led to an absurdity, but said the clear words of s 19 did not allow her to reach any other conclusion. Her decision was upheld on appeal.

3. Golden Rule

This is a modification of the literal approach. The golden rule, called such by Lord Wensleydale, is best explained in his own words in *Grey* v *Pearson* (1857) 6 HL Cas 61, 106:

> ... in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther.

This approach was adopted in *Leaw Mei Lee* v *Attorney General & Ors* [1967] 2 MLJ 62, which centred on the interpretation of s 5(3) of the Advocates and Solicitors Ordinance 1947 (MU Ordinance No 4 of 1947). That section was concerned with fixing the period of local chambering, which is a prerequisite for admission to the bar as an advocate and solicitor. Paragraph (a) determined that 'period' by reference to any period of chambering previously undergone in England. The proviso to that paragraph equated any such previous chambering with the post-final course conducted either by the English Council of Legal Education or the University of Malaya.

The issue which arose was whether the University of Malaya post-final course must precede the local chambering, having regard to the word 'previously' in paragraph (a). The petitioner attended that course and chambered concurrently. Her petition for admission was objected to by the Bar Council, the Bar Committee and the Attorney General; the objection was upheld by the High Court. The Federal Court faced two alternatives: to give (1) a literal interpretation (as did the High Court), with the result that chambering after completing the post-final course would qualify the petitioner for admission, but chambering concurrently with the course would not; or (2) an alternative interpretation which would avoid such an absurd, or unjust, result. The Federal Court (the Lord President dissenting) chose the latter.

The golden rule was also adopted by a majority in the Federal Court (reaffirming the minority decision of the Court of Appeal) in *Kesultanan Pahang* v *Sathask Realty Sdn Bhd* [1998] 2 MLJ 513, which raised the question whether the Sultan of Pahang had the power to lease sultanate land to a body corporate, ie whether the word 'persons' in s 6(1) of the Sultanate Land Enactment 1919 (Enactment No 1 of 1919) of Pahang (the Enactment) is limited to mean natural persons, or can include artificial persons, such as a corporation.

Pursuant to the Enactment, the late Sultan Abu Bakar leased to the respondent, a corporation, Sultanate land for fifty (subsequently extended to ninety-nine) years with effect from 1 July 1964.

In 1985, the appellant instituted a claim before a special tribunal (constituted under s 7 of the Enactment), challenging the validity of the lease on the grounds that the word 'persons' should be confined to natural persons and that the respondent was neither a natural person nor a subject of the Ruler. The tribunal ruled in favour of the appellant, but its decision was quashed by the High Court. The decision of the High Court was upheld by a majority of the Court of Appeal (see below, p 71). On further appeal, the latter's decision was reversed by the Federal Court, which held that in the High Court and Court of Appeal, the word 'persons' had been looked at in isolation and without regard to the context in which it appears.

Mohd Azmi FCJ, delivering the main majority judgment, explicitly referred to the golden rule as the most relevant approach on the facts. In the view of the majority, the definition of 'persons' in s 2 of the General Clauses Enactment 1897 (Enactment No 1 of 1897) of Pahang and its successor, s 2 of the Interpretation Acts of 1948 and 1967, as including legal or artificial persons (ie the grammatical meaning), could not apply to the Enactment as that interpretation would be repugnant to or inconsistent with the other provisions of that Enactment, in particular s 6(1) itself, where the word 'persons' appears in association with the words 'Malay subjects of the said Ruler', and s 2 which defines 'Malay' as meaning 'a person belonging to any Malayan race who habitually speaks the Malay language or any Malayan language and professes the Moslem religion'. Further, the element of allegiance in the concept of subject of a Ruler can attach only to natural persons. Viewed in the context of the Enactment as a whole, the word 'persons' must be confined to natural persons.

Criticisms against the traditional 'rules have led to the evolution of the following approaches.

4. Purposive Approach

The term 'purposive approach' is relatively recent but, in concept, it is not new. It has its origins in the mischief rule: the approach that requires judges to seek, and promote, the purpose underlying the legislation. Lord Denning, former head of the English Court of Appeal and one of the foremost proponents of this approach, explained it thus:

> It means at least this: the judges ought not to go by the letter of the statute. They ought to go by the spirit of it.[8]

[8] Lord Denning, *The Closing Chapter*, London: Butterworths, 1983, p 97.

The purposive approach is influenced by the civil law systems in Continental Europe. Legislation in civil law systems is brief. It sets out only the general principles which must be construed or interpreted as appropriate by judges. European Community legislation tends to be drafted in the continental style and English membership of the European Community has required English judges to adopt the purposive approach in interpreting European Community legislation. This, in turn, has influenced a change in the interpretation of English legislation. Over the past thirty years in England, there has been a trend away from the literal towards the purposive approach;[9] likewise in Malaysia in recent years.

In Malaysia, the purposive approach has received statutory recognition. Parliament has enacted s 17A of the Interpretation Acts 1948 and 1967.[10] That provision directs the courts as follows:

> [i]n the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

The Federal Court applied the purposive approach in *Lim Phin Khian* v *Kho Su Ming* [1996] 1 MLJ 1. The case raised a jurisdictional issue arising from the Courts of Judicature (Amendment) Act 1994 (Act A886), which renamed the Supreme Court as the Federal Court and created an intermediate Court of Appeal with effect from 24 June 1994. That Act, however, omitted to provide for cases pending before the Supreme Court on 23 June 1994. That omission was rectified subsequently by s 17 of the Courts of Judicature (Amendment) Act 1995 (Act A909) which was given retrospective effect to 24 June 1994. The respondent, by way of a preliminary objection, challenged the competency of the appeal to the Federal Court, arguing that since the appeal was filed in the Supreme Court on 24 June 1994, the date of the creation of the Court of Appeal, the appeal should lie to the latter court. In response, the appellant, relying on the common law as illustrated in *Colonial Sugar Refining Co Ltd* v *Irving* [1905] AC 369, argued that the right of appeal is a substantive, not a mere procedural, right and that such a right vests from the date of the institution of the original litigation, although it may be actually exercised only when the judgment is pronounced by the court of first instance. Such right, having so vested, would not be affected by subsequent legislation in the absence of Parliamentary intention, expressed or intended. The

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[9] Per Lord Diplock in *Carter* v *Bradbeer* [1975] 3 All ER 158, 161 (HL); see also Lord Griffiths in *Pepper* v *Hart* [1993] 1 All ER 42, 50 (HL).

[10] Added by s 7, Interpretation (Amendment) Act 1997 (Act A996) with effect from 24 July 1997.

Federal Court rejected the preliminary objection. It ruled that the appeal was competent and rightfully lay to the Federal Court.

What is interesting in this case is that although the panel of three judges decided unanimously, two judges arrived at the same decision by different routes. Both rejected the literal interpretation of the relevant legislation in favour of the purposive approach, but whereas Edgar Joseph Jr FCJ resolved the issue solely by reference to s 17 of the Courts of Judicature (Amendment) Act 1995 (Act A909), Gopal Sri Ram JCA based his decision not merely on that provision, but also the Courts of Judicature (Amendment) Act 1994 (Act A886).

Section 17 of the Courts of Judicature (Amendment) Act 1995 (Act A909) (overlooked by both appellant and respondent) reads:

> Any proceeding which is pending before the Supreme Court on the 23rd June 1994 shall be continued or proceeded with, as the case may be, before the Federal Court and for this purpose the Federal Court shall have and exercise all the powers of the Supreme Court prior to the 24th June 1994.

A literal reading would mean that if there was no proceeding pending before the Supreme Court on 23 June 1994, then there would be nothing to be proceeded with before the Federal Court. That interpretation was rejected by the Federal Court as causing manifest injustice to the appellant who could not have foreseen when he filed his appeal on 24 June 1994 that Parliament, eight months later, would pass legislation with retrospective effect, depriving him of his right. Applying the purposive approach, the Federal Court ruled that Parliament must be deemed to have intended to displace the common law principle only to this extent: that so long as there was a judgment, decision or order of the High Court given on or before 23 June 1994 and an appeal against the same had been brought to the Supreme Court, whether on, before or even after such date, it is the Federal Court, not the Court of Appeal, which has the jurisdiction to hear and determine the same.

The Federal Court also applied the purposive approach in *Kesatuan Kebangsaan Wartawan Malaysia & Anor* v *Syarikat Pemandangan Sinar Sdn Bhd & Anor* [2001] 3 CLJ 547 which centred on the meaning of s 17(1)(a), Industrial Relations Act 1967 (Act 177) (IRA 1967). That provision reads:

> 1. A collective agreement which has been taken cognizance of by the Court shall be deemed to be an award and shall be binding on –
> (a) the parties to the agreement including any case where a party is a trade union of employers, all members of the trade union to whom the agreement relates and their successors, assignees or transferees; and....

The Court of Appeal held that the phrase 'successors, assignees, or transferees' cannot relate to the words 'parties to the agreement' but only to 'party' and 'members' which appear after the word

'including'. Otherwise, said the Court of Appeal, 'there ought to be commas after the words "agreement" in the first line and "relates" in the fourth line'. The Federal Court disagreed. It held that in interpreting a statute, the intention of Parliament must not be deduced only from the language used in the statute, but also from its social and economic background, and the mischief it was meant to remedy. Bearing in mind that the IRA 1967 'is a piece of social legislation whose primary aim is to promote social justice, industrial peace and harmony in the country', the Federal Court said the purposive approach was the correct approach to adopt to promote the objective intended by Parliament. Adopting that approach, the Federal Court held that the phrase in question must apply to the parties to the collective agreement as well as the members of the trade union of employers to whom the collective agreement relates.

Since 2000 the Federal Court has from time to time affirmed the use of the purposive approach and of external aids such as the Explanatory Statement to the Bill of the statute concerned and *Hansard* (Parliamentary reports) in the interpretation of statutes including taxing statutes.[11]

The Court of Appeal, too, has favoured the purposive approach in a number of cases. A majority in the Court of Appeal applied it in *Kesultanan Pahang* v *Sathask Realty Sdn Bhd* [1997] 2 MLJ 701. However, their decision was reversed on further appeal to the Federal Court (see above, p 68). The majority in the Court of Appeal held that the word 'person' in s 6(1) of the Sultanate Land Enactment of Pahang of 1919 could include a corporation. In their view, it was clear from ss 5 and 6 that the Ruler had the power to lease Sultanate lands to two categories of persons: (1) Malay subjects and (2) other persons not being Malay subjects though, in the case of the latter, certain formal requirements (which were complied with in that case) had to be satisfied. Further, it could be inferred from the extension of the lease from fifty to ninety-nine years, which is rarely the life span of a natural person, that the legislature intended 'persons' to include corporations.

The purposive approach can also be seen in two others cases decided by the Court of Appeal. These two cases are not only interesting, but instructive. They contain useful guidance on the so-called 'rules' of statutory interpretation and their proper application.

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[11] See, eg *Lam Kong Co Ltd* v *Thong Guan Co Pte Ltd* [2000] 4 MLJ 1; *DYTM Tengku Idris Shah ibni Sultan Salahuddin Abdul Aziz Shah* v *Dikim Holdings Sdn Bhd & Anor* [2002] 2 MLJ 11, 21; *Pihak Berkuasa Negeri Sabah* v *Sugumar Balakrishnan and Another Appeal* [2002] 3 MLJ 72; *Palm Oil Research and Development Board Malaysia & Anor* v *Premium Vegetable Oils Sdn Bhd & Another Appeal* [2005] 3 MLJ 97, 106, 108–9; *All Malayan Estates Staff Union* v *Rajasegaran & Ors* [2006] 6 MLJ 97, 112.

An issue concerning the legal profession arose in *Syed Mubarak Syed Ahmad* v *Majlis Peguam Malaysia* [2000] 3 CLJ 659. The question was whether an advocate and solicitor may simultaneously practise another profession. The appellant was a practising public accountant. His application to the Bar Council in 1997 for an annual certificate (to practise law) was rejected on the ground that he was disqualified under s 30(1)(c), Legal Profession Act 1976 (Act 166) which reads:

> No advocate and solicitor shall apply for a practising certificate:
> (c) if he is gainfully employed by any other persons, firm or body in a capacity other than as an advocate and solicitor.

The appellant's application to the High Court for the certificate was also refused. The learned High Court judge held that the words 'gainfully employed by any other person, firm or body' in s 30(1)(c) must be construed to include employment by one's own clients. As such, a public accountant is gainfully employed and is disqualified from obtaining a practising certificate. The appellant appealed to the Court of Appeal, submitting, among other arguments, that the contentious words 'gainfully employed' refer to a contract of service and not a contract for services. The Court of Appeal upheld the decision of the High Court. Gopal Sri Ram JCA, in delivering the judgment, conceded that a literal interpretation of s 30(1)(c) would produce the meaning contended by the appellant. But, said the learned judge:

> ... if you look at the decisions of our courts over the past few years, you will notice that we no longer resort to the literal rule when interpreting statutes. We will not use it when it will produce an absurd result. Neither will we use it if it does not advance the aim or object of a statute.[12]

Referring to the Legal Profession Act, the learned judge pointed out that its primary purpose is to regulate the legal profession. The object of Parliament is to maintain high standards in the profession. Parliament intended that persons who choose to be advocates and solicitors must exclusively practise as such; otherwise, one should be able to find in the Act clear language permitting an advocate and solicitor to practise more than one profession.

In *Citibank Bhd* v *Mohamad Khalid Farzalur Rahaman & Ors* [2000] 3 CLJ 739, the bone of contention was s 254(1), National Land Code 1965 (Act 56 of 1965)(NLC), which reads:

> Where, in the case of any charge, any such breach of agreement as is mentioned in sub-section (1) of section 253 has been continued for a period of at least one month or such alternative period as may be specified in the charge, the chargee may serve on the chargor a notice in Form 16D:
> 1. specifying the breach in question;

[12] [2000] 3 CLJ 659, 662–3.

2. requiring it to be remedied within one month of the date on which the notice is served, or such alternative period as may be specified in the charge; and
3. warning the chargor that, if the notice is not complied with, he will take proceedings to obtain an order for sale.

The question which arose was whether the words 'such alternative period as may be specified in the charge' meant a period of more, or less, than one month. The High Court, relying purportedly on the golden rule, held that the phrase meant a period of more than one month. The Court of Appeal rejected that interpretation. It pointed out that the High Court mistook the golden rule for the mischief rule. However, while intending to apply the latter, the High Court neither inquired into the state of the law before the enactment of the disputed legislative provision nor the true purpose for which the provision was enacted. These omissions, said the Court of Appeal, amounted to a serious misdirection of law, leading to a flawed conclusion. Relying on the purposive approach, the Court of Appeal examined the state of the law before the enactment of the NLC. The pre-existing provision, ie s 138(1)(a), Land Code 1928 (Cap 138), stipulated that a statutory notice to a chargor to remedy his default could 'not [be] less than thirty days'. So, when Parliament enacted s 254(1), NLC 1965 and used the words 'or such alternative period as may be specified in the charge', it clearly intended by that phrase to change the law by enabling a chargee to impose a period of less than a month.

5. Unified or Contextual Approach

Academic writers have observed that the three traditional 'rules' or approaches to statutory interpretation seem to be merging as judges become increasingly aware of the importance of context in construing the meaning of statutory provisions. For example, Professor Driedger states: 'Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intent of Parliament'.[13]

Professor Freeman states: 'There seems now to be just one "rule" of interpretation, a revamped version of the literal rule that requires the general context and purpose to be taken into consideration before any decision is reached concerning the ordinary (or, where appropriate, the technical) meaning of statutory words.'[14]

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[13] EA Driedger, *The Construction of Statutes*, Toronto: Butterworths, 1974, p 67.

[14] MDA Freeman, *Lloyd's Introduction to Jurisprudence*, 6th edn, London: Stevens, 1994, p 1191.

In short, the unified approach requires the whole statute to be read in its appropriate context (of which the purpose of the statute is part) before determining the ordinary meaning of the words. The ordinary meaning of the words and the purpose of the statute must correspond. Bennion commented that such correspondence:

> ... is not surprising; indeed it is what we would expect. Parliament, having a certain purpose, naturally seeks to express this in the words used. If it did otherwise to any great extent, the legislature would be using an inefficient method.[15]

The unified approach was referred to as the purposive and literal construction by Abdoolcader SCJ in *Foo Loke Ying* v *Television Broadcasts Ltd* [1985] 2 MLJ 35 and *Vengadasalam* v *Khor Soon Weng & Ors* [1985] 2 MLJ 449. The purposive and literal construction was applied by the Court of Appeal in *Petroleum Nasional Berhad* v *Kerajaan Negeri Terengganu and Another Appeal* [2003] 5 AMR 696. The case involved, among other matters, alleged breach of contract. Petroleum Nasional Berhad (Petronas), the first defendant, ceased making annual cash payments in return for acquisition of petroleum onshore and offshore, off Terengganu, to the government of that state after it came under the control of Persatuan Islam SeMalaysia (PAS). The defendants, by separate applications, applied to the High Court for certain proposed questions of law to be determined under specific Orders of the Rules of the High Court. These applications were primarily intended to expedite the disposal of the action at the interlocutory stage. The High Court dismissed the applications on the ground, among others, that the plaintiff should be given an opportunity to call witnesses to give the factual background leading to the execution of the contract. The defendants appealed. One of the issues before the Court of Appeal was whether extrinsic evidence was necessary to determine the plaintiff's claim. The Court of Appeal held such evidence unnecessary. Terms which called for interpretation, such as 'continental shelf' and 'offshore' used in the relevant statutes had been derived from international agreements to which Malaysia is a party. The court said those statutes called for a purposive and literal construction. Referring to *Foo Loke Ying*, the court said that construction:

> is one which follows the literal meaning of the enactment where that meaning is in accordance with the legislative purpose and applies where the literal meaning is clear and reflects the purposes of the enactment.[16]

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[15] FAR Bennion, *Statutory Interpretation*, 3rd edn, London: Butterworths, 1997, p 737.
[16] [2003] 5 AMR 696, 715.

4.5.2.2 Language Rules

The statute must be read as a whole

No matter which approach is adopted, the fundamental principle of statutory interpretation is that the statute must be read as a whole. A word or phrase must be read in the context of the rest of the section, and each section must be read subject to every other section which may explain or modify it. This fundamental principle is illustrated by several language rules, the so-called 'maxims of interpretation', as discussed below.

'Maxims of interpretation'

1. *Ejusdem Generis*

General words which follow particular and specific words all of one genus are presumed to be restricted to the same genus as the particular words. In *Public Prosecutor* v *Pengurus Tong Trading & Co* [1985] 1 MLJ 366, the phrase 'or other matter for facing' found in reg. 3(v)(ii) of the Sale of Food and Drugs Regulations 1952 ('It shall not contain any spurious or exhausted or decayed or mouldy leaves or stalks or Prussian blue or lead or any compounds of lead or other matter for facing or for any other purpose') was held to be restricted to any matter which is either harmful or deleterious to the human body.

2. *Expressio Unius Est Exclusio Alterius*

Express mention of one or more things or persons of a particular class implies the exclusion of all others of that class.

3. *Noscitur a Sociis*

A word derives its meaning from its context. For example, in *Sykt Perniagaan United Aces Sdn Bhd & Ors* v *Majlis Perbandaran Petaling Jaya* [1997] 1 MLJ 394, 401–2, it was held that the term 'parking place' must be associated with the words which accompanied it, ie 'open space', 'garden', 'recreation', and 'pleasure ground'—all of which refer to places for pleasure and recreation, and not a thoroughfare; thus, 'parking place' was not analogous to 'street'.

4.5.2.3 Presumptions

There are certain principles or values that are important in upholding justice. These the courts protect by presuming them to apply in interpreting statutes, unless the legislature indicates otherwise by express words or necessary implication. It is not possible to produce a definitive list of these presumptions as some may be modified or even abandoned with time. A few examples are listed below:

Presumptions preserve values that uphold justice

- Presumption against retrospective operation
- Presumption against changes in the common law
- Presumption against the imposition of liability without fault or *mens rea*

- Penal statutes should be construed strictly and in favour of the liberty of the subject.

4.5.2.4 Internal Aids

These are parts of the statute itself. They may be used as aids in interpretation.

Parts of the statute itself used as aids in interpretation

1. Short Title

The High Court ruled in *Public Prosecutor* v *Chief Executive Secretary, MCA* (1958) 24 MLJ 151 that the short title is part of the legislation and can be used as an aid in interpretation. In that case, Smith J referred to the short title of the Motor Vehicles Commercial Use Regulations in deciding that the Regulations controlled motor vehicles when used commercially only; not when used privately.

2. Long Title, Preamble, and Schedule

The long title, preamble, and schedule are discussed together as the rule concerning the use of each in interpreting statutes is the same.

The long title of an Act is found at the beginning. The preamble (when there is one, which is rare nowadays) immediately follows the long title. The function of both generally is to set out the purpose of the legislation. The traditional view concerning the use of the long title and the preamble in construing statutes is that while each is a part of the Act, it is not an operative part. It may be looked at to resolve doubt or ambiguity only when the provision being interpreted is capable of two or more meanings. If the provision is unambiguous, the provision must be given its clear meaning and such meaning is not to be modified by the long title or the preamble. The traditional view concerning the use of the long title, set out in the English case of *R* v *Bates & Anor* [1952] 2 All ER 842, can be seen in *Noor Jahan bte Abdul Wahab* v *Md Yusoff bin Amanshah* [1994] 1 MLJ 156, 162. In the case of the use of the preamble, the rule as explained in *Attorney General* v *Prince Ernest Augustus of Hanover* [1957] AC 436, 467, is evident in *Re Application of Tan Boon Liat* [1976] 2 MLJ 83.

A schedule is an extension of the section which introduces it. Material is put into a schedule because it is too lengthy or detailed to be accommodated in a section, or because it forms a separate document (such as a treaty). Although the schedule has always been considered as much a part of the Act as any other part, the traditional view concerning its use in statutory interpretation is that if there is a conflict between the body of the Act and the schedule, the schedule must give way. In other words, a schedule may be used to construe an Act only if not inconsistent with it.

The traditional view concerning each of the above has undergone change in England. The prevailing view is less restrictive. It may be summarized by stating that each of the above is as much an operative part of the Act as the substantive parts and may always be looked at; however, the clear words of a substantive provision must be given effect and will prevail in the event of a conflict. The prevailing view is now reflected in s 15 of the Interpretation Acts 1948 and 1967, as amended by the Interpretation (Amendment) Act 1997 (Act A996). That section reads:

> The long title, preamble and every schedule (together with any note or table annexed to the schedules) to any Act or to any subsidiary legislation shall be construed and have effect as part of the Act or subsidiary legislation.

In *Repco Holdings* v *Pengurusan Danaharta Nasional Bhd* [2000] 2 AMR 1495, 1507, Abdul Wahab Patail J interpreted the amendment to mean that reference to the long title, preamble (and schedule) is no longer confined to when there is an ambiguity in the substantive part of the Act.

3. Marginal or Side-notes

The courts in Malaysia, unlike the courts in England, take the view that marginal notes are part and parcel of a statute and may be used as an aid to interpretation. This was the view expressed by Ford CJ in *Cashin* v *Murray* [1888] 4 Ky 435 which has been reaffirmed in several cases, for instance, in *Lim Phin Khian* v *Kho Su Ming* (see above, p 69). In that case, Edgar Joseph Jr FCJ and Gopal Sri Ram JCA referred to the marginal note to s 17 of Act A909, which states that that section is a saving provision.

4. Punctuation

Long before Lord Lowry in *Hanlon* v *The Law Society* [1981] AC 124, 198 expressed the view that English courts should look at punctuation in construing legislation, Wood J in the Straits Settlements case of *Palaniapah Chetty* v *Lim Poh* [1882] 1 Ky 548 stated that punctuation and capital letters are material to the meaning of statutory terms. The same view was even more forcefully expressed by Abdoolcader SCJ in *Dato Mohamed Hashim Shamsuddin* v *Attorney General, Hong Kong* [1986] 2 MLJ 112, 122.

5. Illustrations

Occasionally, a statute gives examples to illustrate the working of its provisions. The Privy Council in *Mohamed Syedol Ariffin* v *Yeoh Ooi Gark* [1916] 1 MC 165, an appeal from the Straits Settlements, stated that it is the duty of a court to accept, if that can be done, illustrations appended to sections as relevant in the interpretation of the text; and that it would require a very special case to justify their rejection on the ground of their assumed inconsistency

to the sections themselves. Further light on the use of illustrations as an aid to interpretation was shed by Pretheroe Ag CJ of the Court of Appeal, Penang in *Hassan bin Isahak* v *Public Prosecutor* (1948–9) MLJ Supp 179, 180, when he said that an illustration merely explains the section; it does not qualify the plain and unambiguous meaning of the section itself.

4.5.2.5 External Aids

These are materials outside the statute. The problem long posed by external materials is to which of such materials are the courts to refer to. Some external materials are unproblematic: they can be used as aids, eg:

Materials outside the statute used as aids in interpretation

- dictionaries;
- interpretation statutes;
- previous and subsequent statutes on the same subject-matter;
- judicial decisions interpreting statutes in *pari materia* (word for word the same).

Other external materials, ie pre-parliamentary materials (for example, Reports of Commissions and Committees) and *Hansard* (verbatim report of parliamentary proceedings) are more controversial. Historically, English courts have taken a restrictive approach, and refused to inquire into the social and political history of a statute. This restrictive approach has been gradually relaxed, to the extent that courts would refer to pre-parliamentary materials to discover the mischief which the statute is intended to remedy. The same position existed in Malaysia, as can be seen in *Raja Shariman* v *Ribiero & Co Ltd* [1921] 1 MC 57.

Until recently, however, *Hansard* remained a closed book. A relaxation of the prohibition on its use came with the House of Lords' landmark decision in *Pepper* v *Hart* [1993] 1 All ER 42. Their Lordships, in a majority decision, allowed reference to *Hansard* in interpreting the words of a statute, but only if:

Limited use of Parliamentary records as aids in interpretation

- the legislation is ambiguous or obscure or the literal meaning leads to an absurdity;
- the material relied on consists of one or more statements made by a Minister or other promoter of the Bill which led to the enactment of the legislation, together, if necessary, with any other Parliamentary material necessary to understand such statements; and
- the statements relied upon are clear.

The decision in *Pepper* v *Hart* was adopted in Malaysia in *Chor Phaik Har* v *Farlim Properties Sdn Bhd* [1994] 3 MLJ 345.

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Questions

Legislative Process

Assess critically the legislative process in Malaysia. Consider, in particular, the following issues:

1. Parliament as a democratic law-making body:

   The composition of the Dewan Negara; the role and powers of that Dewan, and the role and powers of the Yang di-Pertuan Agong, in particular, his role before and after the Constitution (Amendment) Act 1994 (Act A885).

2. Generation of ideas for legislation:

   The influence of pressure groups, in particular non-governmental organizations, the opportunity for Private Members' Bills.

3. Research and consultation with experts and interested bodies:

   Are experts and interested bodies always consulted on important legislation?

   Are important Bills, for example, on Consumer Protection or the Commission on Human Rights, published in the media for feedback from the public?

4. Passage through Parliament:

   Is sufficient time given to Members of Parliament to study a Bill before it is introduced into Parliament, or, at the very least, before the Second Reading?

   How often has a Select Committee been appointed to scrutinize a Bill at the Committee Stage?

   In theory, the Parliamentary Stage of the legislative process is slow and cumbersome; is it in reality?

   How many days are located in each parliamentary session for the enactment of legislation?

   Are legislative sittings well attended by Members of Parliament?

   Are important Bills, for example, the Domestic Violence Bill and the Constitution (Amendment) Bill in 1994 (which became Act A885), hotly debated?

Statutory Interpretation

1. (a) When *Heydon's case* was decided, what was the primary source of law in England?

   (b) At that time, was it necessary for judges to look beyond the statute to discover the mischief in the common law that it was intended to remedy?

2. (a) Consider the relationship between the mischief rule and the purposive approach: when and why did the latter evolve?

   (b) What possible objection, on theoretical grounds, do some judges have to the purposive approach?

3. It is possible to predict which rule or approach a court is likely to follow in interpreting a particular statute?

Reading List

Basic Reading

Ahmad bin Abdullah, *The Malaysian Parliament (Practice and Procedure),* Kuala Lumpur: Dewan Bahasa dan Pustaka, 1969, Chapter 9.

Hashim Yeop A Sani, *How Our Laws are Made,* Kuala Lumpur: Dewan Bahasa dan Pustaka, 1974.

Holland, JA and Webb, JS, *Learning Legal Rules,* 6th edn, Oxford: Oxford University Press, 2006, Chapters 7 and 8.

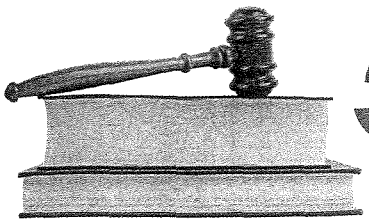
Ingman, Terence, *The English Legal Process*, 11th edn, Oxford: Oxford University Press, 2006, Chapter 6.

Supplementary Reading

Das, CV, 'Democracy and the Sultanate System in Malaysia: The Role of Monarchy', *JMCL*, 21 (1994): 97–116.

Lee, HP, *Constitutional Conflicts in Contemporary Malaysia*, Kuala Lumpur: Oxford University Press, 1995, Chapter 2.

_____, 'The Malaysian Constitutional Crisis: King, Rulers and the Royal Assent', in FA Trindade and HP Lee (eds), *The Constitution of Malaysia, Further Perspectives and Devēlopments*, Singapore: Oxford University Press, 1986, pp 237–61.



5 JUDICIAL DECISIONS

Chapter Objectives

- Define the doctrine of *stare decisis*
- Outline the operation of the doctrine in Malaysia
- Discuss the effect of decisions from other common law countries

5.1 DOCTRINE OF *STARE DECISIS*

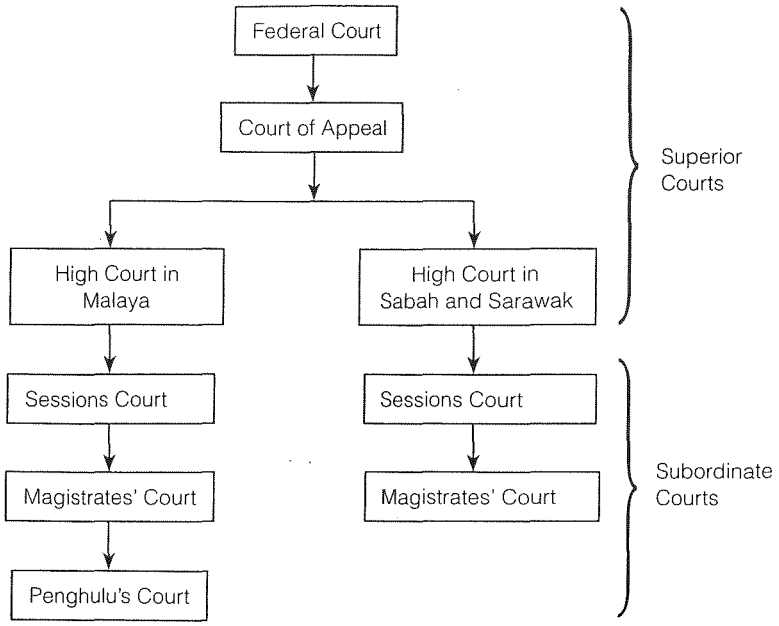
Malaysian case law is also a source of law

IN Malaysia, as in other common law countries, the law is to be found not only in legislation, but also in cases decided by the courts. The courts referred to in this context are the superior courts, ie in Malaysia, currently, the Federal Court, the Court of Appeal, and the two High Courts (see Figure 5.1). Only the decisions of superior courts are sources of law, as it is these courts that decide on matters of law, whereas inferior or subordinate courts generally decide on the matters of fact.

The term 'decision' above is used loosely. The decision in a case, strictly speaking, is the court's actual determination of the dispute between the parties, ie the decision *inter partes* contained in the words, for example, 'judgment for the plaintiff'. That decision is obviously important to the parties, but it binds them and only them; and for them, the determination by the court renders the matter *res judicata* (ie that decision has settled the dispute once and for all) and that dispute cannot be reopened and reargued in any subsequent legal proceedings if the decision has been appealed to the highest level, or the time for lodging an appeal has expired: see *Lye Thai Sang & Anor* v *Faber Merlin (M) Sdn Bhd* [1986] 1 MLJ 166.[1]

[1] Subsequent cases show that the Federal Court, as the apex court, has the jurisdiction and power to hear and review any matter brought before the court under r 137 of the Rules of the Federal Court 1995 only in rare and exceptional circumstances: see, in particular, *Chan Yoke Cher @ Chan Yoke Kher* v *Chan Teong Peng* [2005] 1 MLJ 101 and *Chu Tak Fai* v *Public Prosecutor* [2007] 1 MLJ 201.

Figure 5.1 Present Hierarchy of Courts in Malaysia



The source of law binding future courts in other cases with similar facts is the *ratio decidendi*

What is a source of law, binding future courts in other cases with similar facts, however, is not the decision *inter partes*, but the *ratio decidendi* (literally, the reason for deciding), ie the legal principle or principles underlying the decision. The *ratio* may or may not be explicitly stated by the court; more usually, it has to be extracted from the *obiter dictum* (which translates as a remark in passing). *Dicta* (plural) are remarks not strictly necessary to decide the actual issue, for example, hypothetical examples and remarks concerning broader principles of law which may not be directly in issue in the instant case.[2] *Dicta*, unlike *rationes* (plural), are not binding, but persuasive. *Dicta* of appellate, especially apex, courts may be highly persuasive and even become the *ratio* in subsequent cases.

The law derived solely from decisions of the courts is known as the 'common law', ie the term as used in contradistinction to statute law. The term 'case law' is wider. It includes decisions by the courts in interpreting statutes.

[2] In theory, *ratio* is distinct from *dictum;* but, in practice, it may be difficult to distinguish one from the other. See the differing judicial opinions on whether certain observations of Tun Salleh Abas LP in the Supreme Court case of *Inspector General of Police & Anor* v *Alan Noor bin Kamat* [1988] 1 MLJ 260, concerning the right to make a plea in mitigation on punishment in disciplinary proceedings, is *ratio* or *dictum:* Anwarul Yaqin and Nik Ahmad Kamal Nik Mahmood, 'The Public Servant's Right to Plead Mitigation in Disciplinary Proceedings: Some Reflections on the Recent Federal Court Judgment in *Utra Badi*', *MLJ* 4 (2001): xlix.

Many important areas of English law, for example, contract, criminal, land law, and the law of tort, have their origins in the common law. Indeed, the outstanding characteristic of English law is that it is largely 'judge-made',[3] ie the bulk of English law has not been enacted by Parliament, but developed by judges who, over centuries, applied existing rules of law to new situations as they arose. By thus extending existing rules, ie by following the example or precedent of earlier decisions, the judges have developed the common law, case by case, by way of analogy. Some of the earliest common law rules still survive, but many have been replaced or supplemented by statutes. Common law rules continue to be made today but, as a source of new law, they have been overtaken in importance by statutes.

The practice of following precedents in similar fact situations (to avoid waste of judicial effort and time rethinking solutions to similar problems previously settled, to avoid arbitrariness, and to promote certainty of the law) is a feature of all major legal systems. What is peculiar to the common law system is not its use of precedents but the special way in which precedents have been applied since about the mid-nineteenth century [ie after the reorganization of the English court system brought about by the Supreme Court of Judicature Acts of 1873–75 (36 and 37 Vict c 66) and the establishment of the Incorporated Council of Law Reporting in 1865, which ensured reliable and accurate law reports]. The strict application of precedents in the common law system is known as the doctrine of binding precedents or *stare decisis* (literally, to stand by what has been decided). This doctrine requires courts not only to follow precedents but, in specific circumstances (explained below), courts are bound to do so, whether or not the judge in the subsequent case agrees with the precedent in question.

Meaning of the doctrine of *stare decisis*

The doctrine of *stare decisis* means that in cases where the material facts are the same, a court must follow the prior decisions of a higher court, and (in the case of some courts) its own prior decisions and prior decisions of a court of the same level (ie of equal or coordinate jurisdiction) whether past or present, in the same hierarchy.

Two-way operation of the doctrine

The doctrine of *stare decisis*, therefore, has a two-way operation:

1. vertical (a court is bound by the prior decisions of a higher court); and

[3] It is not proposed to go into the question, debated at great length elsewhere, whether judges make law. Suffice it to say that today it is generally acknowledged that judges do make law, albeit not in the same sense and manner as the legislature does. The only question still debated today is the limits on judicial 'law-making'.

2. horizontal (some courts are bound by their own prior decisions and prior decisions of a court of the same level, whether past or present, if any).

Basic reason for following precedents

The basic rationale for the observance of precedent is that a court higher in the same hierarchy has laid down that principle as the applicable law. If a lower court chooses not to follow that principle, on appeal the higher court can correct, ie reverse, the lower court's decision [Barwick CJ in *Favelle Mort Ltd* v *Murray* [1975] 8 ALR 649, 658 and *Viro* v *R* [1978] 18 ALR 257, 260 (both decisions of the High Court of Australia)]. It is clear, therefore, why in practice, courts must and generally do follow the decisions of higher (and other relevant) courts in the same judicial hierarchy. Decisions of superior courts outside that hierarchy or jurisdiction are, of course, not binding though they may be followed out of judicial comity or respect for the standing of the court in question (see 'Decisions from other common law countries', p 111).

5.2 OPERATION OF THE DOCTRINE IN MALAYSIA

Doctrine applies in Malaysia

The doctrine of *stare decisis*, being a fundamental doctrine in the common law system, applies in Malaysia. From time to time, Malaysian judges affirm this:

- Chang Min Tat FJ in *Public Prosecutor* v *Datuk Tan Cheng Swee & Anor* [1980] 2 MLJ 276, 277:

> It is however necessary to reaffirm the doctrine of *stare decisis* which the Federal Court accepts unreservedly and which it expects the High Court and other inferior courts in a common law system such as ours, to follow similarly.... Clearly the principle of *stare decisis* requires more than lip-service.

- Gopal Sri Ram JCA in the Federal Court decision in *Kumpulan Perangsang Selangor Bhd* v *Zaid bin Haji Mohd Noh* [1977] 1 MLJ 789, 804:

> ... it is useful to remind ourselves of the basic philosophy of our common law. That philosophy is housed in the expression 'certainty through precedent'. Its main object is to enable members of the public to organize their affairs in accordance with law and for legal advisers to advise their clients with fair accuracy about the state of law in order to avoid wasteful and unnecessary litigation. A rule by which one Division of this Court is not to be bound by the decisions of another Division will therefore undermine the very foundations upon which our common law rests and cannot therefore be countenanced.

- Edgar Joseph Jr FCJ, in *Co-operative Central Bank Ltd* v *Feyen Development Sdn Bhd* [1977] 2 MLJ 829, 835 (*'Feyen No 2'*), acknowledged the doctrine as 'a cornerstone of our system of jurisprudence' before ruling that in accordance with that doctrine, it is not open to the Court of Appeal to disregard

a judgment of the Federal Court on the ground that it was given *per incuriam*.

That the doctrine of *stare decisis* applies in Malaysia is clear. Equally clear is that the Malaysian practice of the doctrine is based on the English practice. The Malaysian practice is, however, not exactly the same as the English practice. It is much more complex. This is primarily because the judicial hierarchy in Malaysia has undergone several reorganizations pursuant to the numerous political and constitutional changes. For example, focusing just on recent history, at the time of independence in 1957, there existed a three-tier structure of the superior courts with the Privy Council at the apex. With the final abolition of appeals to the Privy Council at the end of 1984, the three-tier structure was reduced to two tiers, ie the two High Courts and the Supreme Court, which became the final court of appeal. In the most recent reorganization in 1994, the three-tier structure was reinstated, with the Court of Appeal standing between the two High Courts and the apex court, renamed the Federal Court.

Practice of the doctrine in Malaysia, though based on English practice, is very complex

Each reorganization leaves unclear whether a newly created or renamed court is a new court and starts with a clean slate or is, in fact, a successor court and, as such, inherits the practice of the court it superseded. The successive apex courts themselves have neither enunciated a criterion for determining their immediate or distant predecessors nor the theoretical basis for holding that the decision of a predecessor court is binding. Moreover, after each reorganization, the apex court as a collegiate body has not declared its policy on *stare decisis*, something along the lines of the Practice Statement (Judicial Precedent) [1966] 1 WLR 1234 of the House of Lords in England. In Singapore, the Court of Appeal (the apex court) came out with a Practice Statement on 11 July 1994, making clear its policy on *stare decisis*, thereby largely overcoming the problems now faced by the Federal Court in Malaysia.[4]

5.2.1 Vertical Operation

The vertical operation of the doctrine is, in theory, straightforward. A court is bound by the prior decisions of all courts higher than itself in the same hierarchy. A look at the hierarchy of courts of any common law country will immediately make obvious the precedents of which court bind the other courts.

A court is bound by the prior decisions of courts higher than itself in the same hierarchy

Figure 5.1 sets out the present judicial hierarchy in Malaysia. Briefly, decisions of the Federal Court bind all courts. The Court of

[4] *Singapore Supreme Court, The Reorganisation of the 1990s*, Singapore: Supreme Court, 1994, p 91.

Appeal is bound by decisions of the Federal Court, and its decisions bind the two High Courts and the subordinate courts. The High Courts are bound by decisions of the Federal Court and the Court of Appeal, and their decisions bind the subordinate courts. Decisions of the subordinate courts are, of course, not binding.

Every court in the hierarchy must follow the prior decisions of courts higher than itself. It may not decline to follow the higher court's decision on the ground either that it is wrong or rendered obsolete by changing conditions or made *per incuriam* (literally, 'through want of care'; a decision is made *per incuriam* when it is given in ignorance or forgetfulness of a relevant legislative provision or binding precedent and that ignorance or forgetfulness led to faulty reasoning). In *Harris Solid State (M) Sdn Bhd & Ors* v *Bruno Gentil s/o Pereira* [1996] 3 MLJ 489, counsel for the appellants tried to argue before the Court of Appeal that the majority decision of the Federal Court in *Rama Chandran* v *The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 was wrong and ought not to be followed. The Court of Appeal at p 518 disagreed:

> ... This court is bound to follow and apply the law as stated by the majority in *Rama Chandran*, even if it suffers from any infirmity. It is a decision of the apex court and constitutes binding precedent.

In *Co-operative Central Bank Ltd* v *Feyen Development Sdn Bhd* [1997] 2 MLJ 829 ('*Feyen No 2*'), the question arose whether it was open to an intermediate court of appeal, such as the Court of Appeal in Malaysia, to disregard a judgment of a final court of appeal, such as the Federal Court, on the ground that it was given *per incuriam*. Edgar Joseph Jr FCJ, delivering the judgment of the Federal Court at pp 836–7, adopted in express terms the remarks of Lord Hailsham in *Cassell & Co Ltd* v *Broome & Anor* [1972] AC 1027, 1054, which expressed the reaction of the House of Lords to the Court of Appeal's refusal to follow the House of Lords' prior decision in *Rookes* v *Barnard & Ors* [1964] AC 1129:

> ... I am driven to the conclusion that when the Court of Appeal described the decision in *Rookes* v *Barnard* as decided *'per incuriam'* or 'unworkable' they really only meant that they did not agree with it. But, in my view, even if this were not so, it is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way and, if it were open to the Court of Appeal to do so, it would be highly undesirable.... Whatever the merits, chaos would have reigned until the dispute was settled, and, in legal matters, some degree of certainty is at least as valuable a part of justice as perfection.
>
> The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers ...
>
> ... every word of what Lord Hailsham said regarding the status of judgments and relevance of precedent in the House of Lords, the circumstances, and the duty of the Court of Appeal to accept loyally the decisions of the House of Lords, and the chaotic consequences which would follow should the Court of Appeal fail in

> this duty, apply with full force, *mutatis mutandis*, to this country and we adopt what he said ... and we can only express the hope that it will not be necessary for the Federal Court hereafter to have to remind the Court of Appeal of th[e] principles [enunciated by Lord Hailsham].[5]

While a court may not refuse to follow a decision of a higher court, it may choose between two conflicting decisions:

- in the case of two conflicting decisions of the Court of Appeal, courts lower in the hierarchy may choose to follow either decision irrespective of whether it is the earlier or later decision (because the 'dates do not matter to [the] Court of Appeal itself').
- in the case of two conflicting decisions of the Federal Court, all courts below must choose to follow the later decision (because the later decision represents the existing state of the law and therefore, prevails over the earlier decision).

These principles were laid down by the Federal Court in the case of *Dalip Bhagwan Singh* v *Public Prosecutor* [1998] 1 MLJ 1, 13 and 14 respectively. That Federal Court decision qualified an earlier High Court decision in *Datuk Tan Leng Teck* v *Sarjana Sdn Bhd & Ors* [1997] 4 MLJ 329, 347, which stated that where there are two conflicting decisions of a higher court and the later decision does not purport to overrule the earlier, a lower court may choose which to follow and in doing so, it may act on its own opinion as to which is the more convincing. In that case, the High Court was faced with two conflicting decisions of the Federal Court, ie *Ah Mee* v *Public Prosecutor* [1967] 1 MLJ 220 and *Public Prosecutor* v *Datuk Haji Harun bin Idris & Ors* [1977] 1 MLJ 180 (a High Court decision which was approved by the Federal Court [1978] 1 MLJ 240, 247). However, as the High Court in *Datuk Tan Leng Teck* chose to follow the later decision (the court regarded the earlier as not binding because it incorporated a proposition of law that was assumed to be correct without argument), its decision, in fact, was consistent with the second of the two principles subsequently laid down in *Dalip Bhagwan Singh*.

The vertical operation of *stare decisis*, relatively straightforward in most common law countries, is not so in Malaysia because of the following problems:

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[5] The remarks of Edgar Joseph Jr JCJ have deterred neither (1) the Court of Appeal from refusing to follow in *Tan Kim Hor & Ors* v *Tan Heng Chew & Ors* [2003] 1 MLJ 492 the 'real danger of bias' test for recusal of a judge formulated by the Federal Court in numerous cases, nor (2) Gopal Sri Ram JCA from declaring that the Court of Appeal is not bound by a Federal Court decision which in his view was either decided *per incuriam* or wrongly: *Subramaniam NS Dhurai* v *Sandrakasan Retnasamy & Ors* [2005] 3 CLJ 539; *Fawziah Holdings Sdn Bhd* v *Metramac Corporation Sdn Bhd* [2006] 1 CLJ 197; *Au Meng Nam & Anor* v *Ung Yak Chew & Ors* [2007] 4 CLJ 526 and *Abu Bakar bin Ismail & Anor* v *Ismail bin Husin & Ors and Other Appeals* [2007] 4 MLJ 89.

Reasons why vertical operation of the doctrine in Malaysia is not straightforward

- status of decisions of the Privy Council; and
- status of decisions of predecessor courts of the present Federal Court.

Each of these problems is discussed below.

5.2.1.1 Status of Decisions of the Privy Council

The Judicial Committee of the Privy Council (the Privy Council) originated from the ancient Curia Regis (King's council) and the political body which advises the English sovereign (the Cabinet). Today, the Privy Council serves mainly as the final court of appeal for several Commonwealth countries that still retain this option and for certain associated members of the Commonwealth. This role began when the British Empire expanded and it became necessary to provide for the determination of appeals from colonial possessions. In 1833, the British Parliament passed the Judicial Committee Act (3 & 4 Will 4, c 41) to reorganize the Judicial Committee of the Privy Council, which previously did not have a regular composition.

The Privy Council was the highest tribunal of appeal for Malaysia until 31 December 1984. It assumed that position from the establishment of the Straits Settlements and continued even after the independence of the Federation of Malaya, when Article 131(1) of the Federal Constitution empowered the Yang di-Pertuan Agong to make arrangements with the English sovereign for reference to the Privy Council of appeals from the Federal Court. In theory, the final right of appeal lay to the Yang di-Pertuan Agong, who referred the appeal to the Privy Council, whose advice would then be given effect to by the Yang di-Pertuan Agong.

When the Privy Council was at the apex of the Malaysian judicial hierarchy, its decisions were binding on Malaysian courts in two circumstances:

- where the decision was in a case on appeal from Malaysia; and
- where the decision was in a case on appeal from another common law country and the law in point was the same as in Malaysia.

When the Privy Council decided an appeal from Malaysia (or component units of what is now Malaysia), it was deciding as a Malaysian court, ie the apex court in the Malaysian judicial hierarchy. Its decision, therefore, bound all Malaysian courts. This can be seen in *Wong See Leng* v *Saraswathy Amal* (1954) 20 MLJ 141, where counsel for the respondent argued that the Court of Appeal of the Federation of Malaya was bound by its own prior decision

in *Yaacob bin Lebai Jusoh* v *Hamisah binti Saad* (1950) 16 MLJ 255. The Court Appeal rejected that submission because that prior decision was contrary to the Privy Council decision in *Haji Abdul Rahman & Anor* v *Mahomed Hassan* [1917] AC 209, in which case the Board categorically stated that English rules of equity do not apply to a system of registration of titles to land. Buhagiar J said at p 143:

> ... That judgment is binding and affects all jurisdiction in territories within the Commonwealth which have, as in Malay States, a system of registration of title modelled on the well-known Torrens System of Australia and from the Courts of which the Judicial Committee is the highest Court of Appeal....

When the Privy Council decided an appeal from another common law country or jurisdiction, it was deciding as the apex court of that country. Its decision was merely persuasive, not binding, on courts in Malaysia. However, it was laid down by the Federal Court in *Khalid Panjang & Ors* v *Public Prosecutor* (No 2) [1964] 30 MLJ 108 (and affirmed in *Director-General of Inland Revenue* v *Kulim Rubber Plantations Ltd* [1981] 1 MLJ 214) that a Privy Council decision in an appeal from another country was binding on courts in Malaysia, where the statutory provision in point was in *pari materia* (translated as word for word the same) with a statutory provision in Malaysia. These two cases specifically concerned statutory provisions in *pari materia,* but the same principle applies in cases where the law in point, including on common law issues, was the same as in Malaysia (*Fatuma binti Mohamed bin Salim Bakhshuwen* v *Mohamed bin Salim Bakhshuwen* [1952] AC 1 and *Wong See Leng* v *Saraswathy Amal,* see above).

Privy Council decisions, which were binding on Malaysian courts in the two circumstances stated above, in theory, continue to be binding on all Malaysian courts below the apex court after the abolition of appeals to it. This is because when the Privy Council delivered judgment in those circumstances, it was declaring the law as it applied in Malaysia. Its decisions, having become part of Malaysian jurisprudence and preserved on each change of Malaysia's constitutional status—eg Clause 135(1) of the Federation of Malaya Agreement 1948; s 2(1) of the Federation of Malaya Independence Act 1957; Article 162 of the Federal Constitution and s 73(1) of the Malaysia Act 1963—remain so until changed by the competent authority, ie the current apex court or Parliament.[6] Support for that proposition and guidance for Malaysian courts can be derived from the decision of the High Court of Australia (the apex

[6] Michael F Rutter, *The Applicable Law in Singapore and Malaysia*, Singapore: Malayan Law Journal, 1989, p 485.

court in that country) in *Viro* v *R* [1978] 18 ALR 257; [1978] 141 CLR 88 following the abolition of appeals from that court to the Privy Council. In that case, the High Court unanimously held that is was no longer bound by Privy Council decisions, whether given before or after the abolition of appeals to the Privy Council. Gibbs J observed at p 120:

> The modern English rule is usually said to be that 'every court is bound to follow any case decided by a court above it in the hierarchy'.... If this is the rule to be applied the result will be that *this court* is no longer bound by decisions of the Privy Council, which now does not occupy a position above this court in the judicial hierarchy.... Although the rules of precedent are not immutable, it seems to me that when Parliament made *this Court an ultimate court of appeal, with the responsibility of deciding finally and conclusively every question that it is called upon to consider*, it must have intended that we should discharge that responsibility for ourselves, and that we should have the power and duty to determine whether the decision of any other court, however eminent, should be followed in Australia. Part of the strength of the common law is its capacity to evolve gradually so as to meet the changing needs of society. *It is for this court to assess the needs of Australian society and to expound and develop the law for Australia* in the light of that assessment.... (Emphasis added.)

Two Malaysian judges have expressed analogous views, albeit *obiter*, in two cases decided by the Supreme Court. Seah SCJ, in *Inchcape Malaysia Holdings Bhd* v *RB Gray & Anor* [1985] 2 MLJ 297, said at p 315:

> This proposal of Lord Denning MR (to discard the distinction between an error which entails absence of jurisdiction and an error made within the jurisdiction) was rejected by the Privy Council in *South East Asia Fire Bricks* case....
>
> ... Having regard to the conclusion reached by *this Court*, in my opinion, it is not necessary to decide this important point here but *I desire to express that the Court as presently composed, is free to reconsider and if need be, to depart from it, where it arises at some future date.* (Brackets and emphasis added.)

In *Enesty Sdn Bhd* v *Transport Workers Union & Anor* [1986] 1 MLJ 18, Mohamed Azmi SCJ stated at pp 23–4:

> There remains a final point which we need refer to and this concerns the view expressed by the learned Judge in his judgment to the effect that the High Court could interfere with the award of the Industrial Court only if the tribunal had committed error of jurisdiction as distinct from error of law.... We assume this view of the learned Judge is based on the principle enunciated by the Privy Council in *South East Asia Fire Bricks Sdn Bhd* v *Non-Metallic Mineral Products Manufacturers Employees Union*....
>
> ... Perhaps the time will come for *this Court* to consider the view expressed by Lord Diplock in the House of Lords in *Re Racal Communications Ltd* and thereby open the way for acceptance of Lord Denning's suggestion in *Pearlman* v *Harrow School* in discarding the distinction between an error of law which affected jurisdiction and one which did not.... (Emphasis added.)

It was because the Supreme Court in *Inchcape Malaysia* and *Enesty* declined to overrule the Privy Council decision in *South East Asia Fire Bricks Sdn Bhd* v *Non-Metallic Mineral Products Manufacturers Employees Union & Ors* [1981] AC 363 (an appeal from Malaysia), that the newly created Court of Appeal took the

initiative. It did this in *Syarikat Kenderaan Melayu Kelantan Sdn Bhd* v *Transport Workers Union* [1995] 2 MLJ 317. Underlying the issue was whether Malaysia should follow developments in England and discard the distinction between errors of law not affecting jurisdiction (excluded from judicial review by ouster clauses) and errors of law affecting jurisdiction (not thus excluded). The Court of Appeal (Gopal Sri Ram, NH Chan and VC George JJA) declined to follow *South East Asia Fire Bricks* on the ground that that decision was controversial, being a misunderstanding of the law as laid down in England by the House of Lords in *Anisminic* v *Foreign Compensation Commission* [1969] 2 AC 147. Gopal Sri Ram JCA, in delivering the main judgment, said at p 342:

> In my opinion, the time that Mohamed Azmi SCJ spoke of in *Enesty* is now at hand. It would indeed be a misfortune if this court failed to seize the moment and act upon the inspiration offered by His Lordship in that case.
>
> ... the true principle may be stated as follows. An inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not....
>
> ... Since an inferior tribunal has no jurisdiction to make an error of law, its decision will not be immunized from judicial review by an ouster clause however widely drafted.

In departing from *South East Asia Fire Bricks,* the Court of Appeal went against the doctrine of *stare decisis*: the convention that it is the apex court which is competent to overrule a precedent set by the Privy Council. VC George JCA conceded as much on p 360:

> *Fire Bricks* was a Malaysian case, and the judgment of the Board is a binding precedent and, accordingly I was somewhat troubled by finding myself constrained to run foul of the holding the Privy Council had made in that judgment.

Nevertheless, being also of the view that the Privy Council had misread the effect of *Anisminic* and that, consequently, *Fire Bricks* was controversial, the learned judge concluded at p 361 that:

> It is now open to the *superior courts* in Malaysia to refuse to follow *Fire Bricks* if *they* chose to do so, without being guilty of judicial impertinence or indiscipline. (Emphasis added.)

Four months later, the Federal Court in *Hoh Kiang Ngan* v *Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 had the opportunity to examine the law as laid down in *Anisminic.* Gopal Sri Ram JCA, in delivering the judgment of the Federal Court, approved the decision of the Court of Appeal in *Syarikat Kenderaan Melayu Kelantan.* It is unfortunate the Federal Court did not seize that opportunity to consider the precedential status of decisions of the Privy Council previously binding on Malaysian courts, and the opinion expressed by VC George JCA that it is open to the superior courts in Malaysia to overrule such decisions.

In 1997, in *Kesultanan Pahang* v *Sathask Realty Sdn Bhd* [1997] 2 MLJ 701, on a preliminary issue concerning jurisdiction, the appellant submitted in the Court of Appeal that the law as laid down by the Privy Council in the *South East Asia Fire Bricks* is still binding on Malaysian courts. He added that at the most only the Federal Court, being the apex court, could disapprove that decision but not the Court of Appeal, as it did in *Syarikat Kenderaan Melayu Kelantan*. The appellant urged the Court of Appeal in the instant case to reject its earlier decision. Abdul Malek Ahmad JCA, the only judge who dealt with the jurisdiction issue in some depth, rejected the appellant's submissions on two grounds:

- as all the relevant English and Malaysian authorities had been considered and analysed in detail in *Syarikat Kenderaan Melayu Kelantan*, it could only be concluded that the law as stated in that case is correct; and
- in any case, 'we are bound by our own decision', quoting as authority a dictum by Gopal Sri Ram JCA in the Federal Court in *Kumpulan Perangsang Selangor Bhd* v *Zaid bin Haji Mohd Noh* [1997] 1 MLJ 789, 804 (see below, p 108).

Appeals to the Privy Council from Malaysia were abolished in two stages:

- in constitutional and criminal matters with effect from 1 January 1978;[7]
- in civil matters with effect from 1 January 1985.[8]

Decisions delivered by the Privy Council after 1 January 1985 (ie the final breakaway from the Privy Council) in appeals from Malaysia that were pending before that body on that date also bind Malaysian courts, in the same manner as do Privy Council decisions given before the abolition of appeals, until changed by the current apex court. This follows from the provisions of s 3 of the Courts of Judicature (Amendment) Act 1984 (Act A600). Section 3(1), in effect, saves any appeal which was pending before the Privy Council on 1 January 1985 despite the abolition of appeals to the Privy Council. The effect of the provisions of s 3 can be seen in *Manilal & Sons (M) Sdn Bhd & Ors* v *M Majumder* [1988] 2 MLJ 305, where the Supreme Court held that the Privy Council decision in *Manilal & Sons* v *Mahadevan* [1986] 1 MLJ 357, an appeal from Malaysia delivered on 10 February 1986, bound the High Court.

Privy Council decisions in appeals from other common law countries made after Malaysia's breakaway from the Privy Council

[7] Effected through the Courts of Judicature (Amendment) Act 1976 (Act A328).

[8] Effected through the Constitution (Amendment) Act 1983 (Act A566) and the Courts of Judicature (Amendment) Act 1984 (Act A600).

are not binding on Malaysian courts. Such decisions, of a body on longer in the Malaysian judicial hierarchy, are merely persuasive.

5.2.1.2 Status of Decisions of Predecessor Courts of the Present Federal Court

The predecessor courts of the present Federal Court have yet to be authoritatively determined (see below, p 104). It is necessary to identify these courts because their decisions have the same binding (or precedential) status as the decisions of the Federal Court itself.

Although there is no definitive test for determining the predecessor courts of the apex court, looking at recent history, the manner in which Parliament created each successive apex court (by the simple expedient of substituting the new name for the old wherever the old appears in legislation),[9] and judicial pronouncements,[10] it is possible to identify the immediate predecessors of the Federal Court as the Supreme Court (1985–94) and the former Federal Court (1963–85). It follows that decisions of these predecessor courts are binding and continue to be binding until overruled by the present Federal Court. This was acknowledged by the High Court in *Anchorage Mall Sdn Bhd* v *Irama Team (M) Sdn Bhd & Anor* [2001] 2 MLJ 520. The question in issue, arising from a preliminary objection, was whether a defendant, who has entered unconditional appearance, is precluded from making an application under O 18 r 19 of the Rules of the High Court (RHC) to strike out a writ and statement of claim filed by the plaintiff. A relevant authority was the Supreme Court decision in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors* v *Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241. Counsel for the defendant urged the court not to follow *Alor Janggus* on the ground, among others, that what was said in that case was not the ratio. Ahmad Maarop JC rejected counsel's submission, saying at p 529:

> To my mind, the answer to the submission advanced on behalf of the defendant in urging this court not to follow *Alor Janggus*, can be found in the statements made in the judgments in *PP* v *Datuk Tan Cheng Swee, Co-operative Central Bank Ltd* v *Feyen, Cassell & Co Ltd* v *Broome* and *Miliangos* v *George Frank Textiles*.... Indeed in the light of these authorities, I do not think it is open to me to disregard or refuse to follow the decision in *Alor Janggus* unless and until it is reversed [*sic*] by the Federal Court. In any case I am of the view that even if what was said by the Supreme Court in *Alor Janggus* on O 18 r 19 of the RHC was merely *obiter*, being

[9] See eg s 2 Constitutional (Amendment) Act 1994 (Act A885) and s 5(c) Courts of Judicature (Amendment) Act 1994 (Act A886).

[10] Peh Swee Chin FCJ, when delivering the judgment of the Federal Court in *Dalip Bhagwan Singh* v *Public Prosecutor* [1998] 1 MLJ 1, said at p 14: 'In Malaysia, the Federal Court and its forerunner, ie the Supreme Court ...'; and Abdoolcader SCJ, who in *Government of Malaysia & UEM* v *Lim Kit Siang* [1988] 2 MLJ 12 said at p 47: 'The Supreme Court is but the Federal Court reconstituted under a different name with enhanced jurisdiction'.

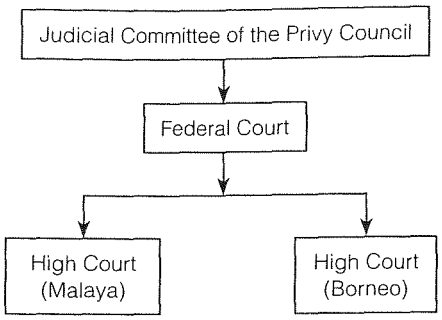
a judicial pronouncement emanating from the highest court in this country then, it deserves the utmost respect and should be followed as a guide as faithfully as possible.[11]

5.2.2 Horizontal Operation

Horizontal operation of the doctrine in Malaysia is more complex than its vertical operation

The horizontal operation of the doctrine of *stare decisis* in Malaysia is much more bewildering compared to its vertical operation. Three phases need to be looked at.

Figure 5.2 Hierarchy of the Superior Courts Pre-1985



5.2.2.1 Pre-1985

1. Privy Council

The Privy Council is not bound by its own decisions

The Privy Council, which stood at the apex of the Malaysian judicial hierarchy until 31 December 1984, has never considered itself bound by its own decisions (see, eg *Read & Ors* v *The Bishop of Lincoln* [1892] AC 644; *Attorney General of St Christopher, Nevis and Anguilla* v *Reynolds* [1979] 3 All ER 129, 140 per Lord Salmon). However, the Privy Council rarely departs from its own precedents.

2. Federal Court

The Federal Court was established on 16 September 1963 under the Malaysia Act 1963 (No 26 of 1963). It was the end product of a series of reorganizations of the judicial systems of three territories: Federation of Malaya, Singapore, and Borneo. Historically, eleven predecessor courts of the Federal Court may be counted.[12]

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[11] In *N Carrupaiya* v *MBf Property Services Sdn Bhd & Anor* [2000] 4 MLJ 389 (HC), however, Mohd Hishamudin J declined to follow the Supreme Court in *Alor Janggus* on the ground that what was said therein was *obiter dicta*.

[12] The Court of Appeal of the Federated Malay States; the Court of Appeal of the Straits Settlements; the Court of Appeal of Johor; the Court of Appeal of Kedah; the Court of Appeal of Terengganu; the Court of Appeal of the Raja in Council in Perlis; the Sultan's Court in Kelantan; the Court of Appeal of the Malayan Union; the Court of Appeal of the Federation of Malaya; the Court of Appeal of Sarawak, North Borneo, and Brunei; the Court of Appeal of Singapore. See Walter Woon, 'Precedents that Bind—A Gordian Knot: *Stare Decisis* in the Federal Court of Malaysia and the Court of Appeal, Singapore', *Mal LR* 24 (1982): 1, 5 note 26.

- Was the Federal Court bound by the precedents of all these courts?

Judicial guidance has been meagre. Such guidance as exists shows that the Federal Court regarded itself bound by the decisions of at least some of them. This can be seen in *China Insurance Co Ltd* v *Loong Moh Co Ltd* (1964) 30 MLJ 307, a decision of the Federal Court in an appeal from Singapore when Singapore was part of Malaysia. In that case, the issue was whether the appellants were entitled to a 'ship's paper order' under the English Rules of the Supreme Court. The Federal Court upheld a refusal of the appellants' application. Thompson LP, delivering oral judgment and without giving any reasons, said he was bound by *KE Mohamed Sultan Maricar* v *Prudential Assurance Co Ltd* [1941] MLJ 20, a decision of the Court of Appeal of the Straits Settlements. In *Re Lee Gee Chong (Deceased)*(1965) 31 MLJ 102, another decision of the Federal Court sitting in Singapore, Wee CJ agreed with counsel:

> ... that by virtue of s 88(3) of the Malaysia Act the Federal Court must be regarded as being one and the same as the former Singapore Court of Appeal and that the decision in the *Lee Siew Kow* [(1952) 18 MLJ 184] case is binding on this court ...[13]

Implicit in that decision is the view that s 88(3) of the Malaysia Act identifies the Federal Court's predecessors whose decisions bind the Federal Court, a view which has been criticized by several writers on the ground that s 88(3) of the Malaysia Act addressed the problem of the 'pending case' (ie by listing the most recent courts of appeal in each of the territories to be absorbed by Malaysia, and by equating these courts with the Federal Court, a pending case in any of these courts would become, after Malaysia Day, a pending case in the Federal Court), not the doctrine of *stare decisis*.[14] In *Yong Chin Lang* v *Tan Chong & Sons* [1968] 2 MLJ 8, 11, Ong Hock Thye FJ in a brief judgment that gave no reasons, explicitly stated that the Federal Court was bound by the decision of the Federation of Malaya Court of Appeal in *Oriental Bank of Malaya Ltd* v *Subramaniam* (1958) 24 MLJ 35.

While these decisions of the Federal Court indicate that it regarded itself bound by the decisions of some of the courts which

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[13] Section 88(3) of the Malaysian Act reads: 'Anything done before Malaysia Day in or in connection with or with a view to any proceedings in the Court of Appeal of the Federation, or of Sarawak, North Borneo and Brunei, or of Singapore, or the Court of Criminal Appeal in Singapore, shall on and after that day be of the like effect as if that Court were one and the same court with the Federal Court'.

[14] Max Friedman, 'Unscrambling the Judicial Egg: Some Observations on *Stare Decisis* in Singapore and Malaysia', *Mal LR* 22 (1980): 227; Woon, 'Precedents that Bind—A Gordian Knot'; and Andrew Phang, '*Stare Decisis* in Singapore and Malaysia: A Sad Tale of the Use and Abuse of Statutes', *Singapore Law Review* 4 (1983): 155.

historically were its predecessors, the High Court (Borneo), in *Public Prosecutor* v *Joseph Chin Saiko* [1972] 2 MLJ 129, expressed a view which, if pressed to its logical conclusion, could mean the Federal Court is bound by the decisions of all its predecessor courts. The issue in that case was the degree of negligence that had to be proved to sustain a conviction for causing death by negligence under s 304A of the Penal Code (a provision common to the Singapore, Malaya, and Borneo and Penal Codes).

Lee Hun Hoe J had to decide whether he was bound by *Cheow Keok* v *Public Prosecutor* (1940) 9 MLJ 103, a decision of the Federated Malay States Court of Appeal (which held s 304A was a codification of the English offence of manslaughter by negligence and, therefore, required the same high degree of negligence as required by the English offence to be proved) or by *Public Prosecutor* v *PG Mills* [1971] 1 MLJ 4, a decision of the Court of Appeal of Sarawak, North Borneo, and Brunei (which decided that s 304A did not require such a high degree of negligence to be proved), or by both decisions. The learned judge held he would be bound by both decisions. Faced with conflicting authorities, Lee Hun Hoe J chose to follow *Mills* in preference to *Cheow Keok*. The learned judge reached his decision by adopting the much criticized interpretation of s 88(3) of the Malaysia Act in *Re Lee Gee Chong* and applying the same rationale to the interpretation of s 14 of the Malayan Union Courts Ordinance 1946 (No 3 of 1946).[15] That interpretation combined with deductive reasoning in tracing the history of the Malaysian judicial hierarchy led the learned judge to conclude that the Federal Court was bound by the decisions of the Court of Appeal of the Federated Malay States, the Malayan Union, the Federation of Malaya and of Sarawak, North Borneo, and Brunei. The decision is *Saiko* was appealed to the Federal Court. Unfortunately, no written judgment was given.[16]

Six months after *Saiko*, the Federal Court reconsidered s 304A of the Penal Code in *Adnan bin Khamis* v *Public Prosecutor* [1972] 1 MLJ 274. The Federal Court, convened with a Full Bench of five judges, settled once and for all that s 304A did not codify the English law on manslaughter by negligence and 'overruled' *Cheow Keok*. Ong CJ, delivering the judgment of the court explained that the judgment in *Cheow Keok* 'must be regarded as *per incuriam*' because in that case the court was mistaken in suggesting that s 304A had not

[15] Section 14 Malayan Union Courts Ordinance 1946 reads: 'Subject to the provisions of this Ordinance the Court of Appeal of the Malayan Union shall be deemed to have taken the place of the courts set out in the Third Schedule to this Ordinance'.

[16] Editorial note [1973] 2 MLJ 177.

been interpreted either locally or in India (the learned judge cited two Indian decisions) and had furthermore wrongly interpreted s 304A. The judgment in *Adnan* raised a doubt: Did the Federal Court regard itself bound by the decisions of the Federated Malay States Court of Appeal, but did not follow its decision in *Cheow Keok* because that decision 'must be regarded as *per incuriam*', or did the Federal Court regard itself not bound by the decisions of the Federated Malay States Court of Appeal and thus free to overrule its decision in *Cheow Keok*?[17]

In *Adnan*, the Federal Court did not refer to either *Mills* or *Saiko*. Its failure to refer to the latter was all the more unfortunate because the Federal Court did not seize the opportunity to comment on the reasoning of Lee Hun Hoe J in determining the predecessor courts of the Federal Court.

- Was the Federal Court bound by its own precedents?

The practice of the Federal Court followed that of the Court of Appeal in England.

In civil cases, its practice was based on that of the English Court of Appeal (Civil Division). This is evident in *Central Securities (Holdings Bhd)* v *Haron bin Mohamed Zaid* [1980] 1 MLJ 304. At issue was the proper test to apply to decide when a judgment or order made by the Federal Court is final or interlocutory. In England, the courts differed as to the proper test. One test, called the *Salaman* test, considers the nature of the application in which the order is made. The other, known as the *Bozson* test, looks to whether the judgment or order finally disposes of the rights of the parties; if it does, it is a final judgment or order. Prior to the instant case, the Federal Court in two cases had adopted the *Bozson* test in preference to the *Salaman* test; wrongly, as it turned out, having regard to subsequent decisions of the Privy Council. Faced with that situation, the Federal Court had to make a final determination. It held at p 307:

> In the absence of any of the exceptions stated in *Young* v *Bristol Aeroplane Co Ltd* ([1944] 1 KB 718), we are bound to follow these two decisions. But even if we believe that they have been wrongly decided and not merely *per incuriam* ... we would heed the admonition given by the House of Lords in *Davis* v *Johnson* ([1978] 2 WLR 553) that in such a case we should follow our previous decisions and leave the matter to be corrected on appeal as being the most convenient and quickest way of having the law determined. (Brackets added.)

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[17] In the High Court [1971] 2 MLJ 231, Syed Agil Barakhbah J, at p 233, indorsed the rationale in *re Lee Gee Chong* in the interpretation of s 88(3) of the Malaysia Act 1963; on that basis, the learned judge expressed the view that *Mills* could be regarded as the equivalent of a decision of the Federal Court and, as such, binding on the Federal Court, but relegated to the Federal Court itself the determination as to whether *Cheow Keok* could be likewise regarded.

The practice of the Federal Court of following the rule in *Young* v *Bristol Aeroplane Co Ltd* can be traced back to the judgment of the Court of Appeal of the Malayan Union in *Hendry* v *De Cruz* (1949) 15 MLJ Supp 25.[18] In that case, the court was faced with the question whether it was bound by its previous decision in *Butter-Madden* v *Krishnasamy* (unreported). The court held at pp 27–8 that the answer to that question

> ... depends on whether the Court of Appeal in England is bound by its own decisions. This is evident from sub-section (ii) of s 16 of the Federated Malay States Courts Enactment, which reads:
>
> 'In any case not provided for by this Enactment or by rules in force thereunder the practice and procedure for the time being of the Court of Appeal in England shall be followed as nearly as may be'.
>
> The question whether the Court of Appeal in England should be bound to follow its own decisions remained in doubt until 1944 and was then settled by the case of *Young* v *Bristol Aeroplane Company Limited:*
>
> ... In the face of that clear decision, which has set a matter at rest on which there had been doubts for a long time, there is no doubt that this Court, in view of s 16(ii) of the Federated Malay States Courts Enactment, is bound by the previous decision of this Court in the case of *Butter-Madden* v *Krishnasamy & Others*....

In criminal cases, the Federal Court, like the English Court of Appeal (Criminal Division), did not regard itself strictly bound by its own precedents. In *Oie Hee Koi* v *Public Prosecutor* [1966] 2 MLJ 183, the Federal Court held that proof of the nationality of the appellant, who claimed the status of a prisoner of war when charged with consorting with Indonesian troops during Indonesia's 'confrontation' with Malaysia, rested with the prosecution. In doing so, the Federal Court dissented from its decision given only seventy-seven days earlier in *Lee Hoo Boon* v *Public Prosecutor* [1966] 2 MLJ 167. Ong Hock Thye FJ, delivering the judgment of the court, said at p 187:

> In arriving at this decision we are not unaware that it runs counter to the previous decision of this court. Nevertheless, we do so without qualms. As Sir Carleton Allen says at p 245 of Law in the Making (6th edn) 'the case of *Gideon Nkambule* v *R* makes it clear that in criminal matters at least, where life and liberty are at stake, the Privy Council will not hesitate to reject even a recent decision of its own, if it is satisfied that all relevant considerations and historical circumstances were not before the court in the earlier case'. We would not hesitate to follow the same principle.

In *Public Prosecutor* v *Ooi Khai Chin & Anor* [1979] 1 MLJ 112, the Federal Court, in holding that it had jurisdiction to hear an appeal from an acquittal by a jury, disagreed with its earlier

[18] Contrary to existing legal literature which attributes the judgment in *Hendry* v *De Cruz* to the Court of Appeal of the federation of Malaya, it is submitted that the forum was the Malayan Union Court of Appeal because the judgment was delivered on 2 December 1948 [(1949) 15 MLJ 62] whereas the Court of Appeal of the Federation of Malaya was established on 1 January 1949, the date of the coming into force of the Federation of Malaya Courts Ordinance 1948 (Ordinance No 43 of 1948).

decision in *Public Prosecutor* v *Tai Chai Geok* [1978] 1 MLJ 166. Suffian LP, in delivering judgment, said at p 113:

> Having carefully considered this matter, we have come to the conclusion that we were in error in *Public Prosecutor* v *Tai Chai Geok* when we held that this court had no jurisdiction to quash an acquittal following the verdict of not guilty by a jury.

3. High Courts

Under Article 121(1) of the Federal Constitution, there were (and still are) two High Courts of equal jurisdiction and status, ie the High Court of Malaya and the High Court of Borneo (renamed Sabah and Sarawak).

After initial uncertainty, the Federal Court in *Sundralingam* v *Ramanathan Chettiar* [1967] 2 MLJ 211 held that one High Court judge does not bind another High Court judge. The abovementioned case concerned the interpretation of s 27 of the Moneylenders Ordinance 1951 (No 42 of 1951). Counsel for the plaintiff, a moneylender, cited *Narayanan* v *Alagappa* (1956) 22 MLJ 23, a decision of the High Court (Storr J), as authority for asserting the validity of a promissory note despite non-attestation as required by that provision if the borrower understands the contents, though not the written language, of the note. At first instance, the magistrate regarded the decision of Storr J binding and gave judgment for the plaintiff. The magistrate's decision was affirmed on appeal by the High Court (MacIntyre J) who expressed the view that he was bound to follow the decision of Storr J, being a decision of a court of equal jurisdiction sitting on appeal. Commenting on this view, Azmi CJ (Malaya) in the Federal Court said at p 212:

> On this question my view is that, we may properly follow the practice in England where a High Court Judge, though he cannot overrule one of his brethren, could disprove his decision and decline to follow him. This to my own knowledge has been the practice in Malaya for several years now.

Ong Hock Thye FJ agreed with Azmi CJ, adding:

> ... 'individual judges are not bound by each other's decisions, although judicial courtesy naturally requires that they do not lightly dissent from the considered opinions of their brethren': see Law in the Making (6th edn) p 231. I do not think I can usefully add anything to what Sir Carleton Allen said, except to point out that, within the past decade and even the last lustrum, judges in Malaya have, on several occasions respectfully agreed to differ, as may be seen from the reports in *The Malayan Law Journal*.

It is not known whether MacIntyre J would have regarded himself bound by the decision of Storr J if the latter had exercised original, and not appellate, jurisdiction. Neither did the Federal Court differentiate between a High Court judge sitting at first instance and sitting on appeal. This is a point of note because in England there was (and still is) a distinction between the High Court

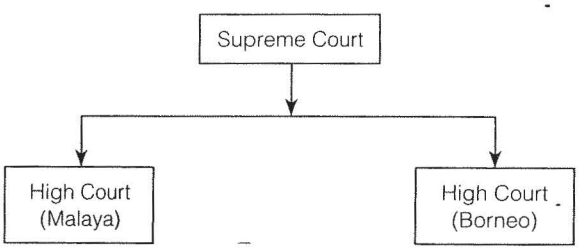
sitting at first instance (presided over by a single judge) and the Divisional Courts of the High Court.[19] A judge of the High Court sitting alone at first instance is not bound by a decision made by another. But such a judge is bound by a decision of the Divisional Court of the same division; and probably by decisions of the Divisional Courts of the other divisions. In criminal cases, the Divisional Court of the Queen's Bench Division may refuse to follow its own decision if convinced that that decision is wrong and following it would unjustly affect the appellant. But in civil cases, the Divisional Courts of the Chancery and Family Divisions are bound by their own decisions.

A High Court judge is not bound by a decision made by another High Court judge

In practice, Malaysian High Court judges have acted on the assumption that one High Court judge (whether exercising original or appellate jurisdiction) is not bound by a decision made by another (whether exercising original or appellate jurisdiction). For example, in *Ng Hoi Cheu & Anor* v *Public Prosecutor* [1968] 1 MLJ 53, Chang Min Tat J (exercising appellate jurisdiction) did not follow the decision of Smith J (also exercising appellate jurisdiction) in *Wong Heng Fatt* v *Public Prosecutor* (1959) 25 MLJ 20. Likewise, in *Joginder Singh* v *Public Prosecutor* [1984] 2 MLJ 133, the High Court (exercising appellate jurisdiction) held it was not bound to follow a decision of the High Court in an appeal presided over by three judges empanelled under s 306(3) of the Criminal Procedure Code (Straits Settlements) in *Hassan bin Isahak* v *Public Prosecutor* (1948–9) MLJ Supp 179.

The practice of the High Courts described above has continued unchanged till today. Therefore, no more will be said of the practice of the High Courts hereafter.

Figure 5.3 Hierarchy of the Superior Courts 1985–1994



[19] A Divisional Court comprises, usually, two or more judges of the Division to preside over appeals from the Country Courts in bankruptcy matters (Divisional Court of the Chancery Division) and from Magistrates' Courts in family law matters (Divisional Court of the Family Division) and criminal matters (Divisional Court of the Queen's Bench Division).

5.2.2.2 1985–1994

1. Supreme Court

With effect from 1 January 1985, the Federal Court was renamed the Supreme Court.[20] It became the court of appeal of last resort in Malaysia with the final abolition of appeals to the Privy Council. Since the structure of the superior courts was reduced from three tiers to two tiers, the following question arises:

- Was the Supreme Court the successor to, and as such, bound by the practice and precedents of, the Federal Court, a court it superseded?

The sole case in point is *Government of Malaysia & UEM* v *Lim Kit Siang* [1988] 2 MLJ 12, where the appellants appealed to the Supreme Court, among other matters, to set aside an interlocutory injunction that was earlier granted by the Supreme Court in an oral judgment delivered on 25 August 1987. These appeals revolved on the crucial issue of *locus standi* or legal standing to sue in public interest litigation. Two cases were applicable: *Lim Cho Hock* v *Government of the State of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh* [1980] 2 MLJ 148, a decision of the High Court which was approved by the Federal Court in *Tan Sri Haji Othman Saat* v *Mohamed bin Ismail* [1982] 2 MLJ 177. The Supreme Court, convened in a full bench of five judges, by a majority of 3 : 2 allowed the appeals. On the issue of *locus standi*, the majority decision departed from the Federal Court decision in *Tan Sri Haji Othman Saat* (although Salleh Abas LP purported to follow the approach to *locus standi* laid down therein). That decision indicates that the Supreme Court did not consider itself bound by decisions of the Federal Court. Abdul Hamid CJ (Malaya) implied as much when he stated at p 29:

> Clearly, the main hinge upon which the judgment of the learned [trial] judge rested as regards the *locus standi* point was the judgment of the Federal Court in *Tan Sri Haji Othman Saat* v *Mohamed bin Ismail*.
>
> Having regard especially to the very full arguments which have been addressed to the court and the obvious public importance of the case before the court, *I consider that the time is now ripe for us to restate our position on the law of standing in this country.* (Brackets and emphasis added.)

Abdoolcader SCJ, one of the minority judges, at p 47 refuted that view and expressed the opinion that the Supreme Court inherited the practice of the Federal Court:

> I must touch on one other matter in this regard. Tan Sri Abdul Hamid CJ (Malaya) in delivering his judgment says that perhaps the time has come to review the decision of the Federal Court in *Tan Sri Haji Othman Saat*, and that the Supreme

[20] Effected through the Constitution (Amendment) Act 1983 (Act A566), ss 15 and 16 and brought into effect on 1 January 1985 *vide* PU(B) 589, 27 December 1984.

> Court is not bound by decisions of the Federal Court. The Supreme Court is but the Federal Court reconstituted under a different name with enhanced jurisdiction, and until a policy in relation to judicial precedent has been agreed, formulated and declared by the judges of the Supreme Court as a collegiate body, as indeed the High Court of Australia has done in *Viro* v *Regina* [1978] 18 ALR-257; [1978] 141 CLR 88 and *Jones* v *The Commonwealth* [1987] 61 ALJR 348 after appeals to the Privy Council ceased, I would have thought that the principles enunciated in *Young* v *Bristol Aeroplane Company Ltd* [1944] 1 KB 718 (at p 169) would apply. As for *Tan Sri Haji Othman Saat,* speaking for myself I can see no reason for any review of that decision of the Federal Court, and the call so made would appear to be all the more surprising as there has been no such suggestion by the appellants....

- Was the Supreme Court bound by its own precedents?

In *Lorrain Esme Osman* v *Attorney General of Malaysia* [1986] 2 MLJ 288, Wan Suleiman SCJ, sitting alone and delivering a short judgment in an interlocutory application, held, on the basis of s 69(4) of the Courts of Judicature Act 1964 (Act 91), that the Supreme Court, when exercising its original jurisdiction under the Federal Constitution, was bound by its prior decision given when exercising its appellate jurisdiction (that prior decision being *Lye Thai Sang & Anor* v *Faber Merlin (M) Sdn Bhd* [1986] 1 MLJ 166, see above, p 81).

There is no clear answer to the question whether the Supreme Court, when exercising its appellate jurisdiction, was bound by its own precedents. *Dicta* in the *Lorrain* case suggest it was. Wan Suleiman SCJ at p 289 said:

> *Even if the Supreme Court were to accept the principle embodied in the Practice Statement (Judicial Precedent) of the House of Lords issued on July 26, 1966, and I am not saying that a similar practice statement is being considered to be made applicable here, ...*
>
> *... Nor would I hold that this Court is, as yet prepared to follow the House of Lords* which will nowadays, given the proper circumstances, depart from its own earlier decisions. (Emphasis added.)

The question was discussed, again *obiter*, in *Government of Malaysia & UEM* v *Lim Kit Siang* (see above, p 101), a complex case that brought forth an equally complex judgment basically because the principle of *res judicata* was so intertwined, and confused, with the principle of *stare decisis*.

On the issue of *locus standi*, the question arose whether the Supreme Court was bound by its oral judgment delivered earlier on 25 August 1987. Therein, a bench of three judges ruled that the respondent, Lim Kit Siang, 'clearly ha[d] *locus standi*' and granted the interlocutory injunction sought with 'liberty to apply to the court below'. The appellants' application to set aside the interlocutory injunction having been rejected by the High Court, the appellants appealed to the Supreme Court. Hence, in the instant appeals the Supreme Court faced the crucial issue of *locus standi,* for the second time.

The situation before the Supreme Court in the instant appeals concerned, it is submitted, the principle of *res judicata*, not *stare decisis*. The question of *locus standi* was raised on 25 August 1987 in an *ex parte* application for an interlocutory injunction that was, in fact, heard as an opposed *ex parte* application. That question, disposed of by the Supreme Court (albeit in a short oral judgment) after hearing submissions from all parties involved and after considering relevant English and local cases, was *res judicata*. The Supreme Court, following its own prior decision in *Lye Thai Sang* (see above, p 81), had no authority to review the 25 August decision given in the same case. Its order granting an interlocutory injunction, made under s 44(1) of the Courts of Judicature Act 1964, could only be discharged or varied in accordance with s 44(3) thereof, ie as Seah SCJ explained, in two circumstances:

1. a change of circumstances or new facts having come to light after 25 August 1987; and/or
2. suppression of material acts when the interlocutory injunction was applied for on 25 August 1987.

However, the majority judges in the instant appeals reviewed the 25 August decision on the grounds that it was only *obiter dicta*, provisional and not conclusive or definitive; and reversed that decision given in the same case, contrary to *Lye Thai Sang*.[21] Since the situation concerned the principle of *res judicata*, not *stare decisis*, the judicial opinions on whether the Supreme Court was bound by its own prior decisions were *obiter*. Abdul Hamid CJ (Malaya) at p 28, having referred to the opinion of the learned High Court judge that the Supreme Court judgment of 25 August 1987 was not open to him to review and that even the Supreme Court might not review its own judgments, commented, ironically:

> With respect, I would say that while the Supreme Court will not review its own decisions, it may, however, where necessary, depart from a previous decision, though it will not, of course, lightly do so.

Supporting the Chief Justice was Hashim Yeop Sani SCJ who, having observed at p 39 that the House of Lords, Indian Supreme Court, United States Supreme Court, and Privy Council are not bound by their own prior decisions, added:

> In this country too, the appellate court has been known to reverse [*sic*] its previous decisions as shown in *Public Prosecutor* v *Ooi Khai Chin & Anor* [1979] 1 MLJ 112 where the Federal Court reversed [*sic*] its previous decision in *Public Prosecutor* v *Tai Chai Geok* [1978] 1 MLJ 166 on the question of interpretation of jurisdiction.[22]

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[21] As Abdoolcader SCJ commented at p 46, it 'becomes a matter of speculation whether [*Lye Thai Sang*] itself has been the subject of review' as a result of the majority decision, and, it may be added, overruled!

[22] But question: Did the Federal Court depart from its own previous decisions in civil matters?

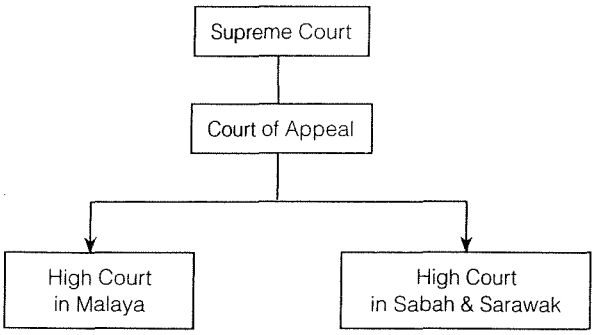
These opinions were counteracted by Abdoolcader SCJ at p 47 when in the passage quoted above (see pp 101–2), he stated that the Supreme Court was but the Federal Court reconstituted under a different name, and that until a policy in relation to judicial precedent had been declared by the judges of the Supreme Court as a collegiate body—as the High Court of Australia had done after appeals to the Privy Council ceased—the principles in *Young* v *Bristol Aeroplane Company Limited* [1944] 1 KB 718 would apply.

5.2.2.3 Post-1994

1. Federal Court

Section 2 of the Constitution (Amendment) Act 1994 (Act A885) and s 5(c) of the Courts of Judicature (Amendment) Act 1994 (Act A886) renamed the Supreme Court as the Federal Court. Further, s 17 of the Courts of Judicature (Amendment) Act 1995 (Act A909), enacted to rectify an omission in Act A886,[23] provided that any proceedings pending before the Supreme Court on 23 June 1994 shall continue in the Federal Court and for that purpose the Federal Court shall have and exercise all the powers of the Supreme Court before 24 June 1994. On the basis of that provision, decisions in appeals pending before the Supreme Court on 23 June 1994 delivered after that date are treated in this book as decisions of the present Federal Court (see *Dalip Bhagwan Singh* v *Public Prosecutor* [1998] 1 MLJ 11; *Malaysian National Insurance Sdn Bhd* v *Lim Tiok* [1997] 2 MLJ 165; and *Kumpulan Perangsang Selangor Bhd* v *Zaid bin Haji Mohd Noh* [1997] 1 MLJ 789).

Figure 5.4 Hierarchy of the Superior Courts Post-1994



Now that the three-tier structure of the superior court which existed before 1 January 1985 is reinstated, the following questions arise:

[23] See above, p 69.

- Is the Federal Court, the present apex court, the successor to the Supreme Court, a court it superseded?
- Is it bound by the practice and precedents of the Supreme Court?

On the basis of s 17 of Act A909 and on the assumption that the rationale of the former Federal Court in *Re Lee Gee Chong* [followed by the High Court (Borneo) in *Saiko*] (see above, pp 95–6) in interpreting s 88(3) of the Malaysia Act 1963 is correct, it is submitted that the present Federal Court is the successor of the Supreme Court and, as such, bound by the decisions of the latter.[24] Guidance derived from decisions of the present Federal Court, however, leaves one bemused because it shows practice that is the reverse of the norm.

In civil matters, the Federal Court does not regard itself bound by decisions of the Supreme Court. This can be seen in *Malaysian National Insurance Sdn Bhd* v *Lim Tiok* [1997] 2 MLJ 165. That case concerned the extent of liability of insurers against third party risks under a compulsory insurance policy in a direct action brought by a third party. The Supreme Court, in *Tan Chik bin Ibrahim* v *Safety Life and General Insurance Sdn Bhd* [1987] 1 MLJ 217, had decided that in a situation involving independent tortfeasors, insurers are liable only to the extent to which their insured is adjudged responsible for the accident. The issue in the instant case was whether the Supreme Court decision in *Tan Chik* should be reviewed to determine whether it was wrongly decided and if so, whether it should be overruled. The Federal Court, which convened with a full bench of five judges, adopted the criteria laid down by the House of Lords in *Food Corporation of India* v *Antclizo Shipping Corporation* [1988] 2 All ER 513. The two prerequisites [ie first, the House should not embark on such a review unless (1) they feel free, if necessary, to depart from the reasoning and the decision; and (2) they are satisfied that it would be of relevance to the resolution of the dispute in the case before them] having been satisfied in the instant case, the Federal Court reviewed *Tan Chik*, decided it was wrongly decided, and should not be followed. In effect, the Federal Court overruled a decision of the Supreme Court.

Conversely, in criminal matters, the Federal Court holds itself bound by decisions of the Supreme Court. In *Tan Boon Kean* v *Public Prosecutor* [1995] 3 MLJ 514, the Federal Court was faced

[24] In *Dalip Bhagwan Singh* v *Public Prosecutor* [1998] 1 MLJ 1, 14, Peh Swee Chin FCJ, in delivering the judgment of the Federal Court, referred to 'the Federal Court and its forerunner, ie the Supreme Court'. See also RR Sethu, 'Re-defining the Appellate Role of the Federal Court', *MLJ* 4 (1999): cxlv, cl.

with the issue of the standard of proof to be satisfied by the prosecution at the close of the prosecution's case in a non-jury trial under s 180 of the Criminal Procedure Code (Act 593). Earlier, the Supreme Court, in *Khoo Hi Chiang* v *Public Prosecutor and Another Appeal* [1994] 1 MLJ 265, had decided that the duty of the court at the close of the prosecution's case was to undertake a maximum evaluation of the evidence to determine whether or not the prosecution had established the charge against the accused beyond reasonable doubt. The Federal Court unanimously held itself bound by the Supreme Court decision. Mohd Azmi FCJ, delivering the judgment of the court, said:

> In the difficult task of interpreting s 180, we are of course strictly guided by the principle of *stare decisis* (p 520).
>
> ... We had to stress once again ... we need only refer to s 180, which is the provision we are directly concerned with. For the purpose of dispelling any doubt, we need to stress also that *we are bound by the ratio in Khoo Hi Chiang* that the duty of the Court, at the close of case for the prosecution, is to undertake a maximum evaluation of the evidence. What remains to be determined after *Khoo Hi Chiang* is whether the object of the maximum evaluation exercise is for the prosecution to establish a beyond reasonable doubt case or a *prima facie* case under s 180 (p 525).
>
> ... The first part of the sentence on the need for maximum evaluation of the evidence is clearly the *ratio* of the judgment, whilst the second limb which is founded on the purpose or object of the maximum evaluation has been incorporated as *obiter* on the basis of mere observation (p 534). (Emphasis added.)

Thus, although the Federal Court held itself bound by the Supreme Court decision it, in fact, departed from that decision by not following the second limb in the mistaken belief that it was *dicta*, and not part of the *ratio*. In the words of Edgar Joseph Jr FCJ, in delivering the main majority judgment in the subsequent case of *Arulpragasan a/l Sandaraju* v *Public Prosecutor* [1997] 1 MLJ 1:

> ... the Federal Court in *Tan Boon Kean* v *Public Prosecutor* [1995] 3 MLJ 514 *correctly recognized that it was bound by the ratio in Khoo Hi Chiang* since in the latter case the court comprised a panel of five judges who were unanimous.... Since the court in *Tan Boon Kean* had *quite correctly acknowledged that it was bound by the ratio* in Khoo Hi Chiang, *but went on, with respect, to misunderstand the ratio* in *Khoo Hi Chiang*, on this ground alone, *Tan Boon Kean* should not be followed on the point regarding standard of proof required from the prosecution at the end of its case in a non-jury trial (pp 55; 57–8). (Emphasis added.)

The words of Edgar Joseph Jr FCJ (as emphasized) clearly support the view expressed by Mohd Azmi FCJ in *Tan Boon Kean* that the present Federal Court is bound by the decisions of the Supreme Court.

- Is the Federal Court bound by its own precedents?

The present Federal Court is not bound by its own previous decisions. Its practice is as summarized by Peh Swee Chin FCJ in *Dalip Bhagwan Singh* v *Public Prosecutor* [1998] 1 MLJ 1, 14:

> In Malaysia, the Federal Court and its forerunner, ie the Supreme Court, after all appeals to the Privy Council were abolished has never refused to depart from its own decision when it appeared right to do so: see the above-mentioned Federal Court's cases on the question of burden of proof at the close of the prosecution's case.
>
> Though the Practice Statement (Judicial Precedent) 1966, of the House of Lords is not binding at all on us, it has indeed and in practice been followed, though such power to depart from its own previous decision has been exercised sparingly also. It is right that we in the Federal Court should have this power to do so but it is suggested that it should be used very sparingly on the important reason of the consequences of such overruling involved for it cannot be lost on the mind of anybody that a lot of people have regulated their affairs in reliance on a *ratio decidendi* before it is overruled. In certain circumstances, it would be far more prudent to call for legislative intervention. On the other hand, the power to so depart is indicated (subject to a concurrent consideration of the question of the consequences), when a former decision which is sought to be overruled is wrong, uncertain, unjust or outmoded or obsolete in the modern conditions.

Arulpragasan al/ Sandaraju v *Public Prosecutor* [1997] 1 MLJ 1 illustrates the departure of the Federal Court from its own previous decision on the issue of burden of proof at the close of the prosecution's case. As explained by Edgar Joseph Jr FCJ in delivering the main majority judgment, the Federal Court declined to follow its previous decision in *Tan Boon Kean* because the Federal Court in that case had misunderstood the *ratio* in the Supreme Court decision in *Khoo Hi Chiang* (see above).

The suggestion by Peh Swee Chin FCJ that the Federal Court should use its power to depart from its previous decisions sparingly was put to practice in *Tunde Apatira & Ors* v *Public Prosecutor* [2001] 1 MLJ 259. The Federal Court in that case rejected the prosecution's submission that a very recent decision of the Federal Court in *Muhammed bin Hassan* v *PP* [1998] 2 MLJ 273 was wrongly decided and ought not be followed. Speaking through Gopal Sri Ram JCA the Federal Court, at pp 263–4, gave the following reasons, among others:

> In the first place, *Muhammed bin Hassan* is a very recent decision of this court.
>
> It is bad policy for us as the apex court to leave the law in a state of uncertainty by departing from our recent decisions. Members of the public must be allowed to arrange their affairs so that they keep well within the framework of the law. They can hardly do this if the judiciary keeps changing its stance upon the same issue between brief intervals. The point assumes greater importance in the field of criminal law where a breach may result in the deprivation of life or liberty or in the imposition of other serious penalties. Of course, if a decision were plainly wrong, it would cause as much injustice if we were to leave it unreversed [*sic*] merely on the ground that it was recently decided. In a case as the present this court will normally follow the approach adopted by the apex courts of other Commonwealth jurisdiction as exemplified by such decisions as *R* v *Shivpuri* [1986] 2 All ER 334.

> The second reason is closely connected to the first. It also has to do with certainty in the law. The decision in *Muhammed bin Hassan* has been affirmed by our courts (see *Public Prosecutor* v *Ong Cheng Heong* [1998] 4 CLJ 209) and convictions have been quashed by this court acting on its strength. See, for example *Harvadi Dadeh* v *Public Prosecutor* [2000] 3 CLJ 553. If we accept the learned deputy's invitation to depart from *Muhammed bin Hassan*, it will throw the law into a state of uncertainty and cast doubt on the accuracy of the pronouncements made in those cases that have so recently applied the interpretation formulated in that case. It is bad policy for us to keep the law in such a state of flux especially upon a question of interpretation of a statutory provision that comes up so often for consideration before the courts....

In civil matters, the policy of the present Federal Court was initially hazy. Its policy was formulated in *Kumpulan Perangsang Selangor Bhd* v *Zaid bin Haji Mohd Noh* [1997] 1 MLJ 789. The counsel for the appellant in that case invited the Federal Court to depart from its majority decision in *Rama Chandran* v *The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 wherein the Federal Court held that in an application for certiorari to quash a decision of the Industrial Court, an appellate court upholding the application is not compelled to remit the case to the Industrial Court for retrial, but has the power to determine the consequential relief or appropriate remedy to be granted. The invitation by counsel was rejected by the Federal Court. Gopal Sri Ram JCA, in delivering the judgment of the Federal Court said at p 804:

> ... We must emphatically reject this invitation for two reasons.
>
> First, although *Rama Chandran* was decided by a majority, it is nevertheless a decision of this court. Contrary to any view that may be held in any quarter, *this court is bound by its own decisions, whether arrived at unanimously or by a majority.* And the correctness of the decisions of this court may not be called into question save and except before a larger bench of this court specially convened by or upon the direction of the Chief Justice. *It is therefore not open for one division of this court to reverse [sic] the decision of another division given in an earlier case.* If a contrary situation be permitted, then no decision of the apex court will be safe as precedent and uncertainty in the law will prevail. For like reasons, the Court of Appeal is bound by its own decisions. See *Hendry* v *De Cruz* [1949] MLJ (Supp.) 25. (Emphasis added.)

At first glance, these words point to the same stand on *stare decisis* as that taken by the former Federal Court in civil matters, ie the court is bound by its previous decisions. Deeper reflection, however, pricks doubts into that prima facie impression: can the Federal Court be bound by its previous decisions and simultaneously be free to depart from them when the circumstances warrant?

The judgment of the Federal Court in the later case of *Koperasi Rakyat Sdn Bhd* v *Harta Empat Sdn Bhd* [2000] 2 AMR 2311 had helped to dispel the haze and reveal the policy of the Federal Court in clearer light. In *Harta Empat*, the defendant cooperative society appealed to the Federal Court against a decision of the Court of Appeal to the effect that a charge created in contravention of

s 133 of the Companies Act 1965 (Act 125) was void and unenforceable.[25] The Court of Appeal reached that decision in disregard of the Federal Court decision in *Co-operative Central Bank Ltd* v *Feyen Development Sdn Bhd* [1995] 3 MLJ 313 ('*Feyen No 1*'). In the instant appeal, the plaintiff (a private housing development company) attempted to invite the Federal Court to review its previous decision in *Feyen No 1* and overrule it. The attempt was rejected. Gopal Sri Ram JCA, in delivering the judgment of the Federal Court, explained at pp 2321–2:

> First, I do not think, as a matter of policy, it is open to us to reverse [*sic*] a decision of another division of this court given so recently. Great care must be taken especially in a case as the present which concerns the interpretation of a statutory provision. It should not be done save in the most exceptional of cases. Otherwise it would lead to uncertainty. Men of business must be in a position to organize their affairs in such a fashion that they keep well within the framework of the law. And members of the legal profession must be able to advise their clients with some degree of certainty as to what the law is upon a particular subject matter. Certainty in the law is therefore one of the pillars upon which our justice system rests.
>
> But I am not to be taken as saying that we should never depart from an earlier decision of this court. Departure may be warranted in a case where it appears patently clear that the earlier decision was given in defiance of an express statutory provision that was overlooked by this court. Equally, where a serious error is embodied in a decision of this court that has distorted the law, in which case the sooner it is corrected the better. See *R* v *Shivpuri* [1986] 2 All ER 334. I hasten to add that that is not the position here....

In the light of the above judgment, it is submitted that the practice of the present Federal Court in civil matters is the same as in criminal matters, ie while treating previous decisions as normally binding, the Federal Court will depart from a previous decision when it appears right to do so—a stand in line with that of most apex courts.

The Federal Court is not bound by its own decisions

2. Court of Appeal

The Court of Appeal was established by the Constitution (Amendment) Act 1994 (Act A885). Section 13 added Clause (1B) to Article 121 of the Federal Constitution:

> There shall be a court which shall be known as the Mahkamah Rayuan (Court of Appeal) and shall have its principal registry at such place as the Yang di-Pertuan Agong may determine, and the Court of Appeal shall have the following jurisdiction, that is to say:
>
> (a) jurisdiction to determine appeals from decisions of a High Court or a judge thereof (except decisions of a High Court given by a registrar or other officer of the Court and appealable under federal law to a judge of the Court); and
>
> (b) such other jurisdiction as may be conferred by or under federal law.

Is the Court of Appeal a new court that starts with a clean slate? Or does it take the place of the former Federal Court in the

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[25] *Harta Empat Sdn Bhd* v *Koperasi Rakyat Sdn Bhd* [1997] 1 MLJ 381.

three-tier structure pre-1985, or of the Federation of Malaya Court of Appeal?[26] These questions are, as yet, unanswered.

Since 24 June 1994 the Court of Appeal became the apex court for personal injury and dependency claims arising from motor accident cases: ss 27 and 96(a) Courts of Judicature Act 1964 (Act 91) (Revised 1972), and s 65(1)(a) Subordinate Courts Act 1948 (Act 92).[27] In such cases, the Court of Appeal is the successor to the former Supreme Court. Standing on equal footing with the latter, the Court of Appeal has the authority to overrule its decisions.[28]

- Is the Court of Appeal bound by its own precedents?

In *Kesultanan Pahang* v *Sathask Realty Sdn Bhd* [1997] 2 MLJ 701 (see above, p 92), the Court of Appeal was urged by counsel for the appellant to reject its earlier decision in *Syarikat Kenderaan Melayu Kelantan Sdn Bhd* v *Transport Workers Union* [1995] 2 MLJ 317 which, in the counsel's opinion, had wrongfully refused to follow the Privy Council decision in *South East Asia Fire Bricks Sdn Bhd* v *Non-Metallic Mineral Products Manufacturers Employees Union & Ors* [1981] AC 363. Abdul Malek Ahmad JCA rejected that invitation on the grounds, among others, that 'we are bound by our own decision', quoting as authority the *dictum* by Gopal Sri Ram JCA in the Federal Court in *Kumpulan Perangsang Selangor Bhd* v *Zaid bin Haji Mohd Noh* (see above, p 108) wherein the learned judge, having stated that the Federal Court is bound by its own decisions, added: 'For like reasons, the Court of Appeal is bound by its own decisions. See *Hendry* v *De Cruz* [1949] MLJ Suppl 25'.

The Court of Appeal is bound by its own decisions

The stand of the Court of Appeal was reaffirmed in *Kwong Yik Bank Berhad* v *Ansonia Management Associates Sdn Bhd* [1999] 1 AMR 377. The appeal in that case raised an important point of practice and procedure. It revolved around the operation of O 49 r 6 of the Subordinate Courts Rules 1980 (SCR) and O 55 r 2 of the Rules of the High Court 1980 (RHC), which govern appeals against decisions of the subordinate courts in interlocutory proceedings to the High Court. The difficulty raised by these two rules was whether

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[26] Was this the implication intended by Gopal Sri Ram JCA in his *dictum* in *Kumpulan Perangsang* (see above, p 108) when he said: 'For like reasons, the Court of Appeal is bound by its own decisions. See *Hendry* v *De Cruz* [1949] MLJ Suppl 25, ie treating that case to be a decision of the Court of Appeal of the Federation of Malaya?'

[27] See, Harbans Singh, 'Is the Court of Appeal the Apex Court in Running Down Actions?', CLJ Supplement (2005) (Bonus Issue to CLJ Subscribers: 50).

[28] *Ibrahim bin Ismail & Anor* v *Hasnah bte Puteh Imat (as beneficiary and legal mother of Bakri bin Yahya and substituting Yahya bin Ibrahim) & Anor and Another Appeal* [2004] 1 MLJ 525; *Cheng Bee Teik & 2 Ors v Peter a/l Selvaraj & Anor* [2005] 4 AMR 13; *Noraini bte Omar (wife of the deceased, Ku Mansur bin Ku Baharom and mother of the deceased, Ku Amirul bin Ku Mansor) & Anor v Rohani bte Said and Another Appeal* [2006] 3 MLJ 150.

a memorandum of appeal must be filed by the appellant. The Court of Appeal was faced with two lines of conflicting authorities. One line of cases, led by the High Court decision in *Syarikat Kayu Bersatu Sdn Bhd & 2 Ors* v *UMW (Sarawak) Sendirian Berhad* [1995] 1 CLJ 113, required the grounds of judgment and notes of evidence to be filed (albeit later, once the appeal is registered, according to Mahadev Shankar JCA in *Yupaporn Seangarthit* v *Neal Allen Campbell Webb* [1996] 1 AMR 197). The Court of Appeal in *Kwong Yik Bank* disagreed. In its view, O 49 r 6 SCR was intended to provide a summary and speedy disposal of appeals against decisions of subordinate courts in interlocutory proceedings.

If the two rules in question were to be read as construed in *Syarikat Kayu Bersatu,* the effect would not only frustrate the purpose for which O 49 r 6 SCR was enacted, but would render an appeal from an interlocutory order no different from an appeal from a decision after trial, and produce unfairness or manifest injustice to an appellant appealing against the interlocutory order. Consequently, the Court of Appeal overruled the High Court decision in *Syarikat Kayu Bersatu* and the cases which followed it. In doing so, the Court of Appeal, speaking through Gopal Sri Ram JCA, justified its departure from a previous decision in *Yupaporn Seangarthit* in these words at p 383:

> We are, of course, conscious of the principle that this court is bound by its own decisions. See *Hendry* v *De Cruz* [1949] 15 MLJ 62. But we arrive at the same conclusion at which Augustine Paul J.C., arrived at in *Vong Ban Hin* (ibid) and in *Hong Kong Bank Berhad* v *Sereedevi* [1997] 3 MLJ 605, in that the views expressed by Mahadev Shankar J.C.A., in *Yupaporn Seangarthit* v *Webb (supra)* were in the course of considering an application for leave to appeal where, strictly speaking, reasons are unnecessary and are usually not delivered. It is trite law that a refusal of leave is not an affirmation of the judgment appealed against. Further, as pointed out by Mokhtar Sidin J.C.A., during argument before us this morning, those observations were purely *obiter dicta* and not *ratio decidendi* since they were not necessary for arriving at a decision in that case.

5.3 DECISIONS FROM OTHER COMMON LAW COUNTRIES

Decisions of courts outside the Malaysian judicial hierarchy are not binding. They are only persuasive.

Decisions of courts in other common law jurisdictions are only persuasive

This is true even of decisions of the courts in England from where Malaysia inherits its legal system. This is, however, subject to the express reception of English law under the specific provisions of ss 3(1), 5(1), and 5(2) of the Civil Law Act 1956 (Act 67) (Revised 1972). Subject to the cut-off dates and 'local circumstances' proviso, decisions of the House of Lords (the supreme arbiter of English

law) were and may, where applicable under continuing reception, continue to be binding. Apart from express reception under the Civil Law Act 1956 and (at least until the final abolition of appeals to the Privy Council) the re-enactment of English statutes in Malaysia in identical terms, decisions of the English courts, including those of the House of Lords, are only persuasive. This is clear from the decision of the Privy Council in *Jamil bin Harun* v *Yang Kamsiah & Anor* [1984] 1 MLJ 217, an appeal against the Federal Court decision to incorporate the principle of itemizing heads of damage in personal injury cases. That Federal Court decision followed the House of Lords decision in the English case of *Lim Poh Choo* v *Camden and Islington Area Health Authority* [1980] AC 174. Lord Scarman in delivering the judgment of the Board observed at p 219:

> Their Lordships do not doubt that it is for the courts of Malaysia to decide, subject always to the statute law of the Federation, whether to follow English case law. Modern English authorities may be persuasive, but are not binding.

The areas in which decisions of English courts are influential are:

- the basic common law principles of tort, contract, and the commercial laws; and
- the basic common law principles of evidence, criminal law, and procedure—areas in which Malaysia has enacted legislation based on Indian legislation which, in turn, is based on English principles. In these areas where the Malaysian legislation embodies common law principles, the decisions of English courts are helpful not only in understanding and applying the legislation, but also in filling in lacunae or gaps in the legislation.

Malaysia has enacted legislation modelled on those of other common law countries. For example, the Contracts Act 1950 (Act 136)(Revised 1974), the Penal Code (Act 574) (Revised 1997), and the Criminal Procedure Code (Act 593) (Revised 1999) are based on those of India, while the National Land Code 1965 (No 56 of 1965) is based on that of South Australia. The status of decisions of courts of these and other common law countries on points of law in *pari materia* with Malaysia law is summarized in the words of Chang Min Tat FJ in *Director-General of Inland Revenue* v *Kulim Rubber Plantations Ltd* [1981] 1 MLJ 214 wherein he referred to decisions of courts in Australia, England, and New Zealand:

> In so far as the decisions of other courts ... are concerned, we have always treated these judgments as of only persuasive authority, but we have never lightly treated them or refused to follow them, unless we can successfully distinguish them or hold them as *per incuriam*. Other than for these reasons, we should as a matter of judicial comity and for the orderly development of the law, pay due and proper attention to them.

Ques

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Questions

1. If the High Court is faced with conflicting precedents, ie a recent decision of the Court of Appeal and a decision of a predecessor court of the present Federal Court, which precedent does the doctrine of *stare decisis* compel the High Court to follow?
2. Assess the view of Abdul Hamid CJ (Malaya) in *Government of Malaysia & UEM* v *Lim Kit Siang* [1988] 2 MLJ 12 which implied that the Supreme Court had the power to depart from precedents of the former Federal Court, the court it superseded.

   Give reasons for and against that stand.
3. (a) Was the Supreme Court, when exercising appellate jurisdiction, bound by its own precedents?

   (b) Assess the views expressed by Abdul Hamid CJ (Malaya) and Hashim Yeop Sani SCJ in *Government of Malaysia & UEM* v *Lim Kit Siang* that the Supreme Court had the power to depart from its own precedents.

   Evaluate the reasons given by the latter for that stand.

   Examine all possible reasons for, and against, that stand.

   (c) Should a stand or policy regarding the doctrine of *stare decisis* be decided and laid down by individual judges in a judgment?
4. Examine the statement by Gopal Sri Ram JCA in *Kumpulan Perangsang Selangor Bhd* v *Zaid bin Haji Mohd Noh* [1997] 1 MLJ 789 that the present Federal Court is bound by its own precedents (at least, in civil cases) and that the correctness of the decisions of that court may not be reviewed except by a specially convened Full Bench.
   (a) Can an apex court be bound by its own precedents and, at the same time, be free to review those precedents—presumably, with the intention to overrule?
   (b) Why is the House of Lords able to review its own prior decisions?
   (c) Since 1966, in what circumstances and subject to what conditions has the House of Lords reviewed its own prior decisions?
5. With reference to the judgment of Peh Swee Chin FCJ in *Dalip Bhagwan Singh* v *Public Prosecutor* [1988] 1 MLJ 1, consider:
   (a) Whether the Federal Court (and its forerunners) could, properly, adopt or follow the House of Lords' Practice Statement (Judicial Precedent) 1966, a Practice Statement that was expressly stated as 'not intended to affect the use of precedent elsewhere than in this House' and regarded as such even in its country of origin.
   (b) If it is not appropriate for the Federal Court to adopt a Practice Statement peculiar to the House of Lords, and if, further, it is not appropriate for individual judges to lay down a policy regarding *stare decisis* in a judgment, what would be the logical step for the Federal Court to take?

Reading List

Basic Reading

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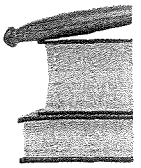

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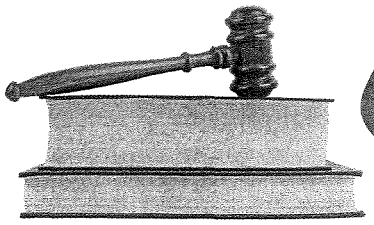

6 ENGLISH LAW

Chapter Objectives

- Define English law
- Outline the history of the reception of English law in Malaysia
- Discuss the application of English law today
- Examine the call for a Malaysian common law

6.1 DEFINITION OF ENGLISH LAW

The common law of England and the rules of equity are part of Malaysian law

ENGLISH law is part of Malaysian law. The definition of law in Article 160 of the Federal Constitution includes 'the common law in so far as it is in operation in the Federation or any part thereof'. That qualification concerns the extent to which English law is applicable in Malaysia. The answer is now to be found in the Civil Law Act 1956 (Act 67)(Revised 1972)(CLA 1956). Under s 3 of that Act, English law means 'the common law of England and the rules of equity' and, in prescribed circumstances, English statutes (see below, pp 129–39).

The common law is the body of rules developed by the old common law courts—Court of Exchequer, Court of Common Pleas, and Court of King's Bench—as distinct from the old Court of Chancery, all of which are now extinct. The common law is based essentially on customs common throughout England (hence the name 'common law') in contrast to local customs, which had applied in England before the Norman Conquest in 1066. The common law is the unwritten or unenacted law of England, the law based solely on decisions of the courts.

Equity, on the other hand, is the body of rules developed first by the Lord Chancellor (the king's right hand) and later, towards the end of the fifteenth century, by the old Court of Chancery. Equity, unlike the common law, is not a complete body of rules which can exist on its own. It came into being to supplement the common law, to correct its defects and mitigate its harshness. For a long time

the Lord Chancellors were trained as priests and acted as keepers of the King's conscience. When faced with petitions alleging injustice suffered at common law, the Lord Chancellors did not decide according to the accumulated body of judicial precedents (at least, not initially), but according to Christian precepts of fairness or their own conscience. Further, unlike common law, equity is a discretionary system of justice. An equitable remedy is not available as of right, it may not be granted if the plaintiff is considered morally undeserving. Among the major contributions of equity are the trust concept, and the equitable remedies of injunction and specific performance.

Common law and equity initially coexisted harmoniously. Eventually they became rivals. In the early 1600s, the rivalry deteriorated to such an extent (partly because of personal enmity between Lord Chancellor Ellesmere and the Chief Justice, Sir Edward Coke) that the king had to intervene. Upon advice by a conference of senior judges, the king decreed that if the common law and equity should conflict, the latter prevails. This is also the case in Malaysia, as s 3(2) CLA 1956 makes clear.

6.2 RECEPTION OF ENGLISH LAW IN MALAYSIA

The history of the reception of English law in Malaysia is also the story of the development of Malaysian law after the arrival of the British.

6.2.1 The Straits Settlements

The British period began with the occupation of Penang in 1786, followed by that of Singapore in 1819, and the acquisition of Melaka from the Dutch in 1824.

6.2.1.1 Penang

The common law principle of reception of English law

Penang was the first territory in the Malay Peninsula acquired by the British. How Penang became a British possession is not clear. Was Penang a ceded or settled territory? The answer to this question would determine the *lex loci* (the law of the territory). According to a general principle of the common law, if a newly acquired territory is *terra nullius* (territory not previously owned or occupied), discovered and settled by the British, English law—to the extent it is applicable—becomes the law of the territory on the date of settlement. On the other hand, if the territory, previously owned or occupied, is acquired by the British through cession or conquest,

the law previously existing continues to be in force until changed by the British.[1]

Penang was occupied on 12 August 1786 by a marine force led by Captain Francis Light. The occupation was made in the name of King George III, for the use of the English East India Company (EIC).[2] The occupation was based on an agreement between the Sultan of Kedah and the EIC. Although the agreement in terms conferred only a right to occupation, subject to certain conditions, it is generally accepted that that agreement and a subsequent agreement of 1 May 1791 (whereby the EIC undertook to pay the Sultan an annual sum so long as British possession continued) effected the cession of Penang from the Sultan of Kedah to the British. Such opinion is difficult to reconcile with the fact that at the material times, Kedah was not an independent state, but a vassal of Siam. Be that as it may, Penang is generally considered a ceded territory. But for the purpose of determining the *lex loci*, the judiciary regarded Penang as a settled territory.[3]

Francis Light reported that Penang was uninhabited when he landed. Judicial opinion backed his view.[4] Such belief conflicted with the contents of a note, dated 1795, found in an old register of survey.[5] That note mentioned a fairly large Malay kampong, about eighteen acres, on the south bank of the Penang river and that the land had been occupied for ninety years. Another small kampong further south was also mentioned. However, what law existed among the inhabitants was not known. For that reason, the Privy Council in *Ong Cheng Neo* v *Yeap Cheah Neo & Ors* in 1872 decided that:

> [i]t is really immaterial to consider whether Prince of Wales Island, or as it is called Penang, should be regarded as ceded or newly settled territory, for there is no trace of any laws having been established there before it was acquired by the East India Company. In either view the law of England must be taken to be the governing law so far as it is applicable to the circumstances of the place, and modified in its application by these circumstances.[6]

Legal chaos until 1807

The early records of Penang, however, showed that no official body of law existed for the first twenty-odd years of British occupation.[7] Rather, legal chaos reigned.

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[1] *Calvin's case* [1608] 77 ER 377; *Campbell* v *Hall* [1774] 98 ER 1045.

[2] An English corporate body which had quasi-sovereign powers over territories in its possession, but which it held in trust for the British Crown.

[3] *R* v *Willians* [1858] 3 Ky 16, 21–2; *Fatimah* v *Logan* [1871] 1 Ky 255, 262.

[4] Ibid.

[5] PP Buss-Tjen, 'Malay Law', *AJCL*, 7 (1958): 248, 254.

[6] [1872] 1 Ky 326, 343–4.

[7] JWN Kyshe, 'A Judicial History of the Straits Settlements, 1786–1890', *Mal LR*, 11 (1969): 38; *R* v *Willans* [1858] 3 Ky 16, 22–5.

The task of maintaining order was left to the Superintendent. He was assisted by a magistrate and second assistant. There was no separation of the judiciary from the executive. Light was the first Superintendent. Requests from Light and his successors for a more regular form of government and a proper system of administration of justice drew from the EIC and the Governor General in India only vague instructions in the form of letters in 1788 and 1800, respectively.[8] In 1794, just before his death, Light received some written regulations from Governor General Lord Teignmouth. These, supposedly the *lex loci* until the grant of the First Charter of Justice in 1807, were rarely acted upon. The 1800 instructions given to Sir George Leith, the first Lieutenant Governor, after Penang was upgraded from a Superintendency to a Residency, included a direction to establish a court, appeal from which lay, in the first instance, to the Lieutenant Governor and, thereafter, to the Governor General in India. The court was to apply 'the law of the different peoples and tribes of which the inhabitants consist, tempered by such parts of British [*sic*] law as are of universal application'.[9]

What is clear from these vague instructions is that English law was not the law to be administered, neither in criminal nor civil matters. Non-European offenders, other than murderers, were directed to be punished not in accordance with English law, but by imprisonment or other common (including some very unusual) forms of punishment. Murderers were tried by court martial. European offenders were left in total impunity, except murderers. These were sent to Calcutta or Fort William in Bengal, India for trial. Petty civil cases among local inhabitants were settled by headmen (*kapitan*) appointed by the Superintendent for each of the various communities. These headmen administered their respective laws and customs. Their decisions were subject to appeal to the magistrate, who also tried the more serious civil cases in the first instance. In the absence of any known body of law, the magistrate applied the principles of natural justice, ie his concept of what was just. In short, far from being the *lex loci*, English law was not even recognized as the personal law of the English inhabitants in Penang.

Grant of First Charter of Justice in 1807

Whatever the reality, the Privy Council decision in *Ong Cheng Neo* v *Yeap Cheah Neo & Ors* ended the long-standing controversy of whether Penang was ceded or settled. In any event, that question became academic in 1807 when the First Charter of Justice was

[8] Penang was administered as part of British India until the Straits Settlements were transferred to the Colonial Office in London in 1867.

[9] JN Matson, 'The Conflict of Legal Systems in the Federation of Malaya and Singapore', *ICLQ*, 6 (1957): 243, 244.

granted by King George III in the form of 'Letters Patent' to the EIC, presumably with knowledge of the chaotic state of affairs.[10]

The Charter established a Court of Judicature which was to exercise the jurisdiction of the superior courts in England 'as far as Circumstances will admit' and jurisdiction as an ecclesiastical court 'so far as the several Religions, Manners, and Customs of the inhabitants ... will admit'.[11] Although the Charter did not in express terms introduce English law, its provisions were interpreted by the judiciary as having introduced English law, as it stood in England on 25 March 1807, in Penang.[12] The Charter was also significant as constituting the first statutory introduction of English law into the Malay Peninsula.

1807 Charter judicially interpreted as having introduced English law into Penang

6.2.1.2 Singapore

Stamford Raffles, acting as an agent for the EIC, sailed into Singapore on 28 January 1819. Through a series of agreements with Temenggung Abdul Rahman—who nominally controlled Singapore—and Sultan Hussain Mahomed Shah of Johor, Raffles succeeded in acquiring for the EIC the right to establish a 'factory' (a trading agency). Raffles, then Lieutenant Governor in Benkulen, appointed his colleague, Major Farquhar, as the first Resident (EIC official in charge).

Singapore is generally regarded as having been ceded to the EIC by the Sultan and the Temenggung under the Treat of Friendship and Alliance 1824. Prior to such cession, which was effected in 1826 when that treaty was ratified by the British Parliament, the same question asked concerning Penang some thirty years earlier was raised: Was Singapore an uninhabited territory without government and laws and settled by the British? If so, English law applied as at the date of settlement. Unlike in the case of Penang, that question was never finally determined.[13]

When Raffles returned to Singapore for the last time in October 1822—after an absence of almost four years—he concluded at the beginning of June 1823 an agreement (the Memorandum) with the

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[10] *Letters Patent Establishing the Supreme Court of Judicature at Prince of Wales Island in the East Indies*, Prince of Wales's Island: Gazette Press, 1887.

[11] Ibid, p 16.

[12] *Kamoo* v *Basset* [1808] 1 Ky 1; *Rodyk* v *Williamson*: Unreported decision of 1834 but noticed in *In the Goods of Abdullah* [1835] 2 Ky Ecc 8, 9; *Moraiss & Ors* v *de Souza* [1838] 1 Ky 27; *R* v *Willans* [1858] 3 Ky 16; *Fatimah* v *Logan* [1871] 1 Ky 255.

[13] Whether the Privy Council decision in *Ong Cheng Neo* v *Yeap Cheah Neo* [1872] 1 Ky 326 applies equally to Singapore has been disputed: see Roland St John Braddell, *The Law of the Straits Settlements: A Commentary, Singapore:* Oxford University Press, 1982, p 23; and Mohan Gopal, 'English Law in Singapore: The Reception that never Was', *MLJ*, 1 (1983): xxv.

Sultan and the Temenggung which was intended to lay down general rules in the interests of Singapore and to define the rights of all parties.[14] That Memorandum, among other matters, provided that in all cases concerning religion, marriages, and inheritance, the 'laws and customs of the Malays', where not contrary to 'reason, justice or humanity', would be respected. In all other cases, English law would be enforced 'with due consideration to the usages and habits of the people'.

In the same year, just before his final departure from Singapore, Raffles appointed twelve magistrates who were to try minor civil and criminal cases under the general supervision of the Resident. Raffles also drew up a set of laws, based on English law, for the administration of justice. These were very general and left large powers of discretion to the magistrates. The Resident administered Malay and Chinese customary laws, but had no authority over Europeans. Legal chaos prevailed until the grant in 1826 of the Second Charter of Justice by King George IV to the Straits Settlements.

Legal chaos until 1826

6.2.1.3 Melaka

The British occupied Melaka peaceably in 1795, but had to return it to the Dutch in 1818. During that brief occupation, the British—knowing it was only temporary—did not give serious attention to the reorganization of the administration in Melaka.

It was only after Melaka was retroceded to the British under the 1824 Anglo-Dutch Treaty that the British planned to establish a regular administration of law. In 1826, when Melaka became part of the Straits Settlements, the Second Charter of Justice granted in that year introduced English law into Melaka and abrogated the Dutch law previously existing.[15]

6.2.1.4 The Straits Settlements after 1826

Formation of the Straits Settlements and the grant of the Second Charter of Justice in 1826

In 1826 Melaka, Penang, and Singapore were incorporated into the Straits Settlements. In the same year a new Charter—called the Second Charter of Justice—was granted by King George IV to the incorporated settlements. The new Charter repealed such parts of the First Charter which conferred jurisdiction upon the Court of Judicature in Penang. That court was replaced by a new Court

[14] William George Maxwell and William Summer Gibson (eds), *Treaties and Engagements Affecting the Malay States and Borneo*, London: Jas Truscott & Son Ltd, 1924, pp 121–2.

[15] *Rodyk* v *Williamson*: Unreported decision of 1834 but noticed in *In the Goods of Abdullah* [1835] 2 Ky Ecc 8; *Sahrip* v *Mitchell* (1877) Leic 466 at 469.

of Judicature for Penang, Melaka, and Singapore. Otherwise, the Second Charter was the same as the First Charter and its provisions were judicially interpreted as having introduced English law existing in England on 27 November 1826 into all three settlements.[16] That interpretation meant the Second Charter effected a second statutory reception of English law for Penang; for Melaka and Singapore, it was the first.

While it is generally agreed that the Charters of Justice introduced English law, there was, for sometime, controversy concerning the extent of English law received, and the modifications necessary, because of the various races, religions, and customs of the local inhabitants, and the theoretical basis for such modifications.

English law was not imported in its entirely under the Charters of Justice

The reception of English law under the Charters was not a reception of English law in its entirety. This was consistent with British colonial policy elsewhere, based on the recognition that not all the rules of English law would be suitable for application in the colonial territories. Sir Edward Stanley, the first Recorder (legally qualified magistrate) of Penang, in explaining the effect of the First Charter, expressed the view that it gave to the local inhabitants the free exercise of their religions, customs, usages, and habits. Sir Ralph Rice, the third Recorder of Penang, shared the same view. He thought the First Charter introduced English law only in criminal matters and that in civil matters, the local inhabitants were governed by their respective laws and customs. On the contrary, Sir Benjamin Malkin, in construing the Second Charter in *In the Goods of Abdullah*, held that the religions and customs of the local inhabitants were recognized as exceptions to the general application of English law—mainly in ecclesiastical jurisdiction—by the general principles of English law, not by the Charter.[17] The judicial view that prevailed might be summarized in the words of Maxwell CJ in *Choa Choon Neoh* v *Spottiswoode*:

> In this colony, so much of the law of England as was in existence when it was imported here, and as is of general [and not merely local] policy, and adapted to the condition and wants of the inhabitants, is the law of the land; and further, that law is subject, in its application to the various alien races established here, to such modifications as are necessary to prevent it from operating unjustly and oppressively on them.[18]

Modifications in the application of English law were made, from time to time. However, the precise theoretical or juristic basis for these modifications was uncertain. While custom was the basis

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[16] For example, *In the Goods of Abdullah* [1835] 2 Ky Ecc 8; *R* v *Willans* [1858] 3 Ky 16; *Choa Choon Neoh* v *Spottiswoode* [1869] 1 Ky 216; *Ismail bin Savoosah* v *Madinasah Merican* [1887] 4 Ky 311.

[17] [1835] 2 Ky Ecc 8, 11.

[18] [1869] 1 Ky 216, 221.

in *Sahrip* v *Mitchell and Endain* (1877) Leic 466, the early cases tended to base the modifications on the principles of conflict of laws or private international law. For example, in *Chulas & Anor* v *Kolson*, Maxwell R said:

> ... and where our law is wholly unsuited to the condition of the alien races living under it, their own laws or usages must be applied to them on the same principles and with the same limitations as foreign law is applied by our Courts to foreigners and foreign transactions. They must be regarded as persons with foreign domiciles and governed for many purposes by this law, and as if they resided among us temporarily.[19]

That reasoning, appropriate initially when the Asian inhabitants were transient aliens, was subsequently abandoned except where a truly foreign element existed. Later cases based the modifications not on any analogy with private international law, but on either the provisions of the Charters or *ex comitate* (the common law principle of comity which seeks to avoid injustice and hardship to the local inhabitants).[20]

Judges repeatedly proclaimed the policy of modifying the application of English law to prevent injustice and oppression, but analysis of the cases shows a general reluctance to accommodate local circumstances and the needs of the local inhabitants.[21] Religious and customary rules were recognized only if deemed not inconsistent with the common law or repugnant to prevailing judicial notions of justice and morality.

The administration of justice after the grant of the Second Charter remained unsatisfactory. There was only one Recorder who was assisted by lay justices. The former, based in Penang, seldom visited Melaka and Singapore, and the latter made many bad decisions. The rudimentary system was simply unable to cope with the increasing workload resulting from economic and social progress in the Straits Settlements, especially in Singapore. A Third Charter of Justice was granted in 1855 to remedy the deficiencies in the system.

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[19] (1867) Leic 462–4.

[20] For example, *Choo Ang Chee* v *Neo Chan Neo* (Six Widows' case) [1911] 12 SSLR 120; *Khoo Hooi Leong* v *Khoo Chong Yeok* (sub Nom Re Khoo Thean Tek's Settlements) [1903] AC 34 (PC); [1928] SSLR 178; *In re the estate of Jacob Menasseh Meyer Deceased* (1938) MLJ Rep. 190.

[21] *Moraiss & Ors* v *de Souza* [1838] 1 Ky 27; *Nonia Cheah Yew* v *Othmansaw Merican & Anor* [1861] 1 Ky 160; *Hawah* v *Daud* (1865) Leic 253; *Kader Mydin, Administrator of Hossan Sah* v *Shatomah* [1868] Wood's Oriental Cases 42; *Coomarapah Chetty* v *Kang Oon Lock* [1872] 1 Ky. 314; *Jemalah* v *Mahomet Ali & Ors* [1875] 1 Ky 386; *Khoo Tiang Bee et Uxor* v *Tan Beng Gwat* [1877] 1 Ky 413; *Pootoo* v *Valee Uta Taven* [1883] 1 Ky 622; *Tijah* v *Mat Alli* [1886] 4 Ky. 124; *Lee Joo Neo* v *Lee Eng Swee* [1887] 4 Ky 325; *In re Sinyak Rayoon* [1888] 4 Ky 331; *Karpen Tandil* v *Karpen* (1895) 3 SSLR 58; *Syed Ali bin Mohamed Alsagoff & Ors* v *Syed Omar Alsagoff* [1918] 15 SSLR 103; *Khoo Hooi Leong* v *Khoo Chong Yeok* [1930] AC 346; *Mong binte Haji Abdullah* v *Daing Mokkah bin Daing Palamai* (1935) 4 MLJ 147.

Grant of the Third Charter of Justice in 1855

The Third Charter raised the question of whether it reintroduced English law existing in England on 12 August 1855 into the Straits Settlements. This question appears never to have been resolved. General opinion agrees with Sir Benson Maxwell in *R* v *Willans* [1858] 3 Ky 16 that the Third Charter merely reorganized the court system.

The Third Charter repealed the Second Charter only to the extent necessary to reorganize the Court of Judicature. The court was split into two divisions: one for Penang, and the other for Melaka and Singapore, each with its own Recorder and Registrar. The court was thereafter reconstituted several times. After the Straits Settlements were transferred from the Indian government to the Colonial Office in London in 1867, Ordinance V was passed by the Legislative Council of the Straits Settlements in 1868. That Ordinance abolished the court and replaced it with the Supreme Court of the Straits Settlements. Lay justices ceased to sit. The new court comprised three divisions, one in each settlement. These divisions were reduced to two in 1873. Simultaneously, the Supreme Court was given, for the first time, appellate jurisdiction. The Court of Appeal sat as a Full Court of not fewer than three judges, and as a Divisional Court of two judges in each settlement. The Supreme Court was reconstituted in 1878. The divisions of the court were impliedly abolished by reducing the number of judges to three.

English law was introduced into the Straits Settlements not only through Charters of Justice, but also legislation. Such legislation comprised:

- English statutes enacted before 1 April 1867 (date of transfer of the Straits Settlements to the Colonial Office) and extending to India (and, as such, to the Straits Settlements as part of India) as well as those enacted after that date and extending to the Straits Settlement; and
- Indian statutes enacted before 1 April 1867 and extending to the Straits Settlements.

After the settlements were transferred to the Colonial Office, the Legislative Council of the Straits Settlements was formed. It was authorized to enact legislation for the settlements with effect from 4 February 1867. Examples of the legislation passed were the Evidence Ordinance 1893 (a re-enactment of the Indian Evidence Act 1872) and the Penal Code 1871 (modelled on the Indian Penal Code), which came into effect in 1872.[22]

[22] No 3 of 1893 and No 4 of 1871, respectively.

The Civil Law Ordinance 1878 (passed pursuant to the English Supreme Court of Judicature Acts 1873–5 which replaced the separate courts of common law and equity in England with a single hierarchy of courts administering both the common law and equity) empowered the Supreme Court of the Straits Settlements to administer common law and equity concurrently, and provided for the latter to prevail in the event of conflict.[23] The Ordinance also provided for a considerable body of English legislation to operate on a continuing basis in commercial matters.

6.2.2 Reception of English Law in the Malay States

The basic law in the Malay States before British intervention

The Malay states had a basic law before British intervention, ie Malay *adat* law modified by principles of the *Syariah*. The basic law is often described the other way round, as 'Moslem (or Mohamedan) law varied by local custom', an expression which reflects not only the importance which the Malays accorded to Islam, but also their efforts to 'Islamize' Malay *adat* law, a process which was arrested when the British came. As RJ Wilkinson said: 'There can be no doubt that Moslem law would have ended by becoming the law of Malaya had not British Law stepped in to check it'.[24]

Malay *adat* law applied to the Malays. The non-Malays were governed by their personal laws or, if they were British subjects, English law.[25] These laws continued to apply, subject to modifications made by specific legislation, until the formal reception of English law.

British intervention in the Malay states began in the second half of the nineteenth century. The Malay Rulers concluded treaties of various dates, but similar form, with the British whereby the Malay Rulers, in return for British protection against external attack, agreed to accept British advisers whose advice had to be sought and acted upon in all matters except those concerning Islam and Malay custom. Through the so-called Residential System, the British imposed indirect rule over the Malay states. Perak, Selangor, Negeri Sembilan, and Pahang formed the Federated Malay States (FMS) in 1895. The other five Malay states stayed out of the federation. They

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[23] No 4 of 1878.

[24] RJ Wilkinson, *Papers on Malay Subjects, First Series, Law Part 1*, Kuala Lumpur: The Government of the Federated Malay States Press, 1922, p 49.

[25] *Ong Cheng I Neo* v *Yap Kwan Seng* [1897] 1 SSLR Supp 1; *Shaik Abdul Latif & Ors* v *Shaik Elias Bux* [1915] 1 FMSLR 204, 214; *Yap Tham Tai* v *Low Hup Neo* [1919] 1 FMSLR 383; *Ramah binti Ta'at* v *Laton binti Malim Sutan* [1927] 6 FMSLR 128; *Patimah* v *Haji Ismail* [1939] MLJ Rep 108; *State of Johore* v *Salleh bin Haji Hassan* [1939] Johore Law Reports 73; *The Official Administrator, FMS* v *Magari Mohihiko & Ors and the State Pahang* [1940] FMSLR 170; *Re Timah binti Abdullah, Deceased* (1941) 10 MLJ 51; *Re Dato Bentara Luar, Deceased* [1982] 2 MLJ 264, 268–269; *Che Omar bin Che Soh* v *Public Prosecutor* [1988] 2 MLJ 55.

were collectively called the Unfederated Malay States (UMS). Compared to the FMS, the UMS enjoyed greater autonomy.

Unlike the Straits Settlements, the Malay states were neither *terra nullius* and newly settled by the British nor ceded to the British. They were British protected states whose rulers continued to reign—formally at least—although effective authority was exercised by British advisers or residents. The legal status of the Malay states and their rulers were discussed in a series of cases.[26] These, ignoring the legal status accorded analogous territories elsewhere, established that the Malay states were independent and the Malay Rulers were sovereign although the former were 'protected' and the latter had divested themselves of some, if not most, attributes of sovereignty.

As the Malay states were not British territories, English law could not be imposed through the common law principle of reception. The only way in which English law could be introduced was voluntarily, ie through legislation enacted by the Malay states themselves. The omnibus introduction of English law took place in the FMS only in 1937, through the Civil Law Enactment passed by the FMS Federal Council.[27]

Formal introduction of English law in FMS in 1937

Section 2(1) of the Civil Law Enactment 1937 provided as follows:

> Save in so far as other provision has been or may hereafter be made by any written law in force in the Federated Malay States, the common law in England and the rules of equity, as administered in England at the commencement of this Enactment, other than any modifications of such law or any such rules enacted by statute, shall be in force in the Federated Malay States: Provided always that the said common law and rules of equity shall be in force in the Federated Malay States so far only as the circumstances of the Federated Malay States and its inhabitants permit and subject to such qualifications as local circumstances render necessary.

Formal introduction of English law in UMS in 1951

The UMS received English law formally when the FMS enactment was extended to them by the Civil Law (Extension) Ordinance 1951.[28] Although English law was not received formally in the FMS until 1937 and in the UMS in 1951, it had been received long before those dates, informally and indirectly. As Edmonds JC said in *Shaik Abdul Latiff & Ors* v *Shaik Elias Bux*:

> The British treaties with the rulers of these States merely provided that the advice of the British administrators should be followed and in accordance with such advice Courts have been established by Enactment, British Judges appointed, and a British administration established....[29]

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[26] *Mighell* v *The Sultan of Johore* [1894] 1 QB 149; *Duff Development Company Ltd* v *Government of Kelantan & Anor* [1924] AC 797; *Pahang Consolidated Company Ltd* v *State of Pahang* [1933] 2 MLJ 247; *Anchom* v *Public Prosecutor* [1940] MLJ Rep 18; *Sultan of Johore* v *Tungku Abu Bakar & Ors* (1952) 18 MLJ 115.

[27] No 3 of 1937, which came into force on 19 March 1937.

[28] No 49 of 1951.

[29] [1915] 1 FMSLR 204, 214.

and Terrell Ag CJ said in *Yong Joo Lin & Ors* v *Fung Poi Fong*:

> Principles of English law have for many years been accepted in the Federated Malay States where no other provision has been made by Statute. Section 2(1) of the Civil Law Enactment, therefore, merely gave statutory reception to a practice which the courts had previously followed.[30]

Informal introduction of English law in FMS before 1937 and in UMS before 1951

English Law was introduced informally and indirectly through the Residential System in two ways:

- The enactment, on the advice of the British administrators, of a number of specific legislation modelled on Indian legislation which, in turn, was based on English law. For example, the Contracts (Malay States) Ordinance 1950 was modelled on the Indian Contracts Act 1872 and the Penal Code was copied from the Indian Penal Code 1860.[31]
- The decisions of the courts established by the British administrators. The higher ranks of the judiciary were mostly filled by English or English-trained judges who naturally turned to English law whenever they were unable to find any local law to apply to new situations (particularly of a commercial character) caused by the very fact of British influence. A great mass of rules of common law and equity were adopted either as such or because they were deemed to conform to the principles of natural justice.[32] At times, so exclusive was the reliance on English law that counsel, the Bench even, had to be reminded of the existence of local law.[33]

The development of English law in the Malay states was not uniform. British influence was greater in the FMS and in Johor (because of its location next to Singapore and modernization introduced by Sultan Abu Bakar, who ascended the throne in 1862). The other UMS received larger doses of English law—in omnibus volume, no less—when they were incorporated into the Federation of Malaya and its common system of federal courts.

6.2.3 Development of English Law in the Federation of Malaya

After the Federation of Malaya was formed on 1 February 1948, the Civil Law Enactment 1937 of the FMS was extended to the UMS by the Civil Law (Extension) Ordinance 1951.[34] Both stat-

[30] [1941] MLJ Rep 54, 55.
[31] No 14 of 1950 and FMS Cap. 45 respectively.
[32] For example, *Government of Perak* v *Adams* [1914] 2 FMSLR 144; *Kandasamy* v *Suppiah* [1919] 1 FMSLR 381; *Re the Will of Yap Kim Seng* [1924] 4 FMSLR 313; *Mohamed Ganny* v *Vadveng Kuti* (1933) 7 FMSLR 170; *Motor Emporium* v *Arumugam* (1933) 2 MLJ 276.
[33] *Haji Abdul Rahman & Anor* v *Mahomed Hassan* [1917] AC 209 (PC); *Leonard* v *Nachiappa Chetty* [1923] 4 FMSLR 265; *Bachan Singh* v *Mahinder Kaur & Ors* (1956) 22 MLJ 97.
[34] No 49 of 1951.

utes were later repealed and replaced by the Civil Law Ordinance 1956 (CLO 1956) which applied to the whole of the Federation of Malaya, including Melaka and Penang.[35]

Application of English law under the Civil Law Ordinance 1956

The CLO 1956 contained three sections relevant to the application of English law:

1. Section 3(1)

This authorized the general application of English law. It provided:

> Save in so far as other provision has been made or may hereafter be made by any written law in force in the Federation or any part thereof, the court shall apply the common law of England and the rules of equity as administered in England at the date of the coming into force of this Ordinance: Provided always that the said common law and rules of equity shall be applied so far only as the circumstances of the States comprised in the Federation and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

2. Section 5

This allowed the specific application of English law, ie in commercial matters. It provided that in such matters, the law to be administered was as follows:

(a) If the issue arose anywhere in the federation other than in Melaka and Penang, the law to be administered 'shall be the same as would be administered in England in the like case at the date of the coming into force of this Ordinance';

(b) If the issue arose in Melaka and Penang, the law to be administered 'shall be the same as would be administered in England in the like case at the corresponding period'; unless in either case other provision had been made or might have been made by any written law.

3. Section 6

This expressly excluded the application of English land law in the federation.

6.2.4 Reception of English Law in the Borneo States

North Borneo (now Sabah) and Sarawak became British protectorates in 1888. Both remained under private administration (North Borneo under the British North Borneo Company; Sarawak under the Brookes) until ceded to the British Crown in 1946, when they became Crown colonies.

As North Borneo and Sarawak were British protectorates from 1888 to 1946, their position concerning the reception of English law was analogous to that of the Malay states: English law could not be imposed through the common law principle of reception.

[35] No 5 of 1956, which came into force on 7 April 1956.

Formal introduction of English law

The formal reception of English law occurred earlier than in the Malay states. Sarawak preceded North Borneo with Order L-4 (Laws of Sarawak Ordinance) 1928, which introduced English law subject to modifications by the Rajah and, as was applicable, having regard to native customs and local conditions. North Borneo followed with the Civil Law Ordinance 1938.[36] Its provisions, though more elaborate, were substantially the same as those of the Sarawak Ordinance, the major difference being that the modifications to English law by local customary laws were explicitly limited: namely, only to the extent that such customary laws were not 'inhumane, unconscionable or contrary to public policy'.

As in the Malay states, the legislation in the Borneo states merely formalized the factual situation. Long before such legislation sanctioned the omnibus reception of English law, principles of English law and equity had been assimilated, informally and indirectly, through the same means as in the Malay states.

English law was received afresh and in larger measure in Sarawak and North Borneo in 1949 and 1951 respectively.[37] Section 2 of the Sarawak Application of Laws Ordinance 1949 and of the North Borneo Application of Law Ordinance 1951 provided for the reception of common law and doctrines of equity, together with statutes of general application, as administered in England at the commencement of the respective Ordinances. The Sarawak Ordinance had an additional section (s 3), importing specific English statutes listed in the schedule to the Ordinance. The reception of English law in both states was only to the extent permitted by local circumstances and customs and subject, further, to such qualifications as local circumstances and native customs rendered necessary. These provisions are reproduced in the CLA 1956.

6.3 APPLICATION OF ENGLISH LAW IN THE FEDERATION OF MALAYSIA

When Malaysia was formed in 1963 there were three separate statutes authorizing the application of English law:

- the CLO 1956 in Peninsular Malaysia;
- Application of Laws Ordinance 1951 in Sabah; and
- Application of Laws Ordinance 1949 in Sarawak.

[36] No 2 of 1938.

[37] Sarawak Application of Law Ordinance 1949 (No 27 of 1949) came into force on 12 December 1949; the North Borneo Application of Law Ordinance 1951 (No 27 of 1951) came into force on 1 December 1951.

After the formation of Malaysia, the CLO 1956 was extended to Sabah and Sarawak by the Civil Law Ordinance (Extension) Order 1971 with effect from 1 April 1972.[38] Today, it is the Civil Law Act 1956 (Act 67)(Revised 1972)(CLA 1956) incorporating all the three earlier statutes which is the statutory authority for the application of English law throughout the whole of Malaysia. The extent of the application of English law is prescribed in three sections:

The Civil Law Act 1956 is the current statutory authority for the application of English law in Malaysia

- Section 3;
- Section 5; and
- Section 6.

Each is discussed in turn below.

6.3.1. General Application of English Law

Section 3(1) provides for the general application of English law. It states:

General application of English law under s 3(1)

> Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall:
>
> (a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April, 1956;
>
> (b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 1st day of December, 1951;
>
> (c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 12th day of December, 1949, subject however to sub-section 3(ii):
>
> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

In short, s 3(1) provides that in the absence of written law, the courts in Malaysia shall apply the common law and rules of equity existing in England on:

- 7 April 1956, in West Malaysia;
- 1 December 1951, in Sabah; and
- 12 December 1949, in Sarawak.

Subsections (1)(b) and (1)(c) of s 3 import English statutes of general application into Sabah and Sarawak, respectively. The difference in wording between these subsections on the one hand and subsection (1)(a) on the other hand perpetuated a controversy which earlier arose from s 3(1) CLO 1956 (which was word for word the same as s 3(1)(a) CLA 1956). Are English statutes of

[38] PU (A) 424 of 1971.

general application applicable in West Malaysia? Two views, each as cogent as the other, exist. Professor Bartholomew, writing on s 3(1) CLO 1956, holds that such English statutes are applicable.[39] Joseph Chia, in discussing the corresponding provision in the CLA 1956, expresses a contrary opinion.[40] Judicial opinion supports the latter.

In 1959, the Court of Appeal in *Mokhtar* v *Arumugam*, on the question whether damages in the nature of interest for delay in returning specific goods could be awarded in Malaysia, held that such a remedy, being 'a creature of English statute, is not available here'.[41] That rationale was endorsed by the Supreme Court in 1985 in *Permodalan Plantation Sdn Bhd* v *Rachuta Sdn Bhd*, when it held that the defence of legal set-off, based on an English statute, did not apply in West Malaysia.[42] In 1996, the High Court took the same stand in *Jayakumari a/p Arul Pragasam* v *Suriya Narayanan a/l Ramanathan* on the issue (which arose before the Malaysian Domestic Violence Act 1994 came into force) of whether a Malaysian court has jurisdiction to grant an interim relief, based on an English statute. The learned judge, James Foong J, however, expressed the rationale in terms of 'the British Domestic Violence and Matrimonial Proceedings Act 1976 and the English authorities decided relating thereto *may not be binding* in our country' (emphasis added).[43] KC Vohrah J was more categorical in *Pushpah a/p MSS Rajoo* v *Malaysian Co-operative Insurance Society Ltd & Anor*, decided a year earlier. In that case, the plaintiff sought to invoke an English statutory provision to revoke a nomination by her deceased husband in his life insurance policy made before their marriage. The learned judge dismissed the application on the primary ground that s (3)(1)(a) CLA 1956 allows in West Malaysia the application of 'the common law of England and the rules of equity and not the additional item, "statutes of general application", (which is included for Sabah and Sarawak)'.[44]

Common law and rules of equity (and in Sabah and Sarawak, English statutes of general application) apply under s 3(1) subject to the following qualifications:

1. Absence of Local Legislation

This qualification is contained in the opening proviso. The same qualification exists in the opening proviso in s 3(1) CLO 1956 and

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[39] GW Bartholomew, *The Commercial Law of Malaysia: A Study in the Reception of English Law*, Singapore Malayan Law Journal, 1965, pp 26–32.

[40] Joseph Chia, 'Reception of English Law under Sections 3 and 5 of the Civil Law Act 1956 (Revised 1972)', *JMCL*, 1 (1974): 42.

[41] (1959) 25 MLJ 232, 233. See also *Ong Guan Hua* v *Chong* (1963) 29 MLJ 6.

[42] [1985] 1 MLJ 157.

[43] [1996] 4 MLJ 421, 426.

[44] [1995] 2 MLJ 657, 662.

s 2 Civil Law Enactment 1937—the antecedents of s 3(1) CLA 1956. The qualification is merely the statutory recognition of judicial practice of resorting to English law to fill lacunae (gaps) in the local law. As Terrell Ag CJ said in *Yong Joo Lin* v *Fung Poi Fong*:

> Principles of English law have for many years been accepted in the Federated Malay States *where no other provision has been made by statute*. Section 2(1) of the Civil Law Enactment therefore merely gave statutory recognition to a practice which the courts had previously followed. (Emphasis added.)[45]

The qualification is illustrated in *Attorney General, Malaysia* v *Manjeet Singh Dhillon* [1991] 1 MLJ 167. The Supreme Court held that in the absence of any specific local legislation concerning contempt of court, the common law of contempt as stated in *R* v *Gray* [1900] 2 QB 36 should be applied under s 3 CLA 1956. That decision was later followed by the Court of Appeal in *Murray Hiebert* v *Chandra Sri Ram* [1999] 4 AMR 4005, 4024.

The exclusion of English law by local legislation in the specific area of land matters is covered by s 6 (see below, p 136).

2. Cut-off Dates

Only common law and rules of equity (and in Sabah and Sarawak, English statutes of general application) existing in England on the dates specified:

- 7 April 1956 for West Malaysia;
- 1 December 1951 for Sabah; and
- 12 December 1949 for Sarawak

can be applied to fill the lacunae in local law. As the Privy Council put it in *Lee Kee Choong* v *Empat Nombor Ekor (NS) Sdn Bhd & Ors* (concerning whether a valuation on the fair price of shares could be questioned), their Lordships need not consider developments in English law after 1956 because under s 3(1) CLO 1956—which is the same word for word as s 3(1)(a) CLA 1956—'any subsequent march in English authority is not embodied'.[46]

Several cases illustrate this qualification. In *Leong Bee & Co* v *Ling Nam Rubber Works* [1970] 2 MLJ 45, the Privy Council held that a presumption—that a fire which began on a man's property arose from some act or default for which he was answerable—has no application in Malaysia because having been displaced by English statutes, the presumption was no longer part of the common law of England on 7 April 1956. That decision was followed by the High Court (Malaya) in *Lembaga Kemajuan Tanah Persekutuan* v *Tenaga Nasional Bhd* [1997] 2 MLJ 783.

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[45] [1941] MLJ Rep 54, 55.
[46] [1976] 2 MLJ 93, 95.

However, despite the clear and categorical wording of s 3(1) to the effect that Malaysian courts shall apply English law existing on the specified dates, in practice the courts may follow developments in English common law after such dates. English decisions made after such dates, though not binding, are persuasive. This was made clear by the Privy Council in *Jamil bin Harun* v *Yang Kamsiah & Anor* in 1984. In an appeal from Malaysia, the appellant argued that the Federal Court was wrong to follow the English case of *Lim Poh Choo* v *Camden & Islington Area Health Authority* [1980] AC 174, a decision of the House of Lords, in itemizing damages in a personal injury case. The Privy Council rejected the argument. Delivering the opinion of the Privy Council, Lord Scarman said:

> Their Lordships do not doubt that it is for the courts of Malaysia to decide, subject always to the statute law of the Federation, whether to follow English case law. Modern English authorities may be persuasive, but are not binding.[47]

That decision not only endorsed the judicial practice before *Lee Kee Choong* v *Empat Nombor Ekor (NS) Sdn Bhd & Ors*, but has left the door open to the continuing reception of principles of English common law and equity in Malaysia. The choice is left to the wisdom of the Malaysian judiciary.

That choice has been seized upon to develop the common law in Malaysia in line with developments in England, particularly in novel situations.[48] It has also heightened concern in academic and judicial circles about the development of a Malaysian common law (see below, p 139).

3. 'Local Circumstances'

English law is applicable only to the extent permitted by local circumstances and inhabitants, and subject to qualifications necessitated by local circumstances. This qualification, contained in the concluding proviso to s 3(1), is commonly referred to as the 'local circumstances' proviso.

That proviso recalls to mind the words used by the judiciary in the early days of British rule in the Straits Settlements. For example, Maxwell CJ in *Choa Choon Neoh* v *Spottiswoode*[49] said:

> In the colony, so much of the law of England as was in existence when it is imported here, and as is of general and not merely local policy, and adapted to the condition and wants of the inhabitants, is the law of the land; and further, that law is subject, in its application to the various alien races established here, to such modifications as are necessary to prevent it from operating unjustly and oppressively on them.

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[47] [1984] 1 MLJ 217, 219.

[48] See Cyrus Das, 'Recent Developments in the Common Law and their Reception in Malaysia', Paper presented at the Conference on the Common Law in Asia, University of Hong Kong, 15–17 December 1986.

[49] [1869] 1 Ky 216, 221.

The effect of the 'local circumstances' proviso in the application of English law can be seen in *Syarikat Batu Sinar* v *UMBC Finance* [1990] 2 CLJ 691, concerning the negligent failure of a finance company to indorse its claim to ownership of a tractor on the Vehicle Registration Card and whether such negligence forfeits its claim. The High Court (Malaya) noted that the English practice of indorsement of vehicle ownership claims by finance companies is different from that in Malaysia (and Brunei). Whereas the English practice is based purely on a voluntary arrangement, the Malaysian practice is based on statutory provisions. Invoking the proviso to s 3(1) CLA 1956, Peh Swee Chin J held the difference in law and practice in Malaysia constitutes 'such a distinctive local circumstance of the local inhabitants of West Malaysia' that English cases on the failure to register a vehicle ownership claim should not be followed. Instead, he followed a decision of the Brunei High Court. The learned judge added: 'We have to develop our own common law just like what Australia has been doing by directing our minds to the "local circumstances" or "local inhabitants".'[50]

6.3.2 Specific Application of English Law

Specific application of English law under s 5

Section 5 CLA 1956 provides for the application of English law in commercial matters.

Section 5 states:

> (1) In all questions or issues which arise or which have to be decided in the States of West Malaysia other than Malacca and Penang with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average life and fire insurance, and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case at the date of the coming into force of this Act, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.
>
> (2) In all questions or issues which arise or which have to be decided in the States of Malacca, Penang, Sabah and Sarawak with respect to the law concerning any of the matters referred to in subsection (1), the law to be administered shall be the same as would be administered in England in the like case at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.

The different terminology used in s 5 ('the law to be administered'), compared to that in s 3(1) (which specifies the relevant sources of English law), shows that s 5 introduces, where applicable, the whole of English law including statutes. There is, therefore, greater reception of English law in commercial matters.

The origin of s 5 is s 6(1) Civil Law Ordinance 1878 of the Straits Settlements.[51] Section 5(1)—apart from its extension to Sabah and

[50] [1990] 2 CLJ 619, 698.

[51] No 4 of 1878. See above, p 107.

Sarawak—is essentially the same as s 6(1) of the Straits Settlements Ordinance. The original rationale of the latter was to put the courts in the Straits Settlements on the same footing as the courts in England. That provision was intended to prevent the validity of the decisions of the Straits Settlements courts from being questioned on the ground that they followed English decisions based on English statutes that were not in force in the Straits Settlements. Putting the Straits Settlements courts at par with the courts in England provided the underlying framework of English statutes necessary to decide commercial disputes.[52]

The difference in wording between subsections (1) and (2) of s 5 means there is a difference in the extent to which English law is applicable in commercial matters in the former Malay states on the one hand, and Melaka, Penang, Sabah, and Sarawak on the other hand. Section 5(1) introduces into the former Malay states the law administered in England on 7 April 1956 whereas s 5(2) introduces the law existing in England on the same date that the issue has to be decided in Melaka, Penang, Sabah, or Sarawak.

Thus, theoretically, in commercial matters, there is a continuing reception of English law in these four states while in the other states the reception stops at the cut-off date. However, in practice, the difference does not exist. For example, even before the Privy Council decision in *Jamil bin Harun* v *Yang Kamsiah & Anor*, Malaysian courts, following developments in England, exercised jurisdiction to grant Mareva injunctions (enabling the court to freeze the assets of the defendant) and to issue 'Anton Piller' orders (requiring a defendant to permit a plaintiff or his representative to enter the defendant's premises to inspect or take away material evidence that the defendant might wish to remove or destroy in order to frustrate the plaintiff's claim; or to force a defendant to answer certain questions).[53]

The interpretation of s 5 has caused much academic debate.[54] There seem to be two conflicting approaches to its interpretation, arising from two Privy Council decisions, decided ten years apart. In *Seng Djit Hin* v *Nagurdas Purshotumdas & Co* [1923] AC 444, the action was for damages for failure to deliver goods, delivery

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[52] Soon Choo Hock and Andrew Phang Boon Leong, 'Reception of English Commercial Law in Singapore: A Century of Uncertainty', in AJ Harding (ed), *The Common Law in Singapore and Malaysia, Singapore:* Butterworths, 1985, pp 37–8.

[53] *Zainal Abidin bin Haji Abdul Rahman* v *Century Hotel Sdn Bhd* [1982] 1 MLJ 260 (FC) (Mareva injunction): *Lian Keow Sdn Bhd* v *Paramjothy & Anor* [1982] 1 MLJ 217 (HC) ('Anton Piller' order).

[54] Bartholomew, *The Commercial Law of Malaysia*, pp 76–100; Chan Sek Keong, 'The Common Law Ordinance, Section 5(1): A Re-Appraisal', *MLJ*, 27(1961): lvii–lxi; David KK Chong, 'Section 5 Thing-um-a-Jig!', *MLJ*, 1 (1982): c–cv; Soon Choo Hock and Andrew Phang, 'Reception of English Law in Singapore: A Century of Uncertainty'.

having been prevented by a shortage of ships owing to wartime requisitioning. In issue was the application of the Defence of the Realm (Amendment) Act No 2 of 1915 and the Courts (Emergency Powers) Act 1917, both English statutes. The trial judge held that the two statutes were part of the mercantile law of England and therefore applicable in the Straits Settlements by virtue of s 6 of the Civil Law Ordinance (as s 5 CLA 1956 was then).

On appeal, a majority in the Court of Appeal reversed the decision on the basis that the two statutes were not part of mercantile law. The Privy Council reversed the Court of Appeal decision. Lord Dunedin, in delivering the opinion of the Privy Council, said the majority in the Court of Appeal erred in thinking that the law to be administered under s 6 was the mercantile law of England. According to Lord Dunedin, the law to be administered was not the 'mercantile law' but 'the law' as would be administered in England in the like case. Such law meant the entirety of English law. The correct approach in interpreting s 6, he said, is to determine if the issue concerned one of the enumerated categories and 'mercantile law generally' in the first part of the section. If it does, then in accordance with the second part of the section, the law to be administered shall be the same as would be administered in England in the like case. In that case, their Lordships held that the issue concerned the law of sale, clearly part of the mercantile law. As the two statutes could be pleaded had the issue arisen in England, they could be relied upon in the Straits Settlements.

The question of the correct interpretation of s 6 was raised again ten years later in *Shaik Sahied bin Abdullah Bajerai* v *Sockalingam Chettiar* (1933) 2 MLJ 81. The plaintiff sued for money allegedly due on a promissory note and a cheque. In defence, the defendant relied upon the absence of a written memorandum as required under the English Moneylenders Acts 1900–1927. In dispute was whether those statutes could be pleaded in the Straits Settlements. The trial judge reasoned that as a question had arisen concerning mercantile law generally, the statutes could be pleaded if the question had arisen in England; likewise, they could be pleaded in the Straits Settlements if the facts permitted their application. However, he held that the facts did not so permit because the statutes were peculiar to England.

The Court of Appeal affirmed the judgment. So did the Privy Council. However, Lord Atkin, in delivering the opinion of the Lordships, took a different approach. He held that the statutes were not part of the mercantile law because they contained saving clauses excluding from their scope the borrowing of money in the course of ordinary commercial transactions. As the statutes were not part

of the mercantile law, an issue raised under any of their provisions was not an issue concerning mercantile law. Consequently, the statutes did not apply in the Straits Settlements.

The approach taken by Lord Atkin looks at the nature of the statute sought to be applied. Such an approach resurrects the approach taken earlier on, before the *Seng Djit Hin* decision, as in the case of *Ngo Bee Chan* v *Chin Teck Kim* [1919] 2 MC 25.

There are, therefore, two conflicting approaches to the interpretation (and application) of s 5 CLA 1956. As both were laid down by the Privy Council, the difficulty is to decide which is to be preferred. Fortunately, the problem is now more theoretical than real because local legislation has been enacted concerning many commercial matters, thus reducing reliance on the section.[55]

The 'local circumstances' proviso presenting s 3(1) is absent from s 5. In practice, however, s 5 seems to have been interpreted as if that proviso exists. For example, in the *Sockalingam Chettiar* case discussed above, the trial judge held that the facts did not allow the application of the Moneylenders Acts 1900–1927 in Singapore because they were peculiar to England, and not general in character, and depended on the existence of procedure and machinery not available in Singapore.[56]

6.3.3 Non-application of English Land Law

Non-application of English land law under s 6

Section 6 CLA 1956 expressly excludes the application in Malaysia of the English law (ie common law and rules of equity) concerning land tenure. Section 6 states:

> Nothing in this Part shall be taken to introduce into Malaysia or any of the States comprised therein any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein.

Section 6 was enacted to prevent the wholesale application of English law under s 3(1) to land matters in Malaysia. This was because there already existed local legislation concerning land matters, when the CLO was enacted in 1956. Such local legislation incorporated the Torrens system in the FMS and each of the UMS, and the deeds system (of English land law) in Melaka and Penang.

The Torrens System, first introduced in the Malay states in the second half of the nineteenth century, is based on the Australian

[55] For example, Bills of Exchange Act 1949 (Act 204)(Revised 1978); Contracts Act 1950 (Act 136)(Revised 1974); Partnership Act 1961 (Act 135)(Revised 1974); Companies Act 1965 (Act 125)(Revised 1973); and Hire Purchase Act 1967 (Act 212)(Revised 1978); Bankruptcy Act 1967 (Act 360)(Revised 1988); and Banking and Financial Institutions Act 1989 (Act 372).

[56] [1933] SSLR 101, 103.

system of land administration. It is a system based on registration of land titles, designed to provide simplicity and certainty. Considered superior to, and more effective than the English deeds system previously administered in the Straits Settlements, the Torrens System is now the system in force in Penang and Melaka under the National Land Code (Penang and Melaka Titles) Act 1963 (Act 518)(Revised 1994), the rest of West Malaysia under the National Land Code 1965 (Act 56), and in Sarawak under the Sarawak Land Code (Cap 81). Sabah retains a different non-Torrens system under the Land Ordinance (Cap 68).

Section 6 has generated heated debate among academics and legal practitioners on whether general equitable principles (which are not peculiar to English land law) are also excluded.[57] There are two views. One, that equitable principles are totally excluded. The other, that general equitable principles are applicable to the extent that they are not precluded by local legislation and are suitable to local circumstances.

The first view rests on the premise that the Torrens System as contained in the National Land Code is a comprehensive system of land law. In the words of Lord Keith of Kinkel when delivering the opinion of the Privy Council in *United Malayan Banking Corporation Bhd* v *Pemungut Hasil Tanah, Kota Tinggi*:

> The National Land Code is a complete and comprehensive code of law governing the tenure of land in Malaysia and the incidents of it, as well as other important matters affecting land there, and there is no room for the importation of any rules of English law in that field except in so far as the Code itself may expressly provide for this.[58]

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[57] SY Kok, 'The Nature of Right Title and Interest under the Malaysian Torrens System: The Non-Application of English Equities and Equitable Interests to Malaysian Land Law', *MLJ*, 1 (1983): cxlix–clxvii; SY Kok, 'Equity in Malaysian Land Law (1)', *MLJ*, 3 (1994): clvii–clxxxiv; SY Kok, 'The Non-Applicability of the Bare Trust Concept Under the Modified Torrens System', *MLJ*, 1 (1999): clxxvii–ccxlviii; Salleh Buang, 'Equity and the National Land Code: Penetrating the Dark Clouds, *MLJ*, 1 (1986): cxxv–cxxxi; RR Sethu, 'Equity in Malaysian Land Law: Scope and Extent', *Supreme Court Journal*, 1 (1989): 37–93; J Sihombing, 'The Role of Equity in Peninsular Malaysia Torrens Scheme', LL M thesis, University of Malaya, 1976; J Sihombing, 'The Bare Trust Syndrome in the Peninsula Malaysian Torrens System: A Harbinger of Total Commitment to Equity Or the Means of a Return to Torrens Concepts?', *JMCL*, 4 (1977): 269–91; Visu Sinnadurai, *The Sale and Purchase of Real Property in Malaysia*, Kuala Lumpur: Butterworths, 1984, pp 209–11; Visu Sinnadurai, 'Equitable Relief Against Forfeiture', *JMCL*, 11 (1984): 25–49; Teo Keang Sood, 'The Scope and Application of Section 6 of the Civil Law Act, 1956', *MLJ*, 1 (1987): lxix–lxxiv; Teo Keang Sood, 'Equity in Land Law', *JMCL*, 15 (1988): 57–86; Teo Keang Sood and Khaw Lake Tee, *Land Law in Malaysia: Cases and Commentary*, 2nd edn, Kuala Lumpur: Butterworths, 1995, pp 5–20; Wong Siong Yong,, 'Equitable Interests and the Malaysian Torrens System', *Mal LR*, 9 (1966): 20–37; Yong Chiu Mei, 'The Role of English Equity in the Peninsula Malaysian Torrens System of Land Law: A Review of Salient Statutory Provisions (Part 1)', *MLJ*, 1 (2005): lxviii–lxxviii; Yong Chiu Mei, 'The Role of English Equity in the Peninsula Malaysian Torrens System of Land Law: A Review of Salient Statutory Provisions (Part II)', *MLJ*, 2 (2005): cvii–cxxvii.

[58] [1984] 2 MLJ 87, 91.

The second view is based on the contrary proposition that the National Land Code does not cover all the relations between the parties to land transactions. The National Land Code, according to this view, merely professes to be comprehensive.

It regulates the rights and obligations of the parties only after registration, but not before registration. Consequently, in the absence of any provision—express or implied—prohibiting the application of general equitable principles, such principles may be applied under s 3(1) CLA 1956. This view is consistent with s 206(3) of the National Land Code which states that the provisions of the National Land Code requiring dealings to be effected in the statutorily prescribed manner shall 'not affect the contractual operation of any transaction relating to alienated land or any interest therein'.[59] In other words, the general principles of law—particularly, contractual principles—that govern land transactions as a whole are not affected by the National Land Code, which covers merely the system of registration of land titles.

A survey of cases on the application of equitable principles in land transactions—which can hardly be said to be consistent—shows support for the second view. A long line of cases—starting with *Wilkins* v *Kannammal & Anor* which pre-dated the National Land Code in which Taylor J observed: 'The Torrens law is a system of conveyancing; it does not abrogate the principles of equity, it alters the application of particular rules of equity but only so far as is necessary to achieve its own special objects ...'[60] —has established beyond doubt that general principles of equity are not excluded by s 6 CLA 1956.[61] What is still in doubt is the scope or extent of the application of equity to land matters under the National Land Code.

6.3.4 Specific Reception of English Law in Other Statutory Provisions

Other than ss 3 and 5 CLA 1956, 'saving provisions' in several Malaysian statutes also allow the application of common law and

[59] In *Templeton & Ors* v *Low Yat Holdings Bhd & Ors* [1993] 1 MLJ 443, 459, Edgar Joseph Jr J said that s 206(3) provides statutory authority for the liberal application of equity whenever there is a basis for that.

[60] (1951) 17 MLJ 99, 100 (CA).

[61] For example, *Margaret Chua* v *Ho Swee Kiew* [1961] 27 MLJ 173 (FC); *Devi* v *Francis* [1969] 2 MLJ 169 (HC); *Mercantile Bank* v *The Official Assignee of the Property of How Han Teh* [1969] 2 MLJ 196 (HC); *Karupiah Chettiar* v *Subramaniam* [1971] 2 MLJ 116 (FC); *Yong Tong Hong* v *Siew Soon Wah & Ors* [1971] 2 MLJ 105 (FC); *Woo Yoke Wah* v *Loo Pek Chee* [1975] 1 MLJ 156 (HC); *Oh Hiam & Ors* v *Tham Kong* [1980] 2 MLJ 159 (PC); *Mahadevan & Anor* v *Manilal & Sons* [1984] 1 MLJ 266 (SC); *Mosbert Berhad* v *Chatib bin Kari* [1985] 1 MLJ 162 (FC); *Bhagwan Singh* v *Hock Hin Bros* [1987] 1 MLJ 324; *Lian Keow Sdn Bhd & Anor* v *Overseas Credit Finance (M) Sdn Bhd* [1988] 2 MLJ 449 (SC); *Cheng Hang Guan* v *Perumahan Farlim Sdn Bhd & Ors* [1993] 3 MLJ 352 (HC); *Wong Ah Yah & Anor* v *Lee Joo Eng & Anor* [1997] 1 CLJ Supp 282 (HC).

rules of equity in specific areas of the law. One such provision is to be found in the CLA 1956 itself. Section 27 provides:

> In all cases relating to the custody and control of infants the law to be administered shall be the same as would have been administered in like cases in England at the date of the coming into force of this Act, regard being had to the religion and the customs of the parties concerned, unless other provision is or shall be made by any written law.

Two other examples are:

- Section 47(1) Partnership Act 1961 (Act 135)(Revised 1974), which reads:

> The rules of equity and common law applicable in partnership shall continue in force, except so far as they are inconsistent with the expressed provisions of this Act.

- Section 101(2) Bills of Exchange Act 1949 (Act 204)(Revised 1978), which states:

> Subject to the provisions of any written law for the time being in force, the rules of the common law of England, including the law merchant shall, save in so far as they are inconsistent with the express provisions of this Act, apply to bills of exchange, promissory notes, and cheques.

6.4 TOWARDS A MALAYSIAN COMMON LAW

Lord President of the Supreme Court, Tan Sri Abdul Hamid Omar (as he then was), was quoted in *The Star* on 2 March 1989 (p 1) as saying that judges would meet to discuss the formulation of a common law based on local rather than English values. He expressed the view that the common law applied in Malaysia belonged to England. The Lord President later explained that he advocated Malaysian judicial independence because s 3 CLA 1956, with its reference to 'the 7th day of April 1956', cannot be defended politically. An important step in asserting that independence and establishing a sense of national identity was to either repeal or amend s 3.[62]

Days after the Lord President made that startling announcement, the Chief Justice of Malaya, Tan Sri Hashim Yeop Abdullah Sani, made a similar call for a Malaysian common law and the amendment of s 3. The Chief Justice explained that the amendment was proposed to: (a) reject anything foreign, and (b) incorporate Islamic values in the judicial decision-making.[63]

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[62] Abdul Hamid Omar, 'Common Law: A Myth or Reality?', Keynote Address at the opening of a seminar on the Legal Profession at the International Islamic University, Kuala Lumpur, 24 February 1990, *CLJ*, 1 (1990): iii–ix.

[63] *New Straits Times*, 25 June 1989.

The call for a Malaysian common law was not new. As far back as 1971, Professor Ahmad Ibrahim (as he then was) had advocated the repeal of s 3 of the then CLO 1956.[64] He quoted Professor LC Green, who said that in view of the increasing political stature of the Federation of Malaya and Singapore, and in anticipation of the formation of Malaysia, existing legislative provisions to fill lacunae in the local law by reference to an 'alien' system, whether it be that of the former imperial power or not, was evidence of an obsolete attitude and contrary to national prestige.[65]

Examining numerous cases, Professor Ahmad Ibrahim asserted that the absence of a Civil Law Enactment before 1937 did not prevent the filling of lacunae in the law in the Malay states. Therefore, he saw no reason why lacunae in local law could not be filled, even if ss 3 and 5 CLO 1956 were repealed. In his view, as the law in Malaysia is developed through legislation and judicial decisions, there will be decreasing need to rely on English law to fill lacunae in Malaysia law. The repeal of ss 3 and 5 would remove the monopoly which English law holds in legal development and reinstates the position of Islamic law as the law of the land. To that end he proposed a provision, combining the relevant provisions in the Egyptian Code of 1948 and the Egyptian Code on the Organization of Native Courts 1883, to the effect that in the absence of local law, the judge shall follow customary rules; if these do not exist, the provisions of Islamic law and if these, in turn, do not exist, the principles of natural law and equity; in commercial matters, the judge shall follow commercial usage.

The call for a Malaysian common law by two of the highest ranking judges triggered a lively debate in the Press and at various forums. The Bar Council of Malaysia refuted the view that the common law is exclusively English. According to its Chairman, although the common law had its origins in England, it is a body of centuries of experience in dealing with human affairs, which are the same everywhere. The common law is a common heritage shared by most of the countries of the Commonwealth and the United States. Under s 3 CLA 1956, the Malaysian courts examine the common law as practised in different jurisdictions to find a solution best suited to this country. The Bar Council supported the proposed change to s 3 only if confined to deleting the reference to England and the cut-off dates. Any change beyond that, he warned, would have far-reaching repercussions, particularly, on Malaysia's commercial relations with other countries.[66]

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[64] Ahmad Ibrahim, 'The Civil Law Ordinance in Malaysia', *MLJ*, 2 (1971): viii–lxi.

[65] LC Green, 'Filling Lacunae in the Law', *MLJ*, 29 (1963): xxviii–xxxiii.

[66] *New Straits Times*, 12 March 1989; Raja Aziz Addruse, Paper presented at a Forum on Malaysian Common Law, Faculty of Law, University of Malaya, Kuala Lumpur, 2 December 1989.

Two former Lord Presidents of the Malaysian judiciary expressed similar views. Tun Mohamed Suffian pointed out that it was the job of the executive, not the judiciary, to propose a wide-ranging law reform.[67] Both Tun Mohamed Suffian and Sultan Azlan Shah of Perak share the view that it is erroneous to regard the common law as meaning the common law of England for two reasons.[68] First, while it may be true that in the early days of the development of Malaysian law, reliance was placed on English law because of the successive civil law statutes, that law was not applied in toto. Only its broad principles were applied, subject to modifications to suit local conditions. Once received, the principles of the English common law became Malaysian law. Malaysian courts, when later called upon to determine new issues, merely extended these principles to situations to which they had not previously been applied. Second, in the absence of local law, Malaysian courts today do not exclusively rely on English law. They refer also to the law in other countries where the common law applies.

The views of the Bar Council and the two former Lord Presidents were adopted by Lord President Tun Abdul Hamid Omar almost a year after he made his clarion call.[69]

With respect, the idea of judges sitting around a table formulating a common law with Malaysian values boggles the mind. Where would they begin? And how would they proceed? Did not Lord Scarman, writing extrajudicially, explain:

> The common law knows as little of its birth as you and I know of ours. It has grown like Topsy: it is as natural in the English scene as the oak, the ash, and the elder. It antedates Parliament and the legislative process. We cannot point to any body of learned men sitting around a table and designing the law and the system. It is customary law developed, modified, and sometimes fundamentally redirected by the judges and the legal profession working through the medium of the courts. Thus it is, in essence, a lawyer's law. Further, it is lawyer's law of universal application.[70]

The common law is judge-made law

The common law is the unenacted or non-statutory law of England. It is judge-made law, but made in a manner very different from the way Parliament enacts legislation. When Parliament enacts legislation, in most cases it creates a comprehensive and complete framework of rules to govern a given area. In contrast, judges can only decide on actual (not hypothetical) issues brought before the

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[67] *The Star,* 18 April 1989.

[68] Ibid; Sultan Azlan Shah, 'Engineers and the Law: Recent Development', Speech delivered in the Second Public Lecture organized by the Institute of Engineers, Malaysia, Kuala Lumpur, 31 March 1989 and reproduced in Visu Sinnadurai, *His Majesty Sultan Azlan Shah: The Yang di-Pertuan Agong IX Malaysia*, Kuala Lumpur: Professional (Law) Books Publishers, 1989, pp 110–11.

[69] Abdul Hamid Omar, 'Common Law, A Myth or Reality?'.

[70] Leslie Scarman, *English Law: The New Dimension* (The Hamlyn Lectures, Twenty-sixth series), London: Stevens & Sons, 1974, pp 1–2.

court by litigants. However, a series of cases concerning a common area can create as firm a framework of rules as the statutory framework. Each case within the judge-made framework can be likened to a brick in a wall.[71] Thus, the common law, like the oak, takes centuries to grow.

But the common law is more than a framework of rules. It is a mental attitude,[72] a distinctive mode of legal reasoning by which to reach (in changing circumstances) fresh solutions to the problems of ensuring fair dealing between citizen and citizen and between citizen and government.[73] And, it is this mental attitude—the quintessence of the common law tradition—which Malaysian judges and lawyers inherited on 7 April 1956 or the other cut-off dates.

Even if one construes the Lord President's call as a proposal to review existing legislative provisions governing the application of common law and to propose either the deletion or amendment of ss 3 and 5 CLA 1956, the question arises—as Tun Mohamed Suffian pointed out—whether it is the function of judges to propose legislative reform.[74] Perhaps it was the acknowledgement of this question that prompted Law Minister Datuk Syed Hamid Albar to appoint, in late 1993, a committee with members drawn from the legal profession and academe, to study the development of a Malaysian common law.[75] To date, nothing is known of the results of such deliberations, if any, of the committee.

Lord President Abdul Hamid's call for a Malaysian common law is unobjectionable only if he meant it as a wake-up call to Malaysian judges not to follow blindly English decisions, heedless of the express provisions of ss 3 and 5 CLA 1956.

As is clear from the exposition of the relevant provisions (see above, 'General Application of English Law', p 129 and 'Specific Application of English Law', p 133) the CLA 1956 and its antecedents (including

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[71] Gwen Morris et al, *Laying Down the Law*, 4th edn, Sydney: Butterworths, 1996, p 49.

[72] GW Batholomew as quoted in the Editorial Preface, AJ Harding (ed), *The Common Law in Singapore and Malaysia*, Singapore: Butterworths, 1985, p iv.

[73] Lord Diplock, 'Judicial Control of Government', Second Tun Abdul Razak memorial Lecture delivered at the University of Malaya, Kuala Lumpur, 4 June 1979, reproduced in *MLJ*, 2 (1979): cxl–cxlvii.

[74] Some four years before the debate on the Malaysian common law erupted, another former Lord President, Tan Sri Mohamed Salleh Abas (as he then was), after delivering the fourteenth Tun Seri Lanang Lecture, entitled 'Culture and the Law', at the Co-operative College in Kuala Lumpur on 15 December 1984, in answer to a question from the floor on why the judiciary rejected the application of Islamic laws in Malaysia, replied that it was up to Parliament, not the judiciary, to decide on the implementation of laws in the country (*New Straits Times*, 16 December 1984). On 9 February 1985, after opening a seminar on Islamic Law organized by the Bar Council in Kuala Lumpur, the Lord President reiterated that the judiciary does not have the power to decide whether or not to implement Islamic Law. 'Our duty is to administer the law as laid down by the Constitution and Parliament' (*New Straits Times*, 10 February 1985).

[75] *The Sun*, 26 November 1993: *New Straits Times*, 29 November 1993.

the Charters of Justice) allow for the development of a Malaysian common law. The closing proviso in s 3(1) makes this very clear. Unfortunately, that proviso has not always been given effect to—as is evident from the eclectic recognition of the rules of Islamic and customary laws by the English Recorders in the straits Settlements and the English or English-trained judges in the Malay states. Lapses in observance of that (and the opening) proviso continue even after independence and the breakaway from the Privy Council.[76]

Proviso in s 3(1) Civil Law Act 1956 allows for the development of a Malaysian common law

At the same time the Malaysian Bar and Bench have not always acknowledged the combined effect of:

- the cut-off dates in ss 3 and 5 CLA 1956, and
- the Privy Council decision in *Jamil bin Harun* v *Yang Kamsiah & Anor* [1984] 1 MLJ 217.[77]

Cases such as *Lee Kee Choong* v *Empat Nombor Ekor (NS) Sdn Bhd & Ors* [1976] 2 MLJ 93 make it clear that under s 3(1), the Malaysian courts are only bound to apply English law existing before the cut-off dates. English cases decided after those dates, as Lord Scarman pointed out in *Jamil bin Harun* v *Yang Kamsiah & Anor*, are not binding, but persuasive. They may be followed. Thus, the common law in Malaysia may develop differently from the common law in England. Only the attitude of mind, ie the mode of legal reasoning, will be the same.

Some judges, however, are well aware of the limits to the reception of English law and of the heavy responsibility of charting the course of Malaysian jurisprudence. On 7 January 1985, at the inauguration ceremony of the Supreme Court following the final breakaway from the Privy Council, Lord President Tan Sri Mohamed Salleh Abas (as he then was) said the Supreme Court 'will be completely responsible for our decisions and for developing the path of law and justice in the country'.[78] Two years later, he elaborated:

> Our Supreme Court is now the final court of appeal. In developing the law, we, of course, have to rely on some of the leading decisions of the former Federal Court and of the Privy Council. But other than this guidance, the space in front of us remains unchartered. It is like being in the middle of a vast ocean. We need a proper guide in order to reach the shore. Just as in economics there are several modules devised for the purpose of forecasting and assessing the state of the

[76] See, in particular, the cases examined by Professor Ahmad Ibrahim in his numerous writings, eg, 'Islamic Law in Malaysia', *JMCL*, 8 (1981): 21–51; 'Towards an Islamic Law for Muslims in Malaysia', *JMCL*, 12 (1985): 37–52; 'Towards a Malaysian Common Law?', *MLJ*, 2 (1989): xlix–l.

[77] See, eg *Nepline Sdn Bhd & Ors* v *Jones Lang Wootton* [1995] 1 CLJ 856, 871 (HC); *Sri Inai (Pulau Pinang)* v *Yong Yit Swee* [1998] 3 CLJ 893, 902–4 (HC); *Wawasan Sedar Sdn Bhd* v *Golden Hope Plantations* (Sarawak) *Sdn Bhd & 2 Ors* [1999] 1 AMR 441, 449 (HC).

[78] *New Straits Times*, 8 January 1985, p 1. See also the Sir John Galaway Foster Memorial Lecture, University College London, 4 November 1988, reproduced in Salleh Abas, *The Role of the Independent Judiciary*, Kuala Lumpur: Promarketing Publications, 1989, p 49.

> economy of a particular country, in law too there are several models which we may use as a guide, such as the British model, the American model, the Indian model or even the civil law model or modified model. But whatever model we adopt, it must suit our own circumstances.[79]

Now, as more and more members of the Bar and Bench are trained locally or, upon returning from training abroad, immerse themselves thoroughly in the CLA 1956 and other local laws, Malaysian common law is in the making,[80] ie if in the eyes of some, it does not yet exist.

The approach of Malaysian courts to the development of a Malaysian common law

The approach of Malaysian courts to the development of a Malaysian common law was articulated by Hashim Yeop Sani CJ (Malaya) when delivering the judgment of the Supreme Court in *Chung Khiaw Bank Limited* v *Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675, 682:

> S. 3 of the Civil Law Act 1956 directs the courts to apply the common law of England only in so far as the circumstances permit and save where no provision has been made by statute law. The development of the common law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the courts of this country. We cannot just accept the development of the common law in England....

One month later, Gunn Chit Tuan SCJ expanded on that approach. This was in *Commonwealth of Australia* v *Midford (Malaysia) Sdn Bhd & Anor* [1990] 1 CLJ 878. That case concerned state immunity. The question before the Supreme Court was whether in Malaysia the absolute (the foreign state is completely immune from the jurisdiction of the local courts) or restrictive (the foreign state is immune from the jurisdiction of the local courts concerning governmental acts but not commercial acts) doctrine applies. Gunn Chit Tuan SCJ, delivering the judgment of the Supreme Court said at p 884:

> S 3 of the Civil Law Act 1956 only requires any court in West Malaysia to apply the common law and the rules of equity as administered in England on the 7th day of April 1956. That does not mean that the common law and rules of equity as applied in this country must remain static and do not develop....
>
> ... when the *Trendtex* case[81] was decided by the U.K. Court of Appeal in 1977 it

[79] Address entitled 'A Closer Link Through the Law', delivered at the closing ceremony of the Fourth International Appellate Judges Conference, Kuala Lumpur, 23 April 1987, reproduced in Mohamed Salleh Abas and Visu Sinnadurai, *Law, Justice and the Judiciary: Transnational Trends*, Kuala Lumpur: Professional (Law) Books, 1988, pp 291–2.

[80] The present Chief Justice of the Federal Court, Tan Sri Mohamed Dzaiddin Abdullah, in an unpublished speech, 'Malaysia's Judicial Aspirations and Global Perspectives', delivered at the Royal Commonwealth Society in London on 12 September 2001, said at pp 9–10.

'It is only after four fulsome decades of national building, do we see images of Malaysian jurisprudence emerging. Those images emerge from within the legal philosophy propounded by the courts. I see a unique Malaysian jurisprudence evolving, which is at first tentative and tremulous, but which has since gained momentum. The need for a Malaysian Jurisprudence or a Malaysian common law, is not only because it is politically correct. It is rooted in the imperatives of national pride and practical utility.'

[81] *Trendtex Trading Corporation* v *Central Bank of Nigeria* [1977] 2 WLR 356.

> was of course for us only a persuasive authority, but we see no reason why our courts ought not to agree with that decision and rule that under the common law in this country the doctrine of restrictive immunity should also apply....

Five months after *Midford*, Peh Swee Chin J voiced his thoughts on the development of a Malaysian common law in *Syarikat Batu Sinar Sdn Bhd & Ors* v *UMBC Finance Bhd & Ors* [1990] 2 CLJ 691, discussed earlier (see above, 'General Application of English Law', p 133).

Explicit statements on the approach to developing a Malaysian common law are found in subsequent cases.[82] The decision of the Court of Appeal in *Tengku Abdullah ibni Sultan Abu Bakar & Ors* v *Mohd Latiff Shah Mohd & Ors & Other Appeals* [1997] 2 CLJ 607 merits attention. In it the Court of Appeal admits the role that judicial policy and local circumstances play in shaping Malaysian jurisprudence; this case was concerned with equity, and not common law, jurisprudence. It dealt with the existence of a fiduciary relationship and the applicability of the fiduciary concept to promoters of proprietary clubs. Gopal Sri Ram JCA said at p 637:

> Whether a particular set of circumstances ought to attract a fiduciary duty is a question of judicial policy. It depends upon the standard of commercial morality that the courts of a particular jurisdiction may choose to impose upon parties to a transaction, having regard to the cultural background and circumstances of the society in which they function. And, as in so many other areas of the law, the views which our courts entertain may differ from those expressed by the courts of other jurisdictions in respect of the circumstances in which a fiduciary duty may be declared to exist....

In *Pendaftar dan Pemeriksa Kereta-Kereta Motor, Melaka* v *KS South Motor Sdn Bhd* [2000] 2 MLJ 540, the Court of Appeal's judgment illustrates the legal reasoning that leads to the creation of a Malaysian common law. *Pendaftar dan Pemeriksa Kereta-Kereta Motor*, like *Syarikat Batu Sinar* (discussed above at p 133) concerns statutory registration of vehicle ownership claims. The Court of Appeal was faced with an important and novel question of law: Does the law impose a duty on a public authority in this case, the Registrar and Inspector of Motor Vehicles (RIMV) at Melaka and Muar, to take care that all information supplied by them to a class of persons (who relies on such information) is accurate?

In holding that the RIMV owes a duty of care, the Court of Appeal relied primarily on a decision of the English Court of Appeal in *Ministry of Housing and Local Government* v *Sharp* [1970] 2 QB 223 concerning an analogous situation, namely, the obligations of the Land Registrar under the English Land Charges Act 1925. The

[82] *Nepline Sdn Bhd* v *Jones Lang Wootton* [1995] 1 CLJ 865, 871; *Wawasan Sedar Sdn Bhd* v *Golden Hope Plantations (Sarawak) Sdn Bhd & 2 Ors* [1999] 1 AMR 441, 449.

reasoning in that case—that a public officer, entrusted with an official duty by statute or common law, is personally responsible for the transgression of his subordinate—was adopted by the Malaysian Court of Appeal. In addition, the latter referred to the Privy Council case of *Invercargill City Council* v *Hamlin* [1996] 2 WLR 367 (an appeal from New Zealand) and two Australian cases, *Parramatta City Council* v *Lutz* [1988] 12 NSWLR 293 and *The Council of the Shire of Sutherland* v *Heyman* [1984–5] 157 CLR 424, to stress that it is the reliance of owners and would-be purchasers of vehicles on the information supplied by the RIMV that imposes a duty on them to take care that all information coming from them is accurate.

In yet another judgment, the Court of Appeal stresses that Malaysian courts need not look exclusively to England to develop a Malaysian common law. This was in *Saad bin Marwi* v *Chan Hwan Hua & Anor* [2001] 2 AMR 2010. That case, like *Tengku Abdullah ibni Sultan Abu Bakar & Ors* (above), was concerned with equity, rather than common law. One of the main issues was whether Malaysian law recognizes a general doctrine of inequality of bargaining power (or unconscionable bargain) in a contract which falls short of undue influence and if it does, the nature and scope of such a doctrine. No legislation exists on the subject-matter. Before deciding, the Court of Appeal surveyed the position in a number of countries—England, Australia, New Zealand, Canada, India, and the United States. Having run the gamut of cases, the court, once again speaking through Gopal Sri Ram JCA, said at p 2031:

> ... the time has arrived when we should recognize the wider doctrine of inequality of bargaining power. And we have a fairly wide choice on the route that we may take in our attempt to crystallize the law upon the subject. The position is that after 1956, we are at liberty to fashion rules of common law and equity to suit our own needs and are not to treat ourselves as being bound hand and foot by the English cases....

The Court of Appeal reiterated the liberty of Malaysian courts to depart from English decisions to develop a Malaysian common law which serves local needs in *Sri Inai (Pulau Pinang) Sdn Bhd* v *Yong Yit Swee & Ors* [2002] 4 CLJ 776. The issue was whether a landlord owes a duty of care to lawful visitors of his tenant. The landlord (second defendant) in this case was a local authority. It had leased a house to a school (first defendant). The school used the house as a hostel for its students. A fire broke out at the hostel. Lives were lost and serious injuries sustained by its occupants.

The Sessions Court found both defendants equally liable. On appeal, the High Court held that the local authority in its capacity as landlord owed no duty of care to the plaintiffs on the basis of

the English case of *Cavalier* v *Pope* [1906] AC 428 (which predicate liability on the existence of a pre-existing contractual relationship). The High Court, while acknowledging that the House of Lords' decision in *AC Billings & Sons Ltd* v *Riden* [1958] AC 240 had made an inroad into *Cavalier* v *Pope*, held that *AC Billings* could not be applied in Malaysia because it was decided after 7 April 1956, the cut-off date set by s 3(1)(a) Civil Law Act 1956.

The Court of Appeal reversed the judgment of the High Court. The Court of Appeal said that *Cavalier* v *Pope* was a case on privity of contract, not tort. *AC Billings*, on the other hand, had been applied by the former Federal Court in *Lembaga Kemajuan Tanah Persekutuan* v *Mariam* [1984] 1 CLJ 225. The importance of that Federal Court decision lies in its acceptance of the proposition that the House of Lords' decision in *Donoghue* v *Stevenson* [1932] AC 562 in which Lord Atkin attempted to provide a general formula of liability in negligence (known as the foreseeability test or neighbour principle) has overruled preceding cases, such as *Cavalier* v *Pope*. Gopal Sri Ram JCA, in delivering the judgment of the Court of Appeal, said at p 786:

> Accordingly, it is in our view irrelevant that the courts in England regard *Cavalier* v *Pope* as being unaffected by the Delphic pronouncement of Lord Atkin in *Donoghue*.... It is entirely up to our courts to develop our common law jurisprudence according to the needs of our local circumstances. The Privy Council accepts this to be in keeping with the common law tradition....

Referring to the Privy Council decision in *Invercargill City Council* v *Hamlin* [1996] 1 All ER 756, Gopal Sri Ram JCA quoted Lord Lloyd Berwick who asserted that the judges in the New Zealand Court of Appeal in that case were entitled to depart from English case law because conditions in New Zealand were different.

It was the differing local circumstances in New Zealand and in Malaysia that influenced Abdul Hamid Mohamad FCJ in *Majlis Perbandaran Ampang Jaya* v *Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389 not to follow the New Zealand Court of Appeal decision in *Invercargill City Council* v *Hamlin* (above). The latter case imposed a duty of care on a local council in New Zealand over the negligence of its inspector in approving defective foundations causing damage to the house in question.

Majlis Perbandaran Ampang Jaya raised the principal issue of acceptance of claims for pure economic loss in negligence in Malaysia. Abdul Hamid Mohamad FCJ stood by the view he held some ten years previously as a High Court judge in *Nepline Sdn Bhd* v *Jones Lang Wootton* [1995] 1 CLJ 865 concerning the approach a Malaysian court should take in deciding whether to accept such claims. The court, he recapitulated, has to consider s 3(1) of the Civil Law Act 1956 and the local circumstances proviso contained

therein. On whether a local council should be imposed liability for pure economic loss suffered by plaintiffs in a particular case, Abdul Hamid Mohamad FCJ followed the House of Lords' decision in *Caparo Industries plc* v *Dickman* [1990] 1 All ER 568 which laid down the 'three-stage test' for determining the existence of a duty of care in any situation: (1) foreseeability of the damage suffered (2) proximity (or neighbourhood) of relationship between the plaintiff and the defendant and (3) it is fair, just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff. Abdul Hamid Mohamad FCJ pointed out that it is the third stage that calls into consideration public policy and local circumstances.

Majlis Perbandaran Ampang Jaya arose from the Highland Towers tragedy in Hulu Kelang, Selangor in 1993. A landslide caused Block 1 of three blocks of apartments to collapse and the loss of forty-eight lives. Occupants of Blocks 2 and 3 had to evacuate their apartments which became unsafe for habitation. These occupants instituted claims for pure economic loss. The judgment of the Federal Court proceeded on the premise that pure economic loss is recoverable in Malaysia in limited circumstances. The issue which divided the panel of judges concerned post-collapse liability. On the facts of the case, should the *Majlis Perbandaran Ampang Jaya* (MPAJ)—the local council and fourth defendant—be imposed liability in negligence and nuisance for pure economic loss suffered by the plaintiffs for its failure to take promised remedial measures to prevent the kind of damage to Blocks 2 and 3 that had caused the collapse of Block 1?

The judges differed in their perception of public policy. Steve Shim CJ (Sabah & Sarawak) considered it would not be in the public interest that a local authority such as MPAJ should be allowed to disclaim liability for negligence committed surpassing the immunity provided under s 95(2) of the Street, Drainage and Building Act 1974 (Act 133) nor would it be fair, just and reasonable to deprive the occupants of Blocks 2 and 3 of their rightful claims under the law. On the other hand, Abdul Hamid Mohamad FCJ (Arifin Zakaria FCJ concurring with him) did not think it fair, just, and reasonable to impose liability on MPAJ or other local councils in similar situations in Malaysia. This is because a local council has endless duties to perform. With limited resources and manpower, it has to prioritize. In his view, 'the provision of basic necessities for the general public has priority over compensation for pure economic loss of some individuals who are clearly better off than the majority of the residents in the local council area'.[83]

[83] [2006] 2 MLJ 389, 423.

The above cases which represent a limited but varied selection suffice to show that on novel issues Malaysian courts no longer refer to and apply solely English authorities. Rather, they take the long route to examine leading authorities in as many common law countries as are relevant, before arriving at a decision best suited to local circumstances. The existence of a Malaysian common law can no longer be refuted.

Questions

1. Compare and contrast the introduction of English law in the Straits Settlements, the Malay states, and the Borneo Territories of North Borneo and Sarawak.
2. To what extent is English law part of the law of Malaysia today?
3. (a) What is 'Malaysian common law'?
   (b) Does a Malaysian common law (that applies uniformly throughout the length and breadth of the land) exist?

Reading List

Basic Reading

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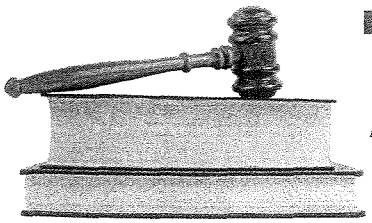

7 ISLAMIC LAW

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Chapter Objectives

- Define *Syariah* and Islamic Law
- Outline the historical background of Islamic Law in Malaysia
- Set out the position of Islam and Islamic Law in the Federal Constitution
- Discuss the administration of Islamic Law in Malaysia

7.1 DEFINITION OF *SYARIAH* AND ISLAMIC LAW

SYARIAH (an Arabic word which means, literally, the way to a watering place) is the sacred law of Islam as revealed through Prophet Muhammad (peace be upon him) in the Qur'an and Sunnah. It is the totality of God's commands that regulate the lives of Muslims in all its aspects: their duties towards Allah (God), and their relations with one another and the environment.

The *Syariah*, which is an all-embracing body of religious duties and ethical, moral, and legal rules, is more than a legal system, strictly speaking. It is 'the Way'. In Islam, Allah alone is sovereign and has the right to ordain a path for the guidance of humankind.

Islamic law is used in this book to mean the legal rules that are part of the *Syariah* and enacted as legislation in accordance with the procedures prescribed in the Federal and State Constitutions.

The Islamic law which applies in Malaysia is of the *Shafii* school of jurisprudence, as modified by Malay *adat* (customary) law. The sources of Islamic law as applied in Malaysia fall into two main categories:

1. Primary sources
   (a) Qur'an: the Word of Allah; and
   (b) Sunnah: rules deduced from the traditions, ie the sayings or conduct of Prophet Muhammad (peace be upon him).
2. Secondary sources (which are not sources, but are rather the means for discovering the law)

(c) *Ijma*: consensus of jurists of any particular era on a juridical rule; and
(d) *Qiyas*: deductions from reasoning by *ijtihad* or analogy.

7.2 HISTORICAL BACKGROUND OF ISLAMIC LAW IN MALAYSIA

Introduction of Islam into Melaka in 1414

Islam came to Melaka in 1414 when Parameswara, the Palembang prince who founded Melaka, married a Muslim princess from Pasai, embraced Islam and adopted the name of Iskandar Shah. As Melaka developed into an international entrepôt and its sovereignty spread over parts of the Malay Peninsula and Archipelago throughout the fifteenth century, the Islamization of its inhabitants made Melaka a centre of Islam until its fall to the Portuguese in 1511.

The coming of Islam was one of the most momentous events in the history of the Malay Archipelago. Its effects were profound and pervasive: social, cultural, political, and legal. In politico-legal matters, Islam replaced the Hindu system of *devaraja* or divine kingship with the Sultanate system. The Sultan was regarded as the *Khalifah* or vicegerent (representative) of Allah who must govern according to Allah's law, or the *Syariah*. In the Malay-Muslim Sultanate, Islam came under the supervision of the Sultan. The two worked together: Islam supported and strengthened the position of the Sultan who, in turn, insisted upon Islam being the established religion.

Islamization of Malay *adat* law after the coming of Islam

Before the coming of Islam, the Malays followed *adat* or customary law which was influenced by Hinduism. The coming of Islam saw the beginning of attempts to introduce the *Syariah* and to modify the Malay *adat* law to accord with Islam—a process that continues to this day. This process of Islamization can be seen in the Malay Digests. For example, the earlier versions of the *Risalat Hukum Kanun* or *Undang-undang Melaka* (Laws of Melaka) set out the customary law, whereas the later versions show a mixture of customary law and principles of the *Syariah*, as set out in Abu Shuja's *At-Taqrib*, ibn al-Qasim Al-Ghazzi's *Fath al-Qarib*, and Ibrahim al Bajuri's *Hashiya Ala'l Fath Al-Qarib*.[1]

After the fall of Melaka, versions of the *Undang-undang Melaka* were adopted in the Malay states which were offshoots of the Melakan Empire. These also show the influence of the *Syariah*. For example, the Pahang Digest compiled for Sultan Abdul al-Ghafur

[1] Ahmad Ibrahim, 'Islamic Law in Malaysia', *JMCL*, 8 (1981): 21.

Muhaiyuddin Shah (1592–1614) shows a strong *Syariah* influence. Its introduction states that Pahang was Dar al Islam, ie an Islamic state, and forty-two of its sixty-eight articles were based on the *Syariah*.[2] How far and to what extent the law as depicted in the Malay Digests was actually implemented is uncertain. Be that as it may, it is this composite body of Malay *adat* law with Hindu–Buddhist elements overlaid with principles of *Syariah* law (in this chapter referred to as Malay-Muslim law)—as modified during the period of British administration when it was incorporated within the framework of English law—that is the forerunner of the Islamic law applicable in Malaysia today.

The Islamization of Malay *adat* law continued until the coming of the British. For example, in Johor, besides the Johor Digest of 1789, which was modelled on the *Undang-undang Melaka*, translations were made of codifications of the *Syariah* made in Turkey and Egypt. The *Majallat Al-Ahkam of Turkey* was translated as the *Majallah Ahkam Johore* and the Hanafi code of Qadri Pasha of Egypt was translated as the *Ahkam Shariyyah Johore*.[3] In 1895, Sultan Abu Bakar had a constitution drafted for Johor which shows some influences of the *Syariah*. Likewise, in Terengganu, the constitution promulgated in 1911 also showed *Syariah* influence.[4] These examples and case law show that before the coming of the British the basic law of the land was the Malay-Muslim law.[5] As RJ Wilkinson said: 'There can be no doubt that Moslem Law would have ended by becoming the law of Malaya had not British Law stepped in to check it'.[6]

The Malay-Muslim law was the basic law of the land before British colonization

British administration separated religion from the state. The state dealt only with mundane matters. Islam was left entirely to the religious establishments. The British purportedly left the religion untouched but, having introduced English law and made it the law of general application in place of the Malay-Muslim law, they reduced the latter to being merely the personal law of the Muslims. The principles of the *Syariah* which concerned personal obligation were incorporated within the framework of English law, subjected to the form and procedures of the latter. This restriction and subjection respectively inhibited the full development of *Syariah* law, and resulted in extensive modifications and distortions of the principles

After British intervention, English law became the basic law; the Malay-Muslim law was reduced to being merely the personal law of Muslims

[2] Ismail Hamid, *The Malay Islamic Hikayat*, Bangi: Penerbit Universiti Kebangsaan Malaysia, 1983, p 26.

[3] Ahmad Ibrahim, 'Islamic Law in Malaysia', p 23.

[4] Ibid.

[5] For example, *Re Loh Toh Met deceased, Kong Lai Fong & Ors* v *Loh Feng Heng* (1961) 27 MLJ 234, 236; *Re Dato Bentara Luar decd.* [1982] 2 MLJ 264, 269.

[6] RJ Wilkinson (ed), *Papers on Malay Subjects, First Series, Law Part 1*, Kuala Lumpur: The Government of the Federated Malay States Press, 1922, p 49.

of the *Syariah*, primarily by reducing its principles to those which the common law was prepared to accept.[7] The history and degree of this subjection varied from time to time and from place to place, according to the status of the territories concerned, each of which is outlined below.

7.2.1 The Straits Settlements

The Straits Settlements were British territories comprising Penang, Singapore, and Melaka. Except in Melaka, where the Malay-Muslim law was spasmodically observed, that law could hardly be said to be the basic law of Penang and Singapore when the British arrived because of the lack of evidence of any such law or of any system of law being administered. It is generally agreed that English law was introduced into the Straits Settlements through 'Letters Patent' granted to the English East India Company and which were later generally referred to as the Charters of Justice. The First Charter or Charter of 1807 introduced English law, as it stood in England on 25 March 1807, into Penang, while the Second Charter or Charter of 1826 introduced English law as administered in England on 27 November 1826, into all three settlements.

While it came to be generally accepted that English law was introduced by the Charters of Justice and became the basic law of the land, there was for a while controversy concerning the modifications necessary, because of the various races and religions of the local inhabitants, to prevent injustice and hardship if English law were to be imposed unmodified. Sir Edward Stanley, the first Recorder in Penang, thought the effect of the Charter of 1807 was to guarantee the free exercise of religion and custom. On the other hand, Sir Ralph Rice, the third Recorder, thought that the Charter merely introduced English criminal law and that in civil matters, justice was to be administered among the Asian races according to their respective laws and customs. The view held by Sir Benjamin Malkin in *In the Goods of Abdullah* [1835] 2 Ky Ecc 8, and supported by Sir Benson Maxwell in *R* v *Willans* [1858] 3 Ky 16, was that the Charter did not sanction or recognize local law, but merely admitted it as an exception to English law, the law of general application that prevailed.

The theoretical basis or justification for modifications to English law was eventually held to be the provisions in the Charters, in particular:

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[7] MB Hooker, *The Personal Laws of Malaysia: An Introduction,* Kuala Lumpur: Oxford University Press, 1976, p 19.

Theoretical basis of accommodating personal laws

> And further, that the said Court of Judicature shall have and exercise Jurisdiction as an Ecclesiastical Court, so far as the several Religions, Manners and Customs of the inhabitants of the said Settlement and Places will admit....

The Court of Judicature interpreted that provision as allowing the application of personal laws, ie laws primarily confined to family matters which apply to specific groups of people which are defined according to race or religion or both. Thus, it was only as personal law that the Malay-Muslim law was administered among Muslims in the Straits Settlements.

Despite acceptance of the policy adopted wherever possible by the English East India Company, of non-interference with native law, custom, and religion, modifications were made. Some customs or religious practices or rules were completely disregarded because of ignorance (eg *In the Goods of Abdullah*, where, contrary to the *Syariah*, a will made by a Muslim alienating all his property was held valid and admitted to probate), or disallowed on grounds of repugnancy to the common law, or to the prevailing judicial notions of justice and morality (eg English law was held to exclude *Syariah* law concerning charities). The application of the principles of the *Syariah* (as of Chinese customary law) was inconsistent. For example, as early as 1865, in *Hawah* v *Daud* [1865] Wood's Oriental Cases 26, the courts held that the property of a Muslim woman was her own separate property in which her husband took no interest, either during her lifetime or after death; however, in *Kader Mydin, Administrator of Hossan Sah* v *Shatomah* [1868] Wood's Oriental Cases 42, it was held that a married woman's conveyance was not valid unless her husband consented and the deed was acknowledged before a judge or an appointed commissioner, as required by statute. At best, the application of the principles of the *Syariah* was eclectic.

In the Straits Settlements, Islamic law was developed before 1880 by the judiciary and subsequently supplemented by legislation. The English or English-trained judiciary encountered problems in applying the principles of Islamic law for various reasons.[8] Islamic law was but one of several religico-legal systems in the Straits Settlements. Unlike in the neighbouring Malay states, Islamic law was not associated with the state or territorial power, nor was it the law of general application.

The rules of Islamic law then were local, non-literary and non-textual (it was not until the end of the nineteenth century that reference was seriously made to the classical legal literature of Islam). The substantive content of the rules was provable by evidence of

[8] MB Hooker, *Islamic Law in South-East Asia*, Singapore: Oxford University Press, 1984, pp 84–9.

local practice (including *adat* or customs) given by the *kadi* (*Syariah* judges), who were prone to mistake *adat* for Islamic law, eg in *Tijah* v *Mat Alli* [1886] 4 Ky 124 which concerned a claim by a wife for a share in joint earnings (*harta sepencarian*). There were also difficulties concerning the extent of the application of Islamic law and, more seriously, the limits upon the civil courts' jurisdiction. These problems necessitated legislative intervention.

The major piece of legislation was the Mahomedan Marriage Ordinance of 1880 (No V of 1880), the foundation for subsequent legislation concerning Islamic law. It was intended to define how much of Islamic law was to be recognized by the civil courts—to be more or less a code of law for them. However, it was not a success. The ordinance was largely procedural or administrative in nature. It provided for the voluntary registration of Muslim marriages and divorces, the recognition of the *kadi,* and the regulation of the property of married women. It did not enact the substantive Islamic law, or prescribe authoritative texts so as to enable the courts to ascertain what that law was.

Amendments were made to the ordinance. The most important were those of 1908 and 1923. The former made the registration of Muslim marriage and divorce compulsory from July 1909. The latter, among other matters, provided a more extensive remedy to a Muslim wife against all persons for the protection of her property as though she were unmarried, and directed (for the first time) that the estate of a Muslim intestate after 1 January 1924 could be administered according to Islamic law. The ordinance with the above amendments, and a subsequent amendment in 1934, was included as Cap 57 in the Revised Laws of the Straits Settlements 1936 under the title of the Mahomedans Ordinance. It remained in force in Penang and Melaka until 1959, when it was repealed by the respective State Enactment on the Administration of Muslim Law.

7.2.2 The Malay States

The Malay states were Islamic states before British intervention

Before the British came, the Malay states were either independent states or Siamese dependencies. In either case, the Malay states were Islamic states with Muslim Rulers and predominantly Malay-Muslim subjects, in which the basic law or law generally applicable was the Malay-Muslim law, as described earlier. The Ruler or Sultan was head of Islam and the political head. In accordance with Islam, the Ruler was the vicegerent or representative of Allah on earth and entrusted to administer the state according to the *Syariah*.

British intervention transformed the Malay states into secular states

After the British came, the Malay states became British protected states. The British, through a series of treaties of protection with the Malay Rulers beginning with the Treaty of Pangkor of 1874, separated Islam from the state.[9] Islam no longer defined the state or sovereignty. Instead, the British turned the Malay states into secular states with secular institutions.

The Ruler remained head of Islam and the political head. He was sovereign within his own state. This was decided in the treaty of protection with the British and in a series of cases.[10] Ascribing sovereignty to the Ruler, a human being, not only contradicted Islam (because in Islam sovereignty belongs to Allah alone), but also severed the divine source of the validity of the laws. Henceforth, the laws received their validity from a secular authority, the State Council, of which the Ruler was but a mere component.

In theory, the Ruler was sovereign. However, under the treaty with the British, in return for protection, the Ruler had to accept a Resident in the Federated Malay States (FMS) or an Adviser in the Unfederated Malay States (UMS) 'whose advice must be asked and acted upon on all questions other than those touching Malay religion and customs'. This phrase, or its variations, was the basis of the Residential or Advisory System—the agency through which the British imposed indirect rule.

Through this system, the Ruler's sovereignty was continuously eroded. For example, following the treaties of protection, State Councils were formed. In the FMS, these councils were presided over by Residents, who became the effective rulers of the states. These councils, originally advisory, over time became the sole legislative bodies. Initially, the State Council had a consultative function in the legislative process. Subsequently, as administration became more complex, even the consultative function was ignored. The Ruler's role in the making of legislation was merely to give his assent.

The establishment of the Federal Council in 1909 in the FMS curtailed the Ruler's administrative powers even more, contrary to the Treaty of Federation of 1895.[11] The President of the Federal Council was the High Commissioner for the FMS (the Governor of the Straits Settlements, based in Singapore), assisted by the Resident General of

[9] MB Hooker, *Islamic Law in South-East Asia*, pp 131 ff. See also *Che Omar bin Che Soh* v *Public Prosecutor* [1988] 2 MLJ 55.

[10] *Mighell* v *The Sultan of Johore* [1894] 1 QB 149; *Duff Development Company Ltd* v *Government of Kelantan & Anor* [1924] AC 797; *Pahang Consolidated Company Ltd* v *State of Pahang* (1933) 2 MLJ 247; *Anchom* v *Public Prosecutor* [1940] MLJ Rep 18 and *Sultan of Johore* v *Tunku Abu Bakar & Ors* [1952] 18 MLJ 115.

[11] William George Maxwell and William Sumner Gibson (eds), *Treaties and Engagements Affecting the Malay States and Borneo*, London: Jas Truscott & Son Ltd, 1924, p 70.

the FMS, based in Kuala Lumpur. The Rulers were reduced in status to ordinary members, with no powers of veto. Legislation passed by the Federal Council was signed by the High Commissioner. The Ruler and his State Council (which became a rubber-stamping authority for legislation passed by the Federal Council) were left responsible only for traditional Malay affairs—interpreted by the British to mean Islam and Malay custom—and in this restricted forum, Islam in its public law aspect meant only matters that might touch on the Ruler's prerogatives. Thus, 'in so far as religion had any constitutional significance it was but an adjunct to the diminished position of the [Rulers]'.[12] In contrast to the FMS, where British administration was strongly entrenched, the UMS retained a considerable measure of autonomy. Not surprisingly, the UMS Rulers were wary of any suggestion of a union or federation which might impair their sovereignty.

English law supplanted the Malay-Muslim law as the basic law of the land

As stated above, before the British came, Malay-Muslim law was the basic law of the Malay states. The British introduced English law, which supplanted Malay-Muslim or Islamic law. British advice led to the enactment of legislation on specific matters, modelled on those in India which, in turn, were based on principles of English law.[13] More significantly, the British administration set up courts manned by English or English-trained judges.[14]

These civil courts acknowledged that Islamic law was local, not foreign, law and that the courts must take judicial notice of it and declare its principles.[15] Despite such acknowledgement, the judges did not hesitate to apply principles of the common law and equity to fill gaps in the local law. This practice of the judiciary was sanctioned by the Civil Law Enactment 1937 (No 3 of 1937) of the FMS, which was extended to the UMS by the Civil Law (Extension) Ordinance 1951 (No 49 of 1951). Both were replaced by the Civil Law Ordinance 1956 (No 5 of 1956), which was subsequently revised and extended to Sabah and Sarawak as the Civil Law Act 1956 (Act 67)(Revised 1972). The 1937 Enactment and successive legislation marked the formal and omnibus introduction of English law. Thus, although in theory Islamic law was the law of the land and the basic law—at least, in Peninsular Malaysia—in practice and in effect, it was English law which had become the basic law. Islamic law was restricted to being merely the personal

The Civil Law Enactment 1937 of the FMS officially endorsed English law as the basic law

[12] Hooker, *Islamic Law in South-East Asia*, p 132.

[13] For example, Penal Code and Evidence Ordinance introduced in 1902; Civil Procedure Code enacted in 1918; Contracts Enactments passed in Negeri Sembilan, Perak, and Selangor in 1899 and in Pahang in 1900.

[14] *Shaik Abdul Latiff & Ors* v *Shaik Elias Bux* [1915] 1 FMSLR 204, 214.

[15] For example, *Ramah binti Ta'at* v *Laton binti Malim Sutan* [1927] 6 FMSLR 128.

law concerning marriage, divorce, and related matters applicable to the Muslims. The development of this personal law—or the private law aspect of Islam—in the Malay states through legislation and judicial decisions paralleled that in the Straits Settlements.[16]

In the treaties of protection between the Malay Rulers and the British there was a clause excepting matters relating to the Malay religion and custom from the scope of advice of the British Resident or Adviser. Despite that clause, the British interfered in the administration of Islamic law.[17] The legislation passed by the State Councils upon the direction of the British Resident or Adviser included matters concerning Islam, such as the appointment and salaries of the *kadi*, the regulation of *zakat* (compulsory alms tax), and *fitrah* (title payable during Ramadan), the administration of mosques, the registration of Muslim marriages and divorce, and the punishment to be imposed for offences against the Islamic religion. Thus, Islam became just another subject for regulation, in the same manner as contracts, crimes, land, etc.

Syariah Courts were relegated to a subordinate position

Syariah Courts were relegated to a subordinate position.[18] They were placed at the bottom of the court structure. Their jurisdiction was restricted, the work of the *kadi* was supervised, and the more serious cases were transferred to magistrates in the civil courts.[19] In cases where the *Syariah* and civil courts had concurrent jurisdiction, there could be a conflict in the judgments given by both, in which case the judgment by the civil court prevailed. Indeed, in some states there was a provision, eg s 45(6) of the Selangor Administration of Muslim Law-Enactment 1952 (No 3 of 1952), to the effect that nothing in the enactment shall affect the jurisdiction of any civil court and in the event of any difference or conflict between the decision of a *kadi besar* or a *kadi* and the decision of a civil court acting in its jurisdiction, the decision of the latter shall prevail. In some matters where Islamic law should have been applied, it had been displaced or ignored as a result of the decisions of the civil courts. For example, in *Ainan bin Mahmud* v *Syed Abu Bakar bin Habib Yusoff & Ors* [1939] MLJ Rep 163, it was held that as the Evidence Enactment FMS (Cap 10) was a statute of general application, s 112 of the ordinance applied in questions of legitimacy to the exclusion of the rule of Islamic law.

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[16] See for details, Hooker, *Islamic Law in South-East Asia,* pp 131 ff.; Mahmood Zuhdi Abd Majid, *Pengantar Undang-Undang Islam di Malaysia*, Kuala Lumpur: Penerbit Universiti Malaya, 1997, pp 116 ff.

[17] Ahmad Ibrahim, 'Islamic Law in Malaysia', pp 35–6.

[18] Ahmad Ibrahim, 'The Future of the Shariah and the Shariah Courts in Malaysia', *JMCL*, 20 (1993): 41, 43.

[19] Ahmad Ibrahim, 'Islamic Law in Malaysia', p 36.

Be that as it may, *Syariah* courts remained part of the judicial structure of each state until 1948, when the judicial system for the Federation of Malaya was established under the Courts Ordinance of 1948 (No 43 of 1948).[20] That ordinance excluded the *Syariah* courts from the federal judicial structure. When Malaya gained independence in 1957, the dichotomy of civil courts and *Syariah* courts was retained. The existence of this dual or parallel system of courts remains till today.

Syariah courts were excluded from the judicial system of the Federation of Malaya in 1948

Islamic law in the Malay states developed separately and at different paces. In Kelantan and Terengganu, the influence of Islam continued unabated during Siamese suzerainty and British administration, and efforts to eliminate un-Islamic practices were given continuing priority. In Johor and Kedah, too, considerable efforts were made towards promoting Islamic law. In general, the development of Islamic law was greater in the UMS than in the FMS.

7.2.3 Borneo States

Sarawak came into being with the transfer of areas of the Brunei Sultanate, dating from 1841 to 1846, from the Sultan to James Brooke. These were transfers not just of territory, but also of the right to govern as a personal sovereign. For over a century, three generations of the Brookes or 'White Rajahs' thus ruled Sarawak.

North Borneo (now Sabah) came under the administration of the British North Borneo Company as a result of a series of agreements between the Sultans of Brunei and Sulu, and Messrs Overbeck and Dent in 1877–8. These grants were transferred to the company, incorporated by Royal Charter, in 1881. Britain declared a protectorate over Sabah and Sarawak in 1888. Both remained under private administration as British protectorates until 1946 when they were ceded to the British Crown and became Crown colonies.

Islamic law in both states was the peculiar creation of the unique systems of private administration under British protection.[21] It was the policy of the Brookes in Sarawak and the British North Borneo Company in Sabah to give effect to native law and custom. Islamic law, which had applied to both the Borneo territories when they were part of the Sultanate of Brunei (where, it is believed, existed the *Undang-undang Brunei* modelled on the *Undang-undang Melaka*),[22] continued to be administered, but was subsumed under the general cover of native law; to be more precise, Malay *adat*

Islamic law was subsumed under the blanket of Malay *adat* law

[20] See for details Ahmad Ibrahim, 'Towards an Islamic Law for Muslims In Malaysia', *JMCL*, 12 (1985): 37; 43–8.

[21] Hooker, *Islamic Law in South-East Asia*, p 189.

[22] Mahmood Zuhdi Abd Majid, *Pengantar Undang-Undang Islam di Malaysia*, p 59.

law. The development of Malay *adat* took a similar course in both states.

7.2.3.1 Sarawak

Islamic law in Sarawak developed from three sources:

- Basic written law;
- Legislation; and
- Judicial decisions.

The basic written law is the *Undang-undang Mahkamah Melayu* (Laws of the Malay Courts). It is a code of Malay *adat* law—the first of its kind in Malaysia. Drafted in 1915 and put into force as the law applicable to Muslim Malays, it was originally enforced by administrative officers. Since 1955, it has been classed as subsidiary legislation and enforced by the courts by authority of the Native Customary Laws Ordinance (Cap 51).

The code now comprises sixty-five sections (one was repealed in 1926). The bulk of the code concerns betrothal, marriage, divorce, and sexual offences. In form, the provisions are a list of fines. The Islamic element is evident in some provisions, but it is minimal. The code is, thus, not a code of Islamic law, but local Malay laws designed to preserve public order in a society whose members share Islamic values.

Legislation (referred to as 'Orders') were enacted in Sarawak in the 1860s. The enactment of legislation or Oders marked the end of the informal and personal administration of justice in Sarawak by James Brooke. The Orders, which concerned Muslims, also gave effect to local custom rather than principles of Islamic law. The earliest surviving Order of any substance was the Order of 13 March 1893 on marriage. It was designed to restrict marriage between *orang dagang* (strangers) and Sarawak women. That Order was followed by the Order of 16 May 1898 regarding the registration of Muslim marriage and divorce. These two Orders were consolidated in the Mohammedan Marriage Ordinance 1946 (Cap 75), which largely repeated their combined provisions. Other matters regulated by way of Orders were succession, inheritance of a Muslim convert's property, and adoption.

Probably the most significant legislation was the Majlis Islam (Incorporation) Order of 1954 which established a Majlis Islam (Islamic Council) for Sarawak. Its main functions included, among others, the giving of advice to the government on Islam and Malay custom, and the issuing of *fatwa* (legal rulings) on religious matters and Malay customary law.

In the courts, the most common matter litigated was succession and wills. The cases on this, as in other matters, illustrated the lack of a distinction between Islamic law and Malay *adat* law.[23] Both were treated as complementary parts of one body of law applicable to the Sarawak Malays.

Islamic law, administered as part of Malay *adat* law, was enforced by the Native Courts until the establishment of the *Syariah* courts in 1978 under the Majlis Islam (Incorporation)(Amendment) Ordinance (No 8 of 1978).

Islamic law is enforced by *Syariah* courts only from 1978

7.2.3.2 Sabah

As in Sarawak, Islamic law in Sabah is found in:

- Law text;
- Legislation; and
- Judicial decisions.

A law text called the *Undang-undang Mahkamah Adat Orang Islam,* a collection of Islamic law and customary rules, codified and accepted by a Conference of Native Chiefs in 1936, gazetted in that year and amended in 1941, was intended as a guide for the Native Courts in cases concerning Muslims. As in the Sarawak *Undang-undang Mahkamah Melayu,* the *Undang-undang Mahkamah Adat Orang Islam* concerned marriage, divorce and related matters, inheritance, and sexual offences. Compared with the Sarawak code, the Sabah law text adhered more closely to the *Syariah*.[24]

The earliest legislation concerning Islamic law was the Mohammedan Customs Proclamation 1902 (No 11 of 1902). This authorized the *kadi* or *imam* (prayer leader) of any district to make rules for the proper observance of public worship by Muslims and for the levy of fines for any breach of the rules. Such rules, however, were not effective until approved by the Governor and gazetted. Provision was made for the regulation of Muslim marriages, divorce, and annulment of divorces by the *kadi* or *imam.* Provision was also made for the maximum amount of the *brian* (*mas kahwin* or marriage gift).

That Proclamation was replaced by the Mohammedan Customs Ordinance 1914 (No 9 of 1914) which, in turn, was replaced by the Native Administration Ordinance 1937 (No 2 of 1937). The latter re-enacted, in substance, the provisions of the Proclamation of 1902. It also authorized the Resident of each district to establish Native Courts. The *imam* of a district could be appointed a member

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[23] *Sheripah Unei & Sheripah Ta'siah* v *Mas Poeti & Anor* [1949] SCR 5; *Abang Haji Zaini* v *Abang Haji Abdulrahim & Anor* [1951] SCR 3; *Men binti Lockman* v *Dan bin Dol* [1952] SCR 13.

[24] Hooker, *Islamic Law in South-East Asia,* p 215.

of the Native Courts. In a case arising from a breach of Islamic law in which all the parties were Muslims, at least two members of the court had to be Muslims.

The Native Administration Ordinance 1937 was amended in 1950 and replaced by the Native Courts Ordinance of 1953 (Cap 86). The provisions concerning Muslims were removed and re-enacted in a new ordinance, the Muslims Ordinance 1953 (Cap 83). The latter, in the main, re-enacted the provisions of the Native Administration Ordinance of 1937.

The Native Courts Ordinance 1953 was amended by the Native Courts (Amendment) Ordinance 1961 (No 13 of 1961), pursuant to the conclusions of Native Chiefs at a number of conferences held to discuss problems relating to the administration of native law and Islamic law. The Native Chiefs concluded that Native Courts should only exercise jurisdiction over Islamic law in so far as it was embodied in the native law applicable to natives. Consequently, the 1953 Ordinance was amended to remove from the Native Courts jurisdiction in cases arising solely from a breach of Islamic law, in which the parties were not natives. The effect was to remove jurisdiction in Islamic law from the Native Courts and to vest it in the district *imam*, with whom it remained for the next ten years.

There were not many judicial decisions on Islamic law in Sabah during British administration. Such as there were show that, as in Sarawak, there was little distinction between Islamic law and native law. In the early days of British administration, Islamic law was administered by the *kadi* or *imam*, who were chiefs appointed under the Village Administration Ordinance 1913 (No 5 of 1913). Subsequently, however, under the 1937 Native Administration Ordinance, the administration of Islamic law was vested in the Native Courts, where it remained (except for the period from 1961 to 1971 when the jurisdiction was revested in the district *imam*) until 1977 when, under a revised Administration of Muslim Law Enactment (No 15 of 1977), *Syariah* courts were established.

Islamic law is enforced by *Syariah* Courts only from 1977

7.3 ISLAM AND ISLAMIC LAW IN THE FEDERAL CONSTITUTION

The subordinate status accorded Islamic law by the British was continued after the independence of the Federation of Malaya. Islamic law is not even included in the definition of law in Article 160 of the Federal Constitution, which definition includes only written law, the common law, and any custom or usage having the force of law. Furthermore, Article 4 declares the supreme law of the federation to be the Federal Constitution.

Article 3 merely declares Islam to be the religion of the federation

Article 3 declares that 'Islam is the religion of the Federation'. Article 3 was not in the Reid Commission draft constitution. The genesis of Article 3 was proposed by the Alliance Party in their memorandum to the Reid Commission:

> ... the religion of Malaysia (sic) shall be Islam. The observance of this principle shall not impose any disability on non-Muslim natives professing and practising their religions and shall not imply that the State is not a secular State.[25]

The Alliance proposal was insisted upon by UMNO because of pressure from 'radicals' within UMNO and the Malay-based opposition parties.[26]

The Reid Commission did not accede to the Alliance proposal. Officially, the Commission cited as their reason the Malay Rulers' request to maintain the status quo and retain Islam as a state matter. Privately, however, the Commission expressed concern over the contradiction between the Alliance declaration that Malaya would be a secular state and the provision for Islam to be the official religion of the federation.[27]

Mr Justice Abdul Hamid, the Pakistani member of the Commission who had at the outset agreed with the majority view, subsequently supported the Alliance proposal.[28] In a separate Note of Dissent, he urged that it be accepted because it was unanimous. He considered such a provision 'innocuous'. He said a provision of the type proposed is entrenched in the constitutions of not less than fifteen countries, without harm to anybody. In his view, no harm would ensue if the proposed provision was included in the constitution of Malaya, pointing out that such a provision already existed in 'all the Constitutions of the Malayan States'.[29]

The Malay Rulers initially opposed the inclusion of a provision declaring Islam as the religion of the federation. They did so on the understanding (based on advice from their constitutional advisers) that should Islam be so declared, the proposed Supreme Head of the federation (the Yang di-Pertuan Agong) would logically become head of Islam throughout the federation. Such an eventuality would affect the position of each Malay Ruler as head of Islam in his own state. The Malay Rulers, however, withdrew their objection after

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[25] The Reid Commission Report, para 169. Independent Malaya Party (IMP) or Party Negara led by Dato Onn Jaafar; Pan Malayan Islamic Party (PMIP) now Persatuan Islam SeMalaysia (PAS) and Party Ra'ayat.

[26] Joseph M Fernando, *The Making of the Malayan Constitution*, Malayan Branch of the Royal Asiatic Society Monograph No 31, Kuala Lumpur: MBRAS, 2002, pp 162, 167.

[27] Ibid, pp 129, 162.

[28] Ibid, pp 130, 138.

[29] Paragraphs 11 and 12 of his Note to the Reid Commission Report. Today all state constitutions, except those of Penang, Melaka, and Sarawak, contain a provision that Islam is the State religion.

the Alliance explained that the intention in declaring Islam the religion of the federation was not to usurp the position of the Malay Rulers as Head of Islam in their respective states. UMNO, the party behind the proposal, assured the Malay Rulers (and non-Muslim organizations which opposed it) that the proposed declaration was meant to be symbolic—primarily, to enable ceremonies at federal official functions (eg prayers offered at the installation of the Yang di-Pertuan Agong) to be conducted in accordance with Islam.[30]

The provision proposed by the Alliance was accepted; however, with the necessary qualification that 'other religions may be practised in peace and harmony in any part of the Federation'. To further assure non-Muslims that their civil rights would not be affected, Clause (4) of Article 3 provides that nothing in that Article derogates from any other provision of the Federal Constitution. One such provision is Article 11, which guarantees the right of every person to profess and practise his or her religion and, subject to Clause (4),[31] to propagate it. In deference to the apprehension expressed by the Malay Rulers, Clause (2) of Article 3 clarifies that in every state, other than states not having a Ruler, the position of the Ruler as head of Islam in his state and all rights, privileges, prerogatives, and powers enjoyed by him as head of Islam are unfettered and unimpaired.

Article 3 does not declare the federation to be an Islamic state

Article 3 merely declares that Islam is the official religion of the federation. It does not declare, as does the Constitution of Pakistan, that the federation is an Islamic state. The intention of the parties who negotiated for independence and those who drafted the Merdeka Constitution to establish a secular state can be seen not only from the Alliance Memorandum to the Reid Commission quoted above but from other constitutional and historical documents:

- Assurance given by Alliance leaders to the Colonial Office during the London Conference (13–21 May 1957) to settle unresolved issues that they 'had no intention of creating a Muslim theocracy and that Malaya would be a secular State';[32]
- The White Paper on the Constitutional Proposals for the Federation of Malaya which affirms that:

[30] Fernando, *The Making of the Malayan Constitution*, p 162; M. Suffian Hashim, 'The Relationship between Islam and the State in Malaya,' *Intisari*, 1(1) (1963): 8.

[31] Clause (4) authorizes state law and in the Federal Territories of Kuala Lumpur, Labuan, and Putrajaya, federal law to control or restrict the propagation of any religious doctrine or belief among Muslims.

[32] CO 1030/494(20), Memo by Jackson, 23 May 1957; CO 1030/496(10), minutes of 1st Working Party meeting, London Conference, 14 May 1957, as cited in Fernando, *The Making of the Malayan Constitution*, p 163, note 74.

... there has been included in the proposed Federal Constitution that Islam is the religion of the Federation. This will no way affect the present position of the Federation as a secular state....[33]

- Letter written by Colonial Secretary, Lennox Boyd, on 31 May 1957 to Lord Reid in response to criticisms by the latter and Sir Ivor Jennings (the other British member in the Reid Commission) on changes to the Reid Commission draft constitution. To pacify them, Lennox Boyd expressed gratitude for the 'remarkable' work done by the Commission. On the inclusion of Article 3, he wrote:

Historical documents clearly show the intention of those who negotiated for independence and who drafted the Merdeka Constitution to create a secular state

The Rulers as you know, changed their tune about Islam and they and the Government presented a united front in favour of making Islam a state religion even though Malaya is to be a secular state.[34]

- Statements made by two senior members of the MCA (one of whom later became its President) in the Federal Legislative Council when speaking in support of the constitutional proposals for the federation contained in the White Paper and published in the federation as Legislative Council Paper No 42 of 1957. On 10 July 1957, Mr Tan Siew Sin (as he then was) when touching on religion said:

... although it has been provided that Islam will be the official religion, it has also been expressly laid down that this does not in any way derogate from the principle, which has always been accepted, that Malaya will be a secular sate....[35]

The following day, when the debate resumed, Mr Ong Yoke Lin (as he then was) said:

The new Constitution provides among other things for ... Islam to be the religion of the Federation, with the Federation remaining a secular State....[36]

- The clarification by Prime Minister Tunku Abdul Rahman on a statement made by an Honourable Member in the Federal Legislative Council on 1 May 1958 that the federation has 'been officially recognized as an Islamic State'.[37] The Prime Minister responded:

I would like to make it clear that this country is not an Islamic State as is generally understood, we merely provide that Islam shall be the official religion of the State.[38]

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[33] Federation of Malaya Constitutional Proposals, Cmnd 210 (1957), pp 18–19; published in Malaya as Legislative Council Paper No 42 of 1957.

[34] Cited in AJ Stockwell (ed), *British Documents on the End of Empire: Malaya Part III The Alliance Route to Independence 1953–1957* (HMSO), p 388 as reproduced in Tommy Thomas, 'Is Malaysia and Islamic State?' [2006] 4 MLJ xv, xxi.

[35] Legislative Council Debates, Official Report of the Second Legislative Council (Second Session) October 1956 to August 1957, 10 July 1957, col 3872.

[36] Ibid, 11 July 1957, col 2890.

[37] Legislative Council Debates, Official Report of the Second Legislative Council (Third Session) September 1957 to October 1958, col 4631.

[38] Ibid, col 4672.

- The recommendation of the representatives of the Federation of Malaya [Dato Wong Pow Nee and Encik Muhammad Ghazalie Shafie (as he then was)] in the Cobbold Commission, having noted the anxieties expressed by non-Muslims in North Borneo and Sarawak concerning Islam being the national religion of the proposed Federation of Malaysia:

> .. we are agreed that Islam should be the national religion for the Federation. We are satisfied that the proposal in no way jeopardizes freedom of religion in the Federation, which in effect would be secular.[39]

Case law supports the conclusion from historical documents that Malaysia is a secular state

Case law,[40] in particular, two decisions of the former Supreme Court support the conclusion derived from the historical and constitutional documents that Article 3 does not establish an Islamic state. In *Che Omar bin Che Soh* v *Public Prosecutor* [1988] 2 MLJ 55, the issue was whether the mandatory death sentence for drug trafficking under the Firearms (Increased Penalties) Act 1971 (Act 37), was unconstitutional because it contravened Article 3. The starting point for the Supreme Court was the meaning to be given to Islam in Article 3 as intended by the framers of the Federal Constitution. The Supreme Court felt compelled to trace the history of Islam after British intervention in the Malay states. It held that the British secularized the administration of Malaya. Secular or English law replaced Islamic law as the law of the land. Islamic law was reduced to begin the personal law of Muslims confined to family matters and inheritance. 'In our view, it is in this sense of dichotomy that the framers of the Constitution understood the meaning of the word "Islam" in the context of Article 3'.[41] Therefore, 'Islam' in Article 3 cannot be understood as the yardstick against which every law has to be tested. Consequently, the Supreme Court held that not much reliance could be placed on the wording of Article 3 to support the submission that the death penalty for drug trafficking, or any other offence, is void as being unconstitutional.

The same approach of ascertaining the intention of the drafters of the Federal Constitution was taken by the Supreme Court in *Teoh Eng Huat* v *Kadhi of Pasir Mas, Kelantan & Anor* [1990] 2 MLJ 300. On the issue whether a person below eighteen years had legal capacity to choose her own religion in exercise of her constitutional right, the Supreme Court traced the drafting history of the Federal Constitution, in particular Article 3. It held, in effect,

[39] *The Birth of Malaysia: A Reprint of the Report of the Commission of Enquiry, North Borneo and Sarawak, 1962 (Cobbold Report) and The Report of the Inter-Governmental Committee, 1962* (IGC Report), Kuching, 1993, p 58.

[40] *Wong Ah Fook* v *State of Johore* [1937] MLJ Rep 121; *Anchom* v *Public Prosecutor* [1940] MLJ Rep 18.

[41] *Che Omar bin Che Soh* v *Public Prosecutor* [1988] 2 MLJ 55, 56.

that the constitution was drafted on the basis that although Islam is the religion of the federation, the federation is a secular state. Consequently,

> ... it is our considered view that the law applicable to her immediately prior to her conversion is the civil law.... As the law applicable to the infant at the time of conversion is the civil law, the right of religious practice of the infant shall be exercised by the guardian on her behalf until she becomes major....[42]

A study of the constitutional and historical documents cited shows that although the majority in the Reid Commission considered Article 3 out of place in a secular constitution, Article-3 was eventually included on the common understanding that it means literally what it states: Islam is the religion of the federation *as a whole*. After all, before independence, Islam was the official religion in each of the Malay states. Hence, Article 3 adds very little to what would be the case had it not been included in the Merdeka Constitution. UMNO, the party that insisted on its inclusion, assured the Malay Rulers and non-Muslims who objected that Article 3 was meant to have symbolic significance rather than practical effect.[43]

Article 3 does elevate Islam to a special status

Nevertheless, a look at Article 3 in the light of the constitution as a whole leads to the inexorable conclusion that apart from guaranteeing the right to profess and practise a religion of one's choice, it elevates Islam to a special status.[44] This is borne out by the following:

- State and federal (in the Federal Territories) law may control or restrict the propagation of any religion other than Islam among Muslims [Article 11(4)];
- The government—whether federal or state—may lawfully establish or maintain, or assist in establishing or maintaining, Islamic institutions, or provide or assist in providing instructions in Islam, and incur the necessary expenditure for these purposes [Article 12(2)];
- The government—both federal and state—through annual Supply Acts and Enactments may spend money on the administration of Islamic law [Article 12(2)].[45]

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[42] [1990] 2 MLJ 300, 302.

[43] The Reid Commission Report, para 169; Fernando, *The Making of the Malayan Constitution*, pp 162, 167.

[44] *Meor Atiqulrahman bin Ishak dan lain-lain* lwn *Fatimah binti Sihi dan lain-lain* [2005] 5 MLJ 375, 382; *Kamariah bte Ali dan lain-lain* lwn *Kerajaan Negeri Kelantan, Malaysia dan satu lagi* [2002] 3 MLJ 657, 665 (CA); see, also, AJ Harding, 'Islam and Public Law in Malaysia: Some Reflections in the aftermath of Susie Teoh's Case', *MLJ*, 1 (1991): xci, xciii; Hashim Yeop A Sani, *Our Constitution*, Kuala Lumpur: The Law Publishers (M) Sdn Bhd, 1980, p 160.

[45] Mohd Salleh bin Abas, 'Traditional Elements of the Malaysian Constitution', in FA Trindade and HP Lee (eds), *The Constitution of Malaysia: Further Perspectives and Developments*, Singapore: Oxford University Press, 1986, p 8.

Although Islam is the religion of the federation, there is no head of the Islamic religion for the whole of the federation. In states without a Ruler, ie Melaka, Penang, Sabah and Sarawak, and in the Federal Territories of Kuala Lumpur, Labuan, and Putrajaya, the head of Islam is the Yang di-Pertuan Agong, who also remains head of the religion in his own state.

The Ruler of each state may act at his discretion in the performance of any functions as head of the Islamic religion, but the Yang di-Pertuan Agong may only act on advice in performing his functions as head of the religion in those states and territories of which he is not the Ruler. Although in theory each Ruler may act separately in religious matters, in the interest of uniformity, Clause (2) of Article 3 provides that each of the Rulers shall authorize the Yang di-Pertuan Agong to represent him in acts, observances, or ceremonies which the Conference of Rulers has agreed should extend to the federation as a whole. That provision has been used, eg for determining the commencement of fasting in Ramadan and the dates of Hari Raya Id Fitri and Id Adha.

Except in the Federal Territories of Kuala Lumpur, Labuan, and Putrajaya, Islamic law is a state matter. It is enumerated in item 1 of List 11 (State List) in the Ninth Schedule of the Federal Constitution. An analysis of the distribution of legislative powers and of matters enumerated in item 1 shows, however, that the state does not have the full or exclusive power to legislate on Islamic law (ie the *Syariah*)[46] in its true sense. The State Legislative Assembly may enact Islamic law only concerning those matters specified in item 1, and legislate on the Islamic aspects of other matters in the State and Concurrent Lists, and of residual matters. Parliament, on the other hand, may legislate on the Islamic aspects of matters in the Federal and Concurrent Lists. For example, Parliament has enacted the Islamic Banking Act 1983 (Act 276), and the Takaful (Islamic Insurance) Act 1984 (Act 312)—legislation which seek to give effect to Islamic principles in banking and insurance, respectively—both banking and insurance being federal matters. Likewise, since item 1 in List II (State List) itself stipulates (because criminal law and procedure, and the administration of justice are federal matters) that *Syariah* courts shall not have jurisdiction in respect of offences except in so far as conferred by federal law, Parliament enacted the *Syariah* Courts (Criminal Jurisdiction) Act 1965 (Act 355)(Revised 1988) to confer a limited criminal jurisdiction upon the *Syariah* courts.

[46] Mohammed Imam, 'Making Laws Islamic in Malaysia: A Constitutional Perspective', *CLJ*, 3 (1994): vii, x.

The line which separates Islamic law (concerning which the State Legislative Assembly has competency) from a federal matter (regarding which Parliament has competency) is a thin one, as is illustrated in *Mamat bin Daud & Ors* v *Government of Malaysia* [1988] 1 MLJ 119. In that case, the Supreme Court applied the criterion of 'pith and substance'.[47] The majority in the Supreme Court held that s 298A of the Penal Code (which in essence creates an offence arising from an act or conduct likely to cause disharmony, disunity or feeling of enmity, hatred or ill-will between persons of the same or different religion) was invalid and *ultra vires* the Federal Constitution because it was a provision which, was, in pith and substance, on Islamic law, regarding which Parliament did not have legislative competence under Article 74(1).

State jurisdiction in Islamic law is restricted not only by the provisions of the Federal Constitution, but also by the operation of federal legislation. Federal laws may restrict the application and scope of state legislation on Islamic law. For example, in testate and intestate succession, account has to be taken of the Probate and Administration Act 1959 (Act 97)(Revised 1972) and the Small Estates (Distribution) Act 1955 (Act 98)(Revised 1972), which have the effect of confining the function of the *kadi* only to certifying the shares to be allotted to beneficiaries under Islamic law.

7.4 ADMINISTRATION OF ISLAMIC LAW

As Islamic law is a state matter (except in the Federal Territories of Kuala Lumpur, Labuan, and Putrajāya where it is a federal matter) there is now, in each state, separate legislation on various aspects of that law.[48] The main one is on the general administration of Islamic law. It is variously entitled in each state, but its contents are substantially similar. Unlike the former enactments (modelled on the Selangor Administration of Muslim Law Enactment 1952) which concentrated power in a *majlis* (or council known by various names),

[47] The Reid Commission acknowledged the line between a federal and state matter may blur. The original Reid draft constitution included a clause in the Article concerning distribution of legislative powers between the federation and the states, that nothing in the Article should 'render invalid any provision of a federal law if in pith and substance it relates to any of the matters enumerated in the Federal List or the Concurrent List, or render invalid any provision of a State law if in pith and substance it relates to any of the matters enumerated in the State List or the Concurrent List'. That clause was, however, dropped from the Merdeka Constitution on the premise that it stated a general principle of interpretation.

[48] Administration of Muslim Law, Administration of *Syariah* Courts, *Syariah* Family Law, *Syariah* Civil Procedure, *Syariah* Criminal Code, *Syariah* Criminal Procedure, and Evidence in the *Syariah* Courts. Before the revised legislation beginning from the late 1970s, all matters concerning the administration of Islamic law were found in one omnibus legislation, the Administration of Muslim Law Enactment.

the present enactments, passed beginning from the late 1970s based on the recommendations of a committee set up to raise the status of *Syariah* courts, provide for three independence authorities:

- Majlis Agama Islam (or its variations): responsible for all matters concerning the Islamic religion except Islamic law and the administration of justice;
- The *mufti* (the highest religious official): responsible for the determination of Islamic law; and
- *Syariah* courts: responsible for the administration of justice.

The first two authorities are discussed below. The *Syariah* courts are dealt with in Chapter 10.

7.4.1 Majlis Agama Islam

The Majlis Agama Islam is a corporation whose primary function is to advise the Ruler (or the Yang di-Pertuan Agong in those states and territories without a Ruler) in all matters concerning Islam. Its day-to-day operations are carried out by a Department of Islamic Religious Affairs.

The Majlis is empowered to acquire, hold, and dispose of movable and immovable property; and to administer all funds of the *bait-ul-mal* (treasury), and to collect *zakat* and *fitrah*. It is the trustee of all mosques, *wakaf* (gifts for religious purposes) and all trusts, promoting the Islamic religion or for the benefit of Muslims, in the state. It also has the power to act as the executor of a will and administer the estate of a deceased Muslim.

In addition, the Majlis is entrusted with the duty to promote the economic and social well-being of the Muslim community. In discharging that duty it may engage in commercial and industrial activities, invest in authorized investments, establish and maintain Islamic schools, and grant loans to Muslim individuals for higher learning. For such purposes, the Majlis may establish corporations under the Companies Act 1965 (Act 125)(Revised 1973).

7.4.2 The Mufti

The *mufti* and deputy *mufti* are appointed by the Ruler and, in the states without a Ruler and the Federal Territories, by the Yang di-Pertuan Agong on the advice of the Minister in the Prime Minister's Department responsible for Islamic Affairs.

The *mufti*, on the direction of the Ruler (or the Yang di-Pertuan Agong), or on his own initiative, or on the request of any person made by letter addressed to him, may make and publish in the *Gazette* a *fatwa* (legal ruling) on any unsettled or controversial question of or concerning Islamic law. Upon publication in

the *Gazette*, the *fatwa* is binding on all Muslims and recognized as authoritative of all matters laid down therein by all courts, in the state or territory concerned.

- In the making of the *fatwa*, the *mufti* is assisted by a committee. That committee (variously named) is presided over by the *mufti* and comprises members (the membership varies from state to state) who are either appointed or nominated by the Majlis.

7.4.3 Coordination of Islamic Law Administration

Measures to coordinate the administration of Islamic affairs

As Islamic law is a state matter, the law and its administration vary from state to state. To promote uniformity in the administration of Islamic affairs, Article 3(2) of the Federal Constitution provides for each of the Rulers to authorize the Yang di-Pertuan Agong to represent him in acts, observances, or ceremonies that extend to the federation as a whole.[49] Another step to coordinate the administration of Islamic affairs was the establishment, on 17 October 1968, of the National Council for Islamic Affairs by the Conference of Rulers and, under it, the National Fatwa Committee. The National Council is administered by the Islamic Affairs Division in the Prime Minister's Department.

The National Council for Islamic Affairs comprises a chairman appointed by the Conference of Rulers (usually the Prime Minister) and eighteen members:

- a representative of each state in Peninsular Malaysia appointed by the Ruler concerned and in the case of Melaka and Penang, by the Yang di-Pertuan Agong;
- a representative from Sabah and Sarawak, each appointed by the Yang di-Pertuan Agong with the approval of the Yang di-Pertua Negeri, and after consulting the Majlis Agama Islam of the state concerned; and
- five persons appointed by the Yang di-Pertuan Agong with the consent of the Conference of Rulers.

The functions of the National Council are:

- to advise and make recommendation on any matter referred to it by the Conference of Rulers, by any state government, or Majlis Agama Islam; and
- to advise the Conference of Rulers, state governments, and Majlis Agama Islam on matters concerning Islamic law, or the administration of Islam and Islamic education, with a view to improving, standardizing, and encouraging uniformity in Islamic law and administration.

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[49] See above, p 168.

The National Fatwa Committee considers matters concerning Islamic law. It comprises the *mufti* of all the states, who are members of the National Council, and five other experts on Islamic law appointed by the Yang di-Pertuan Agong.

The National Council has set up a number of committees to coordinate Islamic affairs in the state, ie a task force to study the collection, administration, and distribution of monies from *zakat*, *fitrah*, *bait-ul-mal*, and *wakaf*, a committee to study the conditions of the *Syariah* courts, a committee to study and streamline the laws concerning marriage and divorce, and a committee to fix the commencement of the month of Ramadan and of Syawal.

Despite these steps to coordinate the administration of Islamic law and affairs, problems remain. This is because the coordinating bodies established are merely advisory bodies—their decisions are not binding on the states—as is clear from the provision establishing the National Council to the effect that the position, right, privileges, sovereignty, and other powers of the Rulers as heads of Islam in the states shall not be prejudiced.

Questions

1. What is the basic law of the Federation of Malaysia?
2. Explain the meaning of Article 3 of the Federal Constitution.
3. Islamic law is a state matter.
   (a) Does a state have full and complete power to implement the *Syariah*?
   (b) Does a state have the exclusive power to enact legislation concerning Islamic law?
   (c) Can a state implement the *hudud* (*hudd*, literally meaning the limits ordained by Allah; *hudud* refers to the seven specific crimes in Islamic criminal law and their mandatory punishments)?

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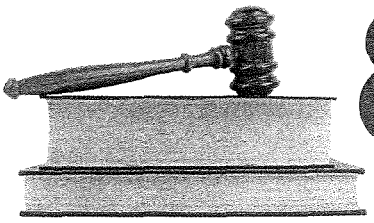

8 CUSTOMARY LAW

Chapter Objectives

- Define customary law
- Introduce the customary laws in Malaysia
- Sketch the preservation of customary laws during the colonial era
- Discuss some problems posed by the application of customary laws
- Comment on the relevance of customary laws today

8.1 DEFINITION

THE origin of most known systems of law is rooted in ancient customs. For example, the English common law was originally based on oral customs of the Anglo-Saxons, which the Norman judges moulded into a formal system of law in the medieval royal courts. Likewise, it should not be forgotten that in Malaysia, the basis of the Islamic law applicable today is Malay customary law onto which were grafted rules of, first, Hindu and, subsequently, *Syariah* law.

What customary law is can be gleaned from the following working definition:

> ... a regular pattern of social behaviour which has been accepted by the bulk of a given society as binding upon its members, because such behaviour has been found to be beneficial not only as a means of encouraging inter-personal relations among them, but also as being beneficial for maintaining a cohesive society for their individual and collective betterment.[1]

The above definition refers to customs which are accepted as binding. These are customs which the courts will enforce. Thus, customary laws are customs which have legal consequences, ie their breach invokes legal (as distinct from moral or social) sanctions. These are the customs discussed in this book, in particular, below.

[1] Lakshman Marasinghe, 'Customary Law as an Aspect of Legal Pluralism, with Particular Reference to British Colonial Africa', *JMCL*, 25 (1998): 19–20.

8.2 INTRODUCTION TO THE CUSTOMARY LAWS IN MALAYSIA

In Malaysia there is no customary law of general application. The customary laws that survive to this day are the following:

- Malay customary law applicable to the Malays;
- Chinese customary law applicable to the Chinese;
- Hindu customary law applicable to followers of Hinduism;
- Orang Asli customary law applicable to the Orang Asli in Peninsular Malaysia, and
- Native customary law applicable to the non-Muslim indigenous communities in Sabah and Sarawak.

Malay *adat* (customary) law requires elaboration. Malay *adat* in Peninsular Malaysia is commonly divided into two contrasting systems:

Classification of Malay *adat* law

- *adat perpatih*;
- *adat temenggung*.

This dichotomy is a perpetration of a loose classification introduced by the nineteenth century colonial administrators. Such a classification was and is factually incorrect. This is because unlike *adat perpatih* (which was and is confined to Negeri Sembilan and some areas of Naning in Melaka), *adat temenggung* (supposed to prevail in the rest of the Malay Peninsula) did not and does not conform to a homogeneous body of law. The Malay *adat* outside of Negeri Sembilan and the Naning areas varied from locality to locality. These variants, in so far as they did not possess the characteristics of *adat perpatih*, were classified as *adat temenggung*.

Classification, by colonial administrators, is factually incorrect

Likewise perpetrated is the common origin of both *adat* systems as posited by the nineteenth century scholars of *adat*. Both systems are said to come from the same cradle, ie Minangkabau in Sumatra. They are called after two mythical law-givers: Dato' Parapatih nan Sabatang and Dato' Katumanggungan who were half-brothers. Dato' Parapatih ruled over the hilly region while Dato' Katumanggungan governed the coastal region. According to legend, Dato' Parapatih married a princess upon his return from a long journey. Later, it was discovered she was his half-sister. Horrified by the incestuous union, Dato' Parapatih and Dato' Katumanggungan divided the Minangkabau people into two main groups: Bodi-Chaniago (the *adat perpatih* group) and Koto-Piliang (the *adat temenggung* group). Marriage between two persons belonging to the same group or *suku* was decreed incestuous; therefore, prohibited. As it is the Bodi-Chaniago (*adat perpatih*) group which follows its

Common origins of Malay *adat* law

adat strictly, one tends to think of *adat perpatih* rather than *adat temenggung* when Malay *adat* is mentioned.

Adat perpatih is characterized as democratic because it exists in a peasant society, one that is organized matrilineally. Conversely, *adat temenggung* is characterized as aristocratic and autocratic. Aristocratic because the rules are made by decree of a ruler and autocratic because the rules tend to define a crime as an infringement of the ruler's prerogative. The degeneration of the democratic, matrilineal *adat perpatih* into the autocratic, patrilineal *adat temenggung* was attributed by the colonial scholars of *adat* to Hindu influence which was alleged to have injected notions of caste and male dominance.

The dichotomy, democratic–autocratic, matrilineal–patrilineal, includes yet another: unwritten–written. *Adat perpatih* is expressed in *perbilangan* or *kata adat* (pithy traditional sayings or maxims) passed down orally from generation to generation. *Adat temenggung*, on the other hand, is a body of written rules. The latter is found in several legal digests, eg the *Undang-undang Melaka* or *Risalat Hukum Kanun*, *Undang-undang Kerajaan* of Pahang, the Kedah Digest, the *Undang-undang Kerajaan* and the Ninety-nine Laws of Perāk. The dichotomy, unwritten–written, like its equivalent, *adat perpatih–adat temenggung*, should be taken with a pinch of salt as three legal digests of *adat perpatih* exist in Malaysia: the *Undang-undang Keturunan daripada Minangkabau turun ka-Negri Perak* (also known as *Undang-undang Dua-belas*) from Perak and one each from Kuala Pilah and Sungai Ujong, Negeri Sembilan.

Not much has been written about *Malay adat* in East Malaysia. There are several reasons for this:

- paucity of data;
- early codification of the main principles of the *adat*;
- administrative and judicial reluctance to separate *adat* and Islam.

The customary laws enumerated at the outset, together with Islamic law, are also referred to as personal laws, ie laws which apply to specific groups of people who are defined according to race (eg Chinese) or religion (eg Islam) or both (eg Indian and Hindu).

These personal laws are not only limited in terms of the people to whom they apply. Their field of application is also limited. All are largely confined to family matters: marriage, divorce, adoption, and inheritance. However, Malay *adat*, Orang Asli customary law and Native customary law regulate land rights as well. And, *adat perpatih* additionally covers traditional *adat* officialdom.

8.3 PRESERVATION OF CUSTOMARY LAWS DURING THE COLONIAL ERA

8.3.1 The Straits Settlements

The colonial judiciary played an important role in preserving the application of customary or personal laws.

In the Straits Settlements the Charters of Justice of 1808, 1826, and 1855 establishing the Court of Judicature granted the courts the jurisdiction and powers of the superior courts in England 'as far as circumstances will admit' and of the ecclesiastical court 'so far as the several Religions, Manners, and Customs of the inhabitants ... will admit'.[2] The major provisions of the Charters had been interpreted as a direction to the court to apply English law as the law of general application. The qualifying words quoted above or words to similar effect in the other provisions concerning the administration of justice and judicial process enabled the judiciary to modify English law so as to accommodate the personal laws of the local inhabitants. Thus, personal laws were applied as exceptions to English law, the law of general application.

Customary or personal laws were applied as exceptions to English law

The Charter provisions, however, were not cited as the juristic or theoretical basis for the application of personal laws in the earlier cases. These earlier cases justified the application of the personal laws on the basis of the principles of conflict of laws. For example, in *Chulas & Anor* v *Kolson*, Maxwell R said:

Theoretical basis for the application of customary law

> ... and where our law is wholly unsuited to the condition of the alien races living under it, their own laws or usages must be applied to them on the same principles and with the same limitations as foreign law is applied by our Courts to foreigners and foreign transactions. They must be regarded as persons with foreign domiciles and governed for many purposes by this law, and as if they resided among us temporarily.[3]

It was later, when the Chinese and Indian migrants could no longer be regarded as temporary residents of the Straits Settlements that the judgments cited either the Charter provisions or the common law policy of avoiding injustice and hardship to the local inhabitants as the basis for applying personal laws.

One other basis for accommodating customary or personal laws must be mentioned. In *Sahrip* v *Mitchell and Endain* (1877) Leic 466, a case which arose in Melaka, the defence to the plaintiff's claim in trespass to land brought into question the existence of an old Malay custom. That custom gave a land cultivator the right to clear and occupy all forest and waste land subject to the payment

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[2] *Letters Patent Establishing the Supreme Court of Judicature at Prince of Wales Island in the East Indies*, Prince of Wales's Island Gazette Press, 1887, p 16.

[3] (1867) Leic 462, 462–463.

of a tithe of one-tenth of the total produce of the land to the sovereign, the owner of the land. Maxwell CJ affirmed the existence and continuity of such custom. He said that the Portuguese, while they held Melaka, and after them, the Dutch, left the Malay customary law or *lex non scripta* (unwritten law) in force. 'That it was in force when this Settlement was ceded to the Crown appears to be beyond dispute, and that the cession left the law unaltered is equally plain on general principles.'[4] He added that English law which had been introduced into the Settlement by the Charter 'would no more supersede the custom in question than it supersedes local customs in England'.[5]

Maxwell CJ's judgment, in particular, his affirmations that:

- long usage establishes a custom;
- the custom in question was not only reasonable but well suited to a country with a thin population and superabundant land in dismissing the Solicitor General's contention that the custom was unreasonable and thus invalid; and
- in any event, it was too late to question the reasonableness of the custom since it had long been acquiesced in;

showed Maxwell CJ's belief that the English doctrine concerning custom had been received into the Straits Settlements along with English law.

Proof of legal custom in England

In England the courts recognize an alleged local custom as a legal custom upon proof that such custom is:

- ancient
- uninterrupted
- acquiesced in
- reasonable
- certain
- obligatory, and
- not inconsistent with other laws.

The theoretical or juristic basis for applying the Malay custom concerning land tenure in *Sahrip* v *Mitchell and Endain* has been criticized.[6]

No blanket application of customary laws

Whatever was the precise theoretical justification for modifying English law to accommodate local customs, Chinese, Hindu, and Malay customary laws were applied. But there was no blanket accommodation. Only customs in areas not conflicting with British interests and policy were recognized. Hence, apart from Malay customs concerning land tenure and Hindu customs regulating

[4] (1877) Leic 466, 469.
[5] Ibid.
[6] See below p 193, footnore 50.

moneylending practices peculiar to the Chettiar community, the customs recognized were confined to the field of family law. Even in this restricted area, preconditions further limited the recognition to customs which were:

- not contrary to reason, justice, and general public policy,[7] and
- not repugnant (ie contrary) to the common law of England.[8]

In the case of Chinese customary law, the main problem faced by the courts in the Malay Peninsula in the nineteenth century was to ascertain what the substantive principles of this law should be. There were neither precedents from China nor authoritative texts to fall back on. The laws of China of the Ching Dynasty were not considered suitable to regulate the affairs of Chinese immigrants owing to the differing social conditions. Furthermore, in the twenty-five years or so after 1912 the Chinese legal system was revolutionized. Traditional principles were discarded and old laws replaced by codes on Western lines. The Chinese customary law in the Straits Settlements and the Malay states was therefore a creation of the courts.

The Chinese customary law in the Straits Settlements and Malay states was a creation of the courts

The courts created a uniform body of Chinese customary law which they applied to all persons of Chinese race, regardless of their religion or domicile. Such a uniform body of customary law ignored the fact that the Chinese people were subject to customs which varied from place to place in their country of origin. This common body of customary law was based on customs originating in Ching China but which had been considerably modified. It was an amalgam of Chinese customs and English law. The Chinese customs thus accommodated were subject to the forms and techniques of English law, including the doctrine of *stare decisis*. This had the effect of not only distorting Chinese customs but rigidifying them and turning them into static law.

The courts created a uniform body of Chinese customary law applicable to all persons of Chinese race

In creating such a body of law, the courts were guided by:

- evidence given by expert witnesses (often, of dubious value) of the established practice of the Chinese immigrants;
- some textbooks on Chinese customs which had acquired a certain degree of recognition;
- Sir George Staunton's incomplete English translation of the *Ta Ch'ing Lu-Li*, the law code which contained some general provisions of family law in Ching China.

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[7] *Karpen Tandil* v *Karpen* (1895) 3 SSLR 58; *Nagammal* v *Suppiah* [1940] MLJ 119; *Woon Ngee Yew* v *Ng Yoon Tai* (1941) 10 MLJ Rep 32 at p 33.

[8] *Khoo Hooi Leong* v *Khoo Chong Yeok* [1930] AC 346.

The matters which troubled the courts most and which provided the bulk of the cases were:

- the position of the *t'sip* (secondary wife) and her children;
- division of property of the deceased rich who died intestate;
- adoption.

The courts recognized the Chinese practice of polygamous unions.[9] In the early cases, the requirements for formal validity of marriage were the same for the *t'sip* (secondary wife) as for the *t'sai* (primary wife), ie (1) long-continued cohabitation; (2) intention to form a permanent union; (3) public repute. All the cases agreed that mutual consent was necessary and that such consent was to be proved by evidence of some 'permanence' of the union. Later cases made the requirements less and less stringent, until the only requirement necessary was proof of mutual consent to marry.[10]

Although in traditional Chinese society, a *t'sai* was of a higher social and legal standing than a *t'sip,* the courts accorded both equal status in some respects, eg both were regarded as widows and entitled to equal shares in the estate of the deceased husband. Oddly, such division was made under the English Statute of Distribution of 1670.[11] Also, a *t'sip* was given the same rights as a *t'sai* to administer her deceased husband's estate.[12] Children of a *t'sip* were considered legitimate and entitled to inherit equally with children of a *t'sai.*[13]

Legitimacy was determined by the domicile of the father. In the case of a father possessing a Chinese domicile, legitimation by subsequent marriage—whether monogamous or polygamous—was possible.[14] Somewhat inconsistently, the courts rejected legitimation by subsequent recognition although this was an established practice in the Straits Settlements.[15]

The Chinese practise adoption to prevent the extinction of a lineage. An adopted child stands in all respects as a legitimate natural born child in the matter of succession. However, the Chinese custom of adoption was not recognized in the Straits Settlements and the Malay states. It was rejected by the Privy Council in *Khoo Tiang Bee et Uxor* v *Tan Beng Gwat* [1877] 1 Ky 413 on the grounds that the Chinese customary law on adoption was uncertain and that

[9] *In the Matter of Choo Eng Choon, Deceased,* commonly referred to as *The Six Widows' Case* [1911] 12 SSLR 120.

[10] See, eg *Yeow Kian Kee decd Er Gek Cheng* v *Ho Ying Seng* [1949] MLJ 171.

[11] 22 & 23 Car 11 c 10. See, *In the Goods of Lao Leong An* [1867] Leic SLR 418; (1867) 1 SSLR 1.

[12] *In the Goods of Ing Ah Mit* (1888) 4 Ky 380.

[13] *Khoo Hooi Leong* v *Khoo Chong Yeok* [1930] AC 346, 354.

[14] *In the Matter of Choo Eng Choon, Deceased* [1911] 12 SSLR 120.

[15] *Khoo Hooi Leong* v *Khoo Chong Yeok* [1930] AC 346.

it would merely add to the conflict of laws problem in the Straits Settlements where uniformity in the laws of inheritance must be preserved as far as possible. Legislation also affected the practice of adoption. The Distribution Ordinance of 1958[16] restricted the status of adoption to persons formally adopted under the Adoption Ordinance of 1952.[17]

In contrast to Chinese customary law, Hindu customary law did not impose upon the courts in the Straits Settlements and the Malay states the problem of ascertaining its substantive principles. Apart from the evidence of experts on the local customs of the Hindu community, the courts were able to rely on:

- authoritative texts of the nineteenth century such as those of Mayne, Jolly, and Mulla, and
- precedents from India.

Development of Hindu customary law in the Malay Peninsula was an adaptation of Hindu customary law in India

Thus, in some matters at least, the development of Hindu customary law in the Malay Peninsula can be seen as an extension and adaptation of Hindu customary law in India. It should be stressed, however, that the Hindu customary law in the Malay Peninsula was not necessarily the same as that in India. Local customs were recognized by the courts provided they were not contrary to reason, justice, and general public policy.

Again, in contrast to Chinese customary law, Hindu customary law was not uniformly applied to all Indians of Hindu faith. This was in recognition of the fact that there existed a great variety of Hindu customary practices.

As with the other personal laws, the main topics were confined to the field of family law. There were, however, two unique features of Hindu customary law: (1) the joint family property and (2) moneylending contracts in the Chettiar community. The judiciary accepted the institution of the joint family property[18] and, while acknowledging the existence of the moneylending contracts, subjected the validity of their *modus operandi* to the requirements of English commercial law.[19]

The only matter concerning Malay customary law which troubled the British in the Straits Settlements (more precisely, Melaka) was customary land tenure. By this tenure, the Malays could take up wasteland and cultivate it temporarily or permanently subject to the condition of paying one-tenth of the total produce to the

[16] No 1 of 1958.
[17] No 41 of 1952.
[18] For example, *In re the Estate of TMRM Vengadasalam Chettiar, Decd* [1940] 9 MLJ Rep 124.
[19] See, eg *Letchumanan Chettiar* v *Alagappa Chettiar* [1934] MLJ 50.

state. Abandonment for more than a certain period operated as forfeiture. The Portuguese and the Dutch had not interfered with this tenure; and the existence and continuity of such tenure was acknowledged by the British judiciary.[20]

In 1861 the Malacca Lands Ordinance[21] was enacted. Among others, it abolished, for the future, customary land tenure; but all existing rights under such tenure were respected. The actual working of these existing tenures, however, was not provided for until 1886 when the Malacca Land Customary Rights Ordinance was enacted.[22] That legislation and the judicial decisions interpreting it created what may be called the 'statutory *adat*' of Melaka, ie certain customary land rights (by prescription) which were recognized but defined and subjected to English law.

8.3.2 The Malay States

The Malay-Muslim law was the basic law of the Malay states before British intervention

The law applicable in the Malay states at the time of British intervention was the Malay *adat* modified by principles of the *Syariah*, though it is often described the other way round. Edmonds JC said in *Shaik Abdul Latiff & Ors* v *Shaik Elias Bux*:

> The only law at that time applicable to Malays was Mohammedan Law modified by local customs. In Selangor, Perak and Pahang amongst Mussalmans succession on death was regulated by unmodified Mohammedan Law; in parts of Negri Sembilan there are special local customs based on matriarchy.[23]

Several cases have laid down that such Malay-Muslim law is not foreign law to be proved by expert evidence but local law and the law of the land of which the court must take judicial notice. It is for the court to declare what that law is, and in ascertaining that law the court may have recourse to appropriate books of reference.[24]

Being one of two elements of the basic law of the land, Malay *adat* law was unquestionably an important part of the laws of the Malay states in the early days. The matters within the ambit of Malay *adat* law that were most often litigated were customary land tenure and *harta sepencarian* (property jointly acquired during marriage).

Chinese customary law was also an important component of the early laws of the Malay states. From the earliest times the Chinese in Perak and Selangor—as in the Straits Settlements—were subject to Chinese officials or 'Kapitan China'. The Chinese were

[20] *Abdullatif* v *Mahomed Meera Lebe* (1829) 4 Ky 249; *Sahrip* v *Mitchell & Anor* (1877) Leic. 466.
[21] Ordinance No 9.
[22] Ordinance No 39.
[23] [1915] 1 FMSLR 204, 214.
[24] *Ramah binti Ta'at* v *Laton binti Malim Sutan* [1927] 6 FMSLR 128; *Re Timah binti Abdullah, deceased* (1941) 10 MLJ 51.

allowed to follow Chinese customs in family matters. Later, British officials (called Protectors of Chinese) were appointed. The Protectors continued to regulate questions of succession in accordance with Chinese customs. The courts often referred questions concerning distribution of Chinese estates to these Protectors. In Perak this practice was codified in Order-in-Council No 23 of 1893. That Order, entitled 'Recognition of Chinese Laws' formally recognized Chinese family law and laid down its main provisions, thereby ending the practical problem of ascertaining what its substantive principles were. Although this Order was enacted law in Perak only, the courts held that it was applicable throughout the Federated Malay States (FMS)[25] partly in the interest of uniformity and partly because the principles of Chinese customary law posited in that Order had been indirectly sanctioned by the Secretary for Chinese Affairs Enactment, 1899 enacted by the legislatures of the FMS.[26] That enactment, among other things, directed the Secretary in settling any case under its provisions to have regard to the known laws and customs of the Chinese as far as local circumstances and justice and equity allowed. According to the earliest practice of the courts set up in the Malay states, the estates of intestate Chinese were distributed according to Chinese custom. To ascertain the custom, the Chief Magistrate and Resident sought the assistance of leading members of the Chinese community.

The Perak Order-in-Council of 1893 was repealed in 1929. It was replaced by the Distribution Enactment.[27] The latter introduced the main provisions of the English Statute of Distribution to govern succession to the estate of every intestate (other than a Muslim) who died locally domiciled. The law on intestate succession was unified to overcome the difficulty of administering a variety of personal laws, a situation brought about by the influx of non-Malays who settled in the Malay states. The repeal of personal laws was, however, confined to succession to the estate of non-Muslims upon intestacy. The personal laws on other matters within the ambit of family law, eg marriage, divorce, and adoption, remained applicable in the absence of legislation.

Before the formal introduction of English law in the Malay states [ie in 1937 in the FMS and 1951 in the Unfederated Malay States (UMS)] the courts applied Chinese and Hindu customary laws by invoking their inherent jurisdiction to do justice between the parties and to decide in conformity with the social

Theoretical bases for the application of Chinese and Hindu customary laws

[25] See, *Yap Tham Thai* v *Low Hup Neo* [1919] 1 FMSLR 383; *In re Tan Soh Sim, deceased* (1951) MLJ 21, 24–26.

[26] *Laws of the Federated Malay States*, 1877–1920, p 115.

[27] Cap 71.

conditions of the community where the law was administered.[28] After English law was formally introduced, the courts applied Chinese and Hindu customary laws in place of the normal rules of English law on the basis of the common law principle of not applying the rules of English law to alien races when intolerable injustice and oppression would be the consequence of their application.

In applying Chinese and Hindu customary laws, the courts in the Malay states referred to, and relied on, precedents from the Straits Settlements. There are several reasons for this:

- the same judges sat in both jurisdictions;
- the Courts of Appeal on both the FMS and the Straits Settlements comprise the same members;
- the desirability of a certain measure of uniformity of the rules of law applied throughout both groups of territory in view of their close ties and common interests.

8.3.3 Sabah and Sarawak

The application of customary laws in Sabah and Sarawak (in particular, the latter) is more extensive and systematic compared to in the Malay Peninsula. Several factors account for this:

Factors accountable for the extensive application of customary laws in East Malaysia

- The Charter granted by the Gladstone Government of Great Britain to the British North Borneo Company (BNBC) and the legislation formally introducing English law to Sabah and Sarawak in 1938 and 1928, respectively, were more protective of customary laws than the Charters of Justice granted to the Straits Settlements and the corresponding legislation formally introducing English law to the Malay states.
- The courts in Sabah and Sarawak, partly because of the above, were more customary law oriented than their counterparts in the Malay Peninsula.
- Sabah and Sarawak have a long history of codification of customary law.
- Legislation, as early as in the administration of the BNBC in North Borneo (as Sabah was then) and the Brookes in Sarawak, supplements the codification to preserve and develop customary laws (Malay customary law, Native customary law and, in Sarawak, Chinese customary law).
- Sarawak has a mechanism established by statute to continue to preserve and develop customary laws.

[28] Terrell JA in *Woon Ngee Yew* v *Ng Yoon Thai* (1941) 10 MLJ Rep 32, 42–43.

Sabah (then North Borneo) and Sarawak were British protectorates from 1888 until 1946. The basic law before the British arrived continued to apply until changed. That basic law was presumably the same as the basic law in the Sultanate of Brunei of which Sabah and Sarawak were once part. The basic law was *Syariah* law modified by Malay customary law (the Malay-Muslim Law). Among the non-Muslim indigenous peoples (generally referred to as the Dayak in Sarawak), native customary law was the law of general application.

The basic law before the British arrived

In Sarawak, well-established systems of unwritten customary laws existed before James Brooke commenced his administration in 1841. These he recognized and exploited to his advantage. The recognition of these customary laws removed what could have been a major source of confrontation with the indigenous peoples. The Brookes relied on customary laws in administering justice during the early period of their rule. They modified the system only after achieving relative stability in the 1860s. An administrative machinery based on the principle of respect for customary laws was put in place. It provided for frequent consultations with the native chiefs. However, some aspects of *adat* (such as headhunting, retaliatory wars, trials by ordeal, unjustified homicide and slavery) were gradually banned. When Sarawak became a British colony in 1946, the colonial government, in return for Dayak support for cession to the British Crown, gave a commitment to uphold native customary law.

Preservation of customary laws during the Brooke administration in Sarawak

In North Borneo, when the BNBC acquired the various territories which now comprise Sabah from Alfred Dent and Baron von Overbeck, it realized the necessity to recognize native customary law then prevailing. Formal recognition was given in Article 9 of the Royal Charter granted to the BNBC by the British Crown on 1 November 1881. Article 9 specifically provided:

Preservation of customary laws in North Borneo

> In the administration of justice by the Company to the people of Borneo, or to any of the inhabitants thereof, careful regard shall always be had to the customs and laws of the class or tribe or nation to which the parties respectively belong, especially with respect to the holding, possession, transfer and disposition of land and goods, and testate or intestate succession thereto, and marriage, divorce and legitimacy, and other rights of property and personal rights.

By the time Sabah and Sarawak joined Malaysia in 1963, the system of native customary law administered by Native Courts had long been an integral part of the state legal system. Under the Federal Constitution, Native Courts and the enforcement of native customary law remain as state matters to be regulated by state legislation.

A large part of the substantive content of native customary law in Sabah and Sarawak is found in codes. Codification goes back to

Customary law codes in Sabah and Sarawak

the administration of the BNBC in Sabah and the Brookes in Sarawak. These codes were compiled by British administrative officials or commissioned by the British administration for administrative purposes. The codes were summaries of the native customary laws. The rules codified were selected by the compiler. They covered a limited range of subjects. While these codes are not the exclusive source of native customary law (principles of which are also found in legislation and judicial decisions), they are the single most extensive source. The status of these codes (apart from those which are incorporated into statutes as subsidiary legislation) has never been established. From the cases it appears that while they do not bind the courts, they are highly persuasive.

In Sabah, the best known of these codes are 'Woolley's Codes'. They were compiled by GC Woolley, a BNBC administrator, between 1932 and 1937. Comprising seven sets, they set out certain features of the customary laws of the Dusun, Murut, and Kwijau. These compilations cover a common set of subjects: marriage, divorce, inheritance, and compensation for wrongdoing. They have been printed in 1953 and 1962 as Native Affairs Bulletin No 1–7.

There is also a codification intended as a guide for Sabah Native Courts in cases involving Muslims. Called the *Undang-Undang Native Court, Mahkamah Adat Orang Islam*, it was drafted in 1936, gazetted in that year,[29] and amended in 1941. Its present status, particularly vis-à-vis the Administration of Muslim Law Enactment of 1977, is uncertain. It covers marriage, divorce, and sexual offences.

Sarawak has more native customary law codes then Sabah. They fall into two categories:

1. those which have been incorporated as subsidiary legislation under the Native Customary Laws Ordinance 1955 (Cap 51); and
2. those which have not been so incorporated but have been published at official direction.

In addition, there are scattered papers, mainly published in the Sarawak Museum Journal, drawn up by administrative officers and utilized in the compilation of codes in (1) and (2) above.[30]

The codes which have been incorporated as subsidiary legislation by orders made under the Native Customary Laws Ordinance 1955 (Cap 51) are a number of lists of customary fines or *Tusun*

[29] GSO 02116/1936.

[30] An example is the text prepared by AB Ward, a Brooke administrator, in 1915. It was the first attempt to record in writing penalties for breaches against customs of the Sea Dayak (Iban). The original text was published in the Sarawak Museum Journal Vol XI (1961).

Tunggu for the various divisions of Sarawak. An example is the Sea Dayak (Iban) Fines or *Tusun Tunggu* of the Third Division. It was originally drafted in 1936 and revised in 1952.

There are two texts which have never been gazetted under the Native Customary Laws Ordinance 1955 (Cap 51). However, they have been published under an administrative order. Both were compiled by AJN Richards, a scholar of *adat*. They are the Dayak (Iban) *Adat* Law in the Second Division published in 1963 and the First Division Dayak (Bidayuh) *Adat* Law published in 1964. These two texts have been replaced by codifications of *Adat* Iban 1993[31] and *Adat* Bidayuh 1994.[32]

As in Sabah, there is in Sarawak a codification of the Malay-Muslim law. It is called the *Undang-Undang Mahkamah Melayu Sarawak*. Drafted in 1915 as an aid to administration it was originally enforced by administrative officers. Since 1955 it has been classed as subsidiary legislation by authority of the Native Customary Laws Ordinance 1955 (Cap 51). The codification comprises short statements of Malay *adat* on marriage, divorce, inheritance, and public order offences. The Islamic element is slight. This code and its counterpart in Sabah make no distinction between Islamic law and Malay *adat*—a reflection of the realities in both Borneo states. The Muslim population in these states was and is small. Since it was the policy of the British administration to give effect to native law, Islamic law—deemed a minor law applicable to a mainly coastal population—was subsumed under the blanket of 'native law'. Thus, in these states Islamic law was administered as part of Malay *adat* and enforced by the Native Courts. Jurisdiction in Islamic law was removed from the Native Courts and vested in the *Syariah* Courts only in 1977 in Sabah and in 1978 in Sarawak.

Administration of native customary law featured prominently in the early history of Sabah. Following the formal recognition of native customary law in Article 9 of the Royal Charter which created its existence (see above, p 185), the BNBC passed several legislation concerning native affairs. Among the most important were:

1. Native Rights to Land Proclamation, 1889[33] which was concerned mainly with establishing a system of land registration;
2. Village Administration Proclamation, 1891[34] which was intended to establish and maintain public order;

[31] Swk LN 18.
[32] Swk LN 27.
[33] No III of 1889.
[34] No II of 1891.

3. Abolition of Poll-Tax Proclamation, 1902[35] which was really an addition to the 1889 Proclamation and should be read together with it. It was, in fact, a code of native land tenure. It made land rights dependent on registration and directed—through accompanying rules—the practice of cultivation.

These three pieces of legislation laid the basis for native law administration in Sabah. Subsequent legislation merely amended or elaborated on the principles established therein.

The 1891 Proclamation was revised by the Village Administration Ordinance of 1913.[36] The latter provided for a Native Court to be established in every district.

The Native Administration Ordinance, 1937[37] was the first of the new series of native customary law legislation. It comprised three parts:

1. Sections 1–15 repeated, with additions and modifications, the provisions of the original proclamation of 1891;
2. Sections 16–30 dealt with the composition, jurisdiction, and powers of a Native Court; and
3. Sections 31–35 provided for the administration of Islamic law.

The 1937 Ordinance was replaced in its effect on native administration by the Native Courts Ordinance 1953.[38] The latter substantially reproduced the provisions of the earlier ordinance as to the composition, jurisdiction, and powers of Native Courts. An important amendment was made in 1958 when the Native Courts (Amendment) Ordinance of that year[39] established a new appeals procedure. A Native Court of Appeal was established.

Formal introduction of English law into Sabah in 1938

The most significant change in the legal system of Sabah was effected by the Civil Law Ordinance 1938.[40] It imported English law. Sections 2 and 3 were a more elaborate version of s 2 in Sarawak's Order No L–4, 1928 (see below, p 189). They provided:

> 2. Save in so far as other provision has been made or may hereafter be made by any enactment in force in the State the common law of England and the rules of equity, other than any modification of such law or any such rule enacted by statute, as administered in England at the date of commencement of this Ordinance, shall, subject to the provisions of this Ordinance, be in force in the State.
>
> 3. The common law of England and the rules of equity as administered in England at the date of the commencement of this Ordinance shall be in force in the

[35] No IX of 1902.
[36] No 5 of 1913.
[37] No 2 of 1937.
[38] No 6 of 1953, subsequently Cap 86.
[39] No 21 of 1958.
[40] No 2 of 1938.

> State *so far only as the circumstances render necessary*; and in the exercise of jurisdiction *all Courts shall have special regard to the laws and customs of the inhabitants of the State so far as they are not inhumane, unconscionable or contrary to public policy.* (Emphasis added).

These provisions, with modifications, were repeated in the North Borneo Application of Laws Ordinance 1951.[41]

In Sarawak, legislation passed by the Brookes (variously called 'Orders', 'Regulations' or '*Pemerintah*') in the early and informal period of administration (1863–1920) was designed to establish a distinct system of law for each racial and religious group. Two examples may be given:

1. Order III of 1870 established the structure of the early court system. The fourfold structure was the basis of the court system for the next sixty years or so. One of the four courts was a 'Native Court' (officially called the 'Native Mohammadan Probate and Divorce Courts') which had jurisdiction in marriage, divorce, and inheritance. The president of the court was the 'principal chief of each Residency or District'.
2. Order IX of 1911 which set up a Chinese Court; probably the only one in British South-East Asia. It too had jurisdiction in marriage, divorce, and division of property. The court personnel were elected annually, chosen from the leading Chinese merchants of Kuching. Decisions of the court on a matter of Chinese customary law were final. The court continued to exist until 1920 but since no magistrates were appointed to it after 1919, it virtually ceased to function thereafter.

In the early period of administration, legislation concerning the indigenous peoples was few in number and limited in scope. Native customary law was implemented administratively rather than judicially.

Increasing complexity in administration brought about increasing formality in government machinery. This was reflected, eg in the enactment of Order No L-4 of 1928[42] which placed on a more formal basis the law applicable in the courts in Sarawak. Section 2 of that Order provided:

Formal introduction of English law into Sarawak in 1928

> The law of England in so far as it is not modified by Orders and other Enactments issued by His Highness the Rajah of Sarawak or with his authority, and in so far as it is applicable to Sarawak having regard to native customs and local conditions, shall be the law in Sarawak.

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[41] No 27 of 1951.

[42] Reproduced in Appendix, RH Hickling, *Malaysian Law*, Subang Jaya: Pelanduk Publications (M) Sdn Bhd, 2001, pp 225–9.

Guidelines on the application of English law

Of greater significance to the application of native customary law were the 'Notes for the Guidance of Officers in Interpreting Order No L-4 (Law of Sarawak)'.[43] It explained that the Order was intended to provide for the application of English law where existing Orders were silent. It set down two main principles to be considered in deciding on the law to apply:

1. English law was to be applied as far as possible.
2. Native customary law was to be maintained as far as it was 'not repugnant to good administration, or ... to humanity, morality and public policy'.

Guidelines on proof of legal custom

The Notes also laid down some guidelines in determining whether to apply a particular rule of customary law:

1. Is the custom general and of great antiquity?
2. Is it reasonable?
3. Does the custom offend against morality?
4. Does the custom offend against public policy?

Overall, these Notes cautioned the courts against haste in applying English law.

The increasing formality in administration also saw the enactment of the Native Courts Order 1940.[44] It set up a series of Native Courts: (1) District Court comprising a Magistrate of the Second Class, a Native Officer, and two assessors; (2) Court of a Native Officer or Chief comprising these officials; (3) Headman's Court comprising a Headman and two assessors. Appeal lay from the most junior to the more senior of the Native Courts; from them to the court of the Magistrate of the First Class and eventually to the Supreme Court.

Milestones in the development of native customary laws in Sarawak

The formal structure of native customary law administration reached its definitive form in 1955 with the enactment of the Native Courts Ordinance[45] and the Native Customary Laws Ordinance.[46] The former was an enlargement of the earlier Native Courts legislation. Its most important feature was the creation of a Native Court of Appeal presided over by a judge of the High Court of Borneo. The second named ordinance represented a watershed in the development of native customary laws in Sarawak. All customary laws gazetted under it acquired the status of subsidiary legislation. It

[43] Reproduced in Appendix, Hickling, *Malaysian Law*, pp 225–9.
[44] Order N–3 of 1940, later Cap 4 Laws of Sarawak.
[45] No 2 of 1955, later Cap 43 Revised Laws of Sarawak 1958; subsequently replaced by the Native Courts Ordinance 1992 and Native Courts Rules 1993.
[46] No 3 of 1955, later Cap 51 Revised Laws of Sarawak 1958; subsequently replaced by the Native Customs Declaration Ordinance 1996.

also empowered the Governor-in-Council to amend any system of native customary law with the consensus of the community concerned, in recognition of the fluidity of such law.

The development of Dayak customary law reached another milestone after Sarawak became part of Malaysia. This was the establishment in 1977 of the *Majlis Adat Istiadat Sarawak* (Council for Customs and Traditions, Sarawak) under the *Majlis Adat Istiadat* Ordinance 1977.[47] The *Majlis* is empowered, among other things, to:

1. examine the various *adat* of the Dayak and make recommendations for their application and enforcement;
2. review from time to time the *adat* and recommend its amendment;
3. conduct inquiries and consider requests for new rulings to be made concerning certain aspects of the *adat*. Recent and current codification of the *adat* of the various Dayak communities are undertaken under powers vested in the *Majlis* under the 1977 Ordinance.

It is clear that successive administrations in Sarawak have adopted a protective policy concerning native customary law. That policy has preserved (and continues to preserve) the customary law of the indigenous peoples. It has also provided for amendments of the *adat* to ensure its continuing relevance.

Customary law in Sabah and Sarawak is found not only in codes and legislation but also in judicial decisions.

In Sabah, the most important single source of native customary law cases is the published collection compiled by Tan Sri Lee Hun Hoe, CJ of the then High Court of Borneo. The cases reported, all appeals to the Native Court of Appeal, covered two main matters: (1) family law and (2) land and property disputes. The cases show that the Native Courts give effect to native customary law with little amendment.

In Sarawak, the Native Courts give maximum effect to native customary law. At least two reasons may be offered:

1. The legal justification for the application of customary law in Sarawak contrasts with that in the Straits Settlements and the Malay states. In *Kho Leng Guan* v *Kho Eng Guan* [1936] SCR 60 'certain laws and customs of races indigenous to Sarawak including Mohammedan law and other native law or custom in so far as it is reasonable' were enumerated by the court as one of three sources of law of Sarawak.

[47] No 5 of 1977.

2. A good deal of judicial power has been left in the hands of the traditional Dayak authorities whose cooperation has always been sought in the compilation of the *adat*. The reduction of the *adat* to writing combined with the cooperation of the *adat* authorities has avoided the practical problem faced in Peninsular Malaysia of ascertaining the substantive rules of customary law.

As in Sabah, the bulk of the cases deal with family law and land matters.

Malay customary law was applied as part of native customary law in Sabah and Sarawak until the later half of the twentieth century. The majority of the cases illustrate the lack of any distinction between Malay customary law and Islamic law. In both states, there are cases which show that the courts in the past gave effect to Malay *adat* even when such *adat* contradicts Islamic law.[48]

Chinese customary law is not native customary law because the Chinese are not indigenous to Sarawak. So it was held in *Chan Bee Neo* v *Ee Siok Choo* [1947] SCR 1. The court would, nevertheless, apply Chinese customary law when the custom is expressly regulated (directly or indirectly) by or recognized (expressly or impliedly) in a Sarawak Ordinance.

The effect of the above decision is illustrated in *Li Khoi Chin* v *Su Ah Poh* [1950] SCR 17 and *Chiew Boon Tong* v *Goh Ah Pei & Lan Ngoh* [1956] SCR 58. Both cases concerned Chinese customary marriages. In Sarawak, such marriages are regulated by statute, ie Chinese Marriage Ordinance 1933.[49] The validity of Chinese customary marriages is, therefore, judged by the requirements of the ordinance, the most important of which is registration with a Registrar of Chinese Marriages. In both cases the court held that a Chinese customary marriage would not be valid unless registered under the Chinese Marriage Ordinance 1933.

More rational judicial approach towards the development of Chinese customary law in East Malaysia

In Sabah and Sarawak the courts have adopted a more rational approach in ascertaining the substantive rules of Chinese customary law. Whereas their counterparts in the Malay Peninsula looked upon Chinese customary law as a homogeneous body of law applicable to all persons of Chinese race regardless of domicile or religion, the courts in Sabah and Sarawak have differentiated customs of the various dialect groups, eg Hakka, Henghua, Foochow. They have accepted evidence on a case by case basis and looked to the

[48] See, eg in Sabah *Re An Application of Sipang bin Logong* 1973:17; Lee Hun Hoe, *Cases on Native Customary Law in Sabah*, p 17; and, in Sarawak, *Sheripah Unei & Sheripah Ta'siah* v *Mas Poeti & Anor* [1949] SCR 5.

[49] Cap 74, Revised Laws of Sarawak 1946.

custom of the group to which the persons before them belonged at the time of the decision. In so doing, the courts in Sabah and Sarawak have taken upon themselves the responsibility of determining what the contemporary custom is.

8.4 SOME PROBLEMS POSED BY CUSTOMARY LAW

Problem of proof of legal custom

One of the early problems posed by customary law lay and still lies, in the method of its recognition and proof. As mentioned above (see p 178), in England the courts recognize an alleged local custom as a legal custom upon proof that the custom is (1) ancient; (2) uninterrupted; (3) acquiesced in; (4) reasonable; (5) certain; (6) obligatory; and (7) not inconsistent with other laws. The English rule concerning proof of legal custom was adopted in *Sahrip* v *Mitchell* (see above, pp 177–8). It was similarly adopted in *Haji Saemah* v *Haji Sulaiman* (1942) 11 MLJ (FMSLR) 17, a case arising in Pahang. A widow claimed a half share of land belonging to her deceased first husband as *harta sepencarian* on the basis of a local custom. Horne J dismissed her claim. Having held such a custom as alleged had not been proved, Horne J then referred to a passage in Woodroffe and Ameer Ali, *Law of Evidence*, 9th edn, p 175, to show how a custom must be established:

> 'Custom' as used in the sense of a rule which in a particular district, class or family has from long usage obtained the force of law must be ancient, continued, unaltered, uninterrupted, uniform, constant, peaceable and acquiesced in, reasonable, certain and definite, compulsory and not optional to every person to follow or not. The acts required for the establishment of customary law must have been performed with the consciousness that they spring from a legal necessity....

Criteria for judicial recognition of custom in Sarawak

The application of these criteria in local cases has been criticized on the ground that such criteria do not necessarily apply outside England.[50] In Sarawak, the criteria for judicial recognition of custom are (1) reasonableness; (2) generality; (3) antiquity; (4) consistency with morality; and (5) not contrary to public policy.[51] The view has been expressed that these criteria are probably valid for the recognition and proof of customary law in Malaysia generally.[52]

Customary law is unwritten law. In Malaysia, except in Sarawak, the bulk of customary law remains not only uncodified but

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[50] MB Hooker, *The Personal Laws of Malaysia*, Kuala Lumpur: Oxford University Press, 1976, p 85.

[51] John Wayne Chamberlain Sirau, 'The Bidayuks of Sarawak: The People and their Adat–A Sociological Study', University of Malaya, LLB Academic Exercise 1984, p 142.

[52] Hickling, *Malaysian Law*, p 76.

Problem of admissibility of evidence of oral history in proving customary law

unrecorded. Proof of custom, especially of the Orang Asli in Peninsular Malaysia, depends on evidence of oral history from time immemorial. Prior to the High Court decision in *Sagong bin Tasi & 6 Ors* v *Kerajaan Negeri Selangor & 3 Ors* [2002] 2 MLJ 591, the objection to such evidence is the hearsay rule. As Mohd Noor Ahmad J put it on p 622:

> It is trite that hearsay evidence is to be excluded because it is not the best evidence and not delivered on oath. The truthfulness and accuracy of the person whose words are spoken by another witness cannot be tested by cross-examination and the light which his demeanour would throw on his testimony is lost.... Also, it is trite that hearsay becomes admissible only when specific provision has been made for its admissibility.

That case is a landmark decision concerning land rights of indigenous peoples in Malaysia. Among other things, it ruled that oral history of the indigenous peoples can be admitted as evidence subject to the requirements of the Evidence Act 1950.[53]

The plaintiffs in that case were the Orang Asli of the Temuan tribe. They had occupied land, approximately thirty-eight acres, classified as an aboriginal area under the Aboriginal Peoples Act 1954 (the Act).[54] The plaintiffs were evicted from the land following the acquisition of that land for the construction of a portion of the highway to the Kuala Lumpur International Airport. The plaintiffs were compensated for the loss of their crops, fruit trees and homes, ie the building structures. The defendants refused to compensate the plaintiffs for the loss of the land on the grounds that the plaintiffs did not have any proprietary interest in the land.

The primary issue arose from the defendants' challenge to the plaintiffs' status. The defendants did not dispute that the plaintiffs were members of the Temuan tribe but asserted that as the plaintiffs were no longer practising their traditional way of life, they no longer met the definition of aboriginal peoples in the Act.

The plaintiffs sought to introduce evidence of oral history concerning the status of their land, their practices, and traditions to prove their status as aboriginal peoples and their relationship with their ancestral land. The defendants objected to such evidence on the ground that it offends against the hearsay rule.

The High Court judge, having explained the rationale for the exclusion of hearsay evidence (quoted above), said the Evidence Act 1950 (EA) provides the exceptions to the hearsay rule. Among these is s 32 which permits verbal statements.

The judge said that under Article 8(5)(c) of the Federal Constitution and the Act, the plaintiffs have the right to be protected,

[53] No II of 1950.
[54] (Act 134) (Revised 1974).

to well-being and advancement, particularly concerning land use. He likened the situation of the aboriginal peoples here to those in Canada. The Supreme Court of Canada in *Delgamuukw* case[55] affirmed the principles established in *R* v *Van der Peet*[56] that trial courts must (1) approach the rules of evidence in the light of evidentiary difficulties inherent in adjudicating aboriginal claims, and (2) interpret that evidence against this background. In practical terms these principles require the trial courts to accept the oral histories of aboriginal societies, which for many aboriginal peoples, are the only record of the past.

Turning to Malaysia, the judge said the EA determines whether oral histories of aboriginal societies should be accepted and if so, under what circumstances. Noting that s 32 permits verbal statements, the judge expressed the view that:

> ...the framers of the EA would have been aware or ought to have been aware of the fact that our aboriginal peoples also did not keep or have written records of their histories. That being the case, the evidentiary difficulties as envisaged should not be a reason for the courts here to create further exceptions to the hearsay rule other than what have been codified otherwise it will make a mockery of the law....
>
> ... in principle, oral histories of aboriginal societies relating to their practices, customs and traditions and on their relationship with land should be admitted subject to the confines of the EA, in particular s 32(d) and (e) that is to say:
>
> (i) they must be of public or general nature or general interest;
>
> (ii) the statement must be made by a competent person ie one who 'would have been likely to be aware' of the existence of the right, customs or matter; and
>
> (iii) the statement must be made before the controversy as to the right, customs or matter had arisen.

The defendants appealed against the decision of the High Court on the nature of the land rights of the plaintiffs to the Court of Appeal and, subsequently, to the Federal Court but not on the High Court's ruling concerning the admissibility of oral histories of the aboriginal peoples.

The application of customary law in a plural legal country such as Malaysia may raise from time to time a conflict of laws problem.

Problem of conflict of laws

The clearest illustration of this is conversion to and out of Islam. Islamic law is the personal law of Muslims. Islamic law is enforced by the *Syariah* Courts which have jurisdiction only over Muslims. Not only a conflict between the civil law and Islamic law but a conflict of jurisdiction between the civil courts and *Syariah* Courts is a real possibility when:

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[55] *Delgamuukw* v *British Columbia* [1997] 3 SCR 1010.
[56] [1996] 2 SCR 507.

1. One party to a marriage registered under the civil law converts to Islam before dissolving such marriage, and the other party who does not convert does nothing subsequently to end the marriage;
2. A Muslim convert who prior to his or her death renounces Islam and reverts to his or her original faith.

It is a moot point which court has the jurisdiction to decide in (1) the status of the marriage and in (2) the religious status of the deceased.

In the past, the Chinese custom of polygamous unions raised a potential conflict between Chinese customary law and the civil law. Questions have arisen concerning the validity of polygamous marriages contracted according to Chinese customary law by a Chinese supposedly of Christian faith; and whether a Chinese married under the Christian Marriage Enactment[57] could contract a subsequent marriage in accordance with Chinese customary law while the first marriage was still subsisting. Potential conflict between the civil law and Chinese customary law was avoided in the case of the former by the finding of the Court of Appeal that the person in question was not in fact a Christian and that being a man of 'Chinese race', the rules of Chinese customary law should apply to him.[58] In the case of the latter, conflict was averted by the court's finding that there was nothing in the enactment in question that would prohibit a subsequent and polygamous union.[59] In effect, the court refused to equate Christianity with monogamy.

Awareness of the problem of conflict of laws prompted Thomson LP in the latter case to make the following observation:

> ... the whole question of personal law in this country, particularly as regards questions of marriage, divorce and succession, calls for the attention of the legislature....
>
> The questions involved are questions which go to the very root of the law relating to the family which, after all, is the basis of society at least in its present form, and the existence of a civilized society demands that these questions be settled beyond doubt by legislation which will clearly express the modern mores of the classes of persons concerned and put the rights of individuals beyond the chances of litigation.[60]

Such legislation was not to materialize until more than fifteen years later (see below).

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[57] FMS Cap 109 (subsequently replaced by the Christian Marriage Ordinance No 33 of 1959).

[58] See, *Re Loh Toh Met, deceased: Kong Lai Fong & Ors* v *Loh Heng Peng* (1961) 27 MLJ 234.

[59] See, *Re Ding Do Ca* [1966] 2 MLJ 220.

[60] Ibid, p 223.

8.5 RELEVANCE OF CUSTOMARY LAW TODAY

Today, other than native land rights of indigenous peoples in Malaysia and native customary law in Sabah and Sarawak, the influence of customary law is waning.

Of Malay *adat* law, only *adat perpatih* is still practised in Negeri Sembilan and the *adat* areas of Naning in Melaka. Chinese and Hindu customary laws on marriage and divorce have diminished relevance since the coming into force of the Law Reform (Marriage and Divorce) Act 1976 (Act 164) on 1 March 1982.

That Act introduced a uniform law on marriage, divorce, and ancillary matters among non-Muslims. Its provisions are based largely on English legislation. Polygamous marriages among non-Muslims are abolished. A common system of solemnization of marriage and compulsory registration of marriage has been imposed. The Act does not abolish customary forms of marriage. A couple may celebrate their marriage according to their customary laws provided such marriage is solemnized in accordance with the provisions of the Act.

The Act does not operate retrospectively. It does not affect the legality of polygamous and customary law marriages contracted before the Act came into force. The Act also does not apply to natives of Sabah and Sarawak and the Orang Asli of Peninsular Malaysia unless they elect to marry under the Act.

The uniform law on marriage, divorce and ancillary matters introduced by the Act replaced the heterogeneous personal laws applicable previously to non-Muslims of different ethnic origins. Malaysia had to choose between preserving plural legalism or providing a unified body of substantive laws. The Act leans towards the latter.

Uniformity of the law on family matters not only renders the law more certain but also minimizes the problem of conflict of laws.

Native customary law continues to apply as the personal law of the non–Muslim indigenous peoples of Sabah and Sarawak. How long it will remain so depends on how long these communities can maintain their beliefs, customs, traditions, and culture against the onslaught of modern lifestyles brought about by economic and social development.

Declining importance of customary law except
- in Sabah and Sarawak; and
- in relation to native land rights of the indigenous peoples in Malaysia

Of emerging importance is the question of native land rights (or common law native title) of the indigenous peoples in Malaysia, ie the natives of Sabah and Sarawak and the Orang Asli in Peninsular Malaysia. The cases of *Adong bin Kuwau & Ors* v *Kerajaan Negeri Johor & Anor*[61] (concerning the construction of a dam near Kota

[61] [1997] 1 MLJ 418.

Tinggi, Johor in aboriginal ancestral land), *Nor Anak Nyawai & Ors* v *Borneo Pulp Plantation Sdn Bhd & Ors*[62] (involving the logging of Iban forest land in Bintulu, Sarawak), and *Sagong bin Tasi & Ors* v *Kerajaan Negeri Selangor & Ors*[63] (above), and *Superintendent of Land & Surveys Miri Division & Anor* v *Madeli Salleh*[64] (concerning a native customary rights claim over land in Miri—formerly 'ex-Shell Concession Areas'—declared to be a government reserve for a park) show judicial recognition of some form of common law native title. What remains to be defined by the Federal Court is the precise nature of such title and its extent.

Native title may become increasingly relevant in Malaysia for two primary reasons:

1. the acquisition of land both for public purposes and private enterprise in the country's relentless march towards economic and social development may encroach upon the ancestral lands of the indigenous peoples, and
2. native land rights have assumed a global dimension primarily through the development of international human rights law. The United Nations Human Rights Council adopted the Declaration on the Rights of Indigenous Peoples on 29 June 2006.[65] Among other things, that Declaration states in Article 26 Clause 2:

> Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

Questions

1. Distinguish legal custom from social and religious customs.
2. How is the existence of a custom proved in a court of law in:
   (a) England; and
   (b) Malaysia?
3. Evaluate the contribution made by each of the three branches of government in perpetuating the application of customary laws
   (a) during British colonization; and
   (b) after independence and the formation of Malaysia.

---

[62] [2001] 6 MLJ 241.
[63] [2002] 2 MLJ 591.
[64] [2007] 6 CLJ 509.
[65] United Nations Declaration on the Rights of Indigenous Peoples, Human Rights Council Res, 2006/2 (June 29, 2006) contained in UN Doc A/HRC/1/L10 (Annex).

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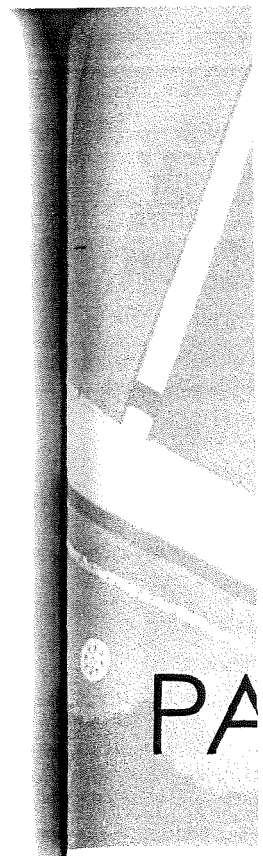

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PART THREE

INSTITUTIONS AND PERSONNEL OF THE LAW

Part 3 deals with the courts and the people primarily involved in the administration of justice.

There are two kinds of courts:

- Federal; and
- State

Federal Courts are discussed in Chapter 9 and State Courts in Chapter 10. The Federal Courts (often called the civil courts to distinguish them from the *Syariah* Courts) are the principal courts. They administer the law of general application, ie one based on the common law tradition.

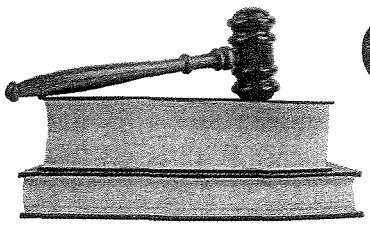
The State Courts are:

- The *Syariah* Courts; and
- The Native Courts

Syariah Courts administer Islamic law which is applicable only to Muslims. Native Courts are found only in Sabah and Sarawak. They administer native customary laws applicable only to the non-Muslim natives in these two states.

The people primarily involved in administering justice in the Federal Court system are:

- Judges and judicial officers discussed in Chapter 11;
- Attorney General and other legal officers described in Chapter 12; and
- Legal practitioners dealt with in Chapter 13.



9 FEDERAL COURTS

Chapter Objectives

Discuss the:

- constitution
- jurisdiction, and
- powers

of the Federal Courts

9.1 INTRODUCTION

MALAYSIA, although a federation, has a single hierarchy of courts which enforce both Federal and State laws (the latter apply only within the State concerned). The hierarchy comprises, in order of prominence, the:

- Federal Court;
- Court of Appeal;
- Two High Courts of equal status and jurisdiction—the High Court in Malaya and the High Court in Sabah and Sarawak;
- Sessions Courts;
- Magistrates' Courts; and
- Penghulu's Courts (in West Malaysia only).

The Federal Court, Court of Appeal, and the two High Courts are superior courts. The courts below the High Courts are inferior or subordinate courts. The superior courts are established under Article 121 of the Federal Constitution. The jurisdiction of the Federal Court and Court of Appeal is defined by both the Federal Constitution and the Courts of Judicature Act 1964 (Act 91) (Revised 1972)(CJA 1964) while that of the High Courts is defined only by the CJA 1964. Superior courts have unlimited jurisdiction. In contrast, subordinate courts have limited or prescribed jurisdiction. They are established by and derive their jurisdiction and powers from the Subordinate Courts Act 1948 (Act 92)(Revised 1972)(SCA 1948). Subordinate courts are called such because they

are generally subject to the control and supervision of the superior courts.

The courts listed above are vested with general jurisdiction. They have the jurisdiction to deal with civil and criminal matters, and with disputes involving private law (between private persons only) and public law (involving the government). With effect from 10 June 1988, clause (1A)—which was added to Article 121 of the Federal Constitution by the Constitution (Amendment) Act 1988 (Act A704)—removed from the High Courts and subordinate courts any matter that was within the jurisdiction of the *Syariah* courts.

High Courts and subordinate courts have no jurisdiction over any matter within the jurisdiction of the *Syariah* courts

In addition to the above courts, there are other judicial and quasi-judicial bodies with specific jurisdiction. Examples of specialized courts are the Special Courts (for the Malay Rulers),[1] the Court for Children,[2] and the Intellectual Property Courts.[3] Quasi-judicial bodies, such as the Industrial Court,[4] the Tribunal for Consumer Claims,[5] and the Tribunal for Housebuyer Claims,[6] are established by specific statutes primarily to spare the courts from additional work or to decide disputes of a technical nature. Unlike courts, these quasi-judicial bodies are generally not presided over by lawyers and are not required to observe strictly the rules of evidence and procedure.

Until 1 January 1985, the superior courts formed a three-tier system:

- The Privy Council;
- The Federal Court; and
- The High Court (Malaya) and the then High Court (Borneo).

Appeals from Malaysia to the Privy Council were abolished in two stages

Appeals from Malaysia to the Privy Council were abolished in two stages: appeals involving constitutional and criminal matters were abolished on 1 January 1978, and all other appeals on 1 January 1985, when the Federal Court was renamed the Supreme Court. Thereafter, until 1 January 1994, the three-tier system was reduced to two tiers: the Supreme Court and the two High Courts. The Constitution

[1] Established by the Constitution (Amendment) Act 1993 (Act A848).

[2] Established by the Child Act 2001 (Act 611) which consolidated the Juvenile Courts Act 1947 (Act 90), the Women and Young Girls' Protection Act 1973 (Act 106) and the Child Protection Act 1991 (Act 468).

[3] A system of Intellectual Property Courts (fifteen Session Courts and the High Courts sitting as 'special designated courts' in six states with the highest intellectual property infringements) was officially launched on 17 July 2007; *New Straits Times*, 18 July 2007, p 13.

[4] Established by the Industrial Relations Act 1967 (Act 177) (Revised 1976).

[5] Established by the Consumer Protection Act 1999 (Act 599).

[6] Established under Part VI of the Housing Developers (Control and Licensing) Act 1966 (Act 118) which was added by the Housing Developers (Control and Licensing)(Amendment) Act 2002 (Act A1142).

(Amendment) Act 1994 (Act A885) renamed the Supreme Court as the Federal Court and created the Court of Appeal. Consequently, the three-tier system of the superior courts was reinstated.

With the exception of the Court for Children and the Special Court, only the courts with general jurisdiction are discussed below.

9.2 COURTS OF GENERAL JURISDICTION

9.2.1 Federal Court

The Federal Court is the apex court or the final court of appeal in Malaysia.

9.2.1.1 Constitution

Since 1 September 2003, the principal registry of the Federal Court is located in the Palace of Justice, Putrajaya.

The Federal Court is established under Article 121(2) of the Federal Constitution.[7] It consists of the Chief Justice of the Federal Court (as the president of the court), the President of the Court of Appeal, the two Chief Judges of the High Courts, and (until the Yang di-Pertuan Agong, by order, otherwise provides) eight other judges and such additional judges as may be appointed pursuant to Article 122 clause (1A) of the Federal Constitution.[8]

A judge of the Court of Appeal (apart from the President) may sit as a judge of the Federal Court when the Chief Justice of the Federal Court considers that the interests of justice so require.[9]

Every proceeding of the Federal Court is heard and disposed of by three judges or such greater uneven number of judges as the Chief Justice may determine.[10] The Federal Court as a final court of appeal normally sits in a full bench of five judges, although in very rare and important cases it may sit as a full bench of seven. All proceedings are decided in accordance with the opinion of the majority of the judges composing the court.

Forum of 3 or such greater uneven number of judges as determined by the Chief Justice

9.2.1.2 Jurisdiction

By 'jurisdiction' is meant the power of the court or judge to hear and decide a case or make a particular order. The Federal Court has the following jurisdiction:

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[7] All Articles subsequently referred to are Articles of the Federal Constitution.
[8] Art 122(1) and PU (A) 229/05.
[9] Art 122(2).
[10] CJA 1964, s 74.

1. original;
2. appellate;
3. referral; and
4. advisory.

1. Original Jurisdiction

Same original jurisdiction as the High Court and exclusive original jurisdiction under Article 128(1)

Original jurisdiction means the power to hear a case for the first time (or at first instance). The Federal Court has the same original jurisdiction as the High Court. In addition, the Federal Court has an exclusive original jurisdiction under Article 128(1) to:

(i) determine whether a law made by Parliament or by the legislature of a state is invalid on the ground that it deals with a matter it has no power to legislate; and

(ii) decide disputes on any other question between the States of the Federation or between the Federation and a State; and in such a dispute the Federal Court may give only a declaratory judgment.[11]

The Federal Court may, in its original jurisdiction, also exercise a consultative jurisdiction when the need arises.

2. Appellate Jurisdiction

The bulk of the Federal Court's work is hearing and determining civil and criminal appeals.

(a) Civil

Appeals against Court of Appeal decisions, with leave, on any civil matter tried in the first instance in the High Court

Section 96 CJA 1964 provides that an appeal can be made from the Court of Appeal to the Federal Court with the leave of the Federal Court. Such an appeal can be made:

(i) from any judgment or order of the Court of Appeal concerning any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or

(ii) from any decision as to the effect of any provision of the Federal Constitution including the validity of any written law concerning any such provision.

The Federal Court has the power to order a new trial of any case or matter tried by the High Court in the exercise of its original or appellate jurisdiction.[12] As a safeguard, s 100 CJA 1964 provides that a new trial must not be granted on the ground of improper rejection or admission of evidence unless the Federal Court is of the opinion that a failure of justice has been caused by such impropriety.

(b) Criminal

The Federal Court has jurisdiction to hear and determine any appeal from any decision of the Court of Appeal in its appellate jurisdiction

[11] CJA 1964, s 82.
[12] CJA 1964, s 96.

concerning any criminal matter decided at first instance by the High Court. For example, in a murder trial held in the High Court any party, which is dissatisfied with the judgment, can appeal to the Court of Appeal, with a further right to appeal to the Federal Court.[13] An appeal may lie on a question of fact or of law, or of mixed fact and law.[14] The Public Prosecutor may appeal against acquittal. Notice of any appeal by the Public Prosecutor must be given by, or with the consent in writing of, the Public Prosecutor.[15]

Appeals against Court of Appeal decisions on any criminal matter decided at first instance by the High Court

Under s 90 CJA 1964, the Federal Court may summarily dismiss an appeal that comes before it. It may also confirm, reverse, or vary the decision of the Court of Appeal, or order a retrial or remit the matter with its opinion to the High Court, or make such other order as may seem just.

(c) Referral Jurisdiction

The Federal Court has the jurisdiction to decide a question which has arisen in another court concerning the interpretation or effect of any provision of the Federal Constitution which is referred to it in the form of a special case. When the Federal Court has decided, it remits the case to the trial court to be disposed of in accordance with that decision. Pending a decision by the Federal Court, the trial court may stay proceedings.

(d) Advisory Jurisdiction

Under Article 130, the Yang di-Pertuan Agong may refer to the Federal Court for its opinion any question concerning the effect of any provision in the Federal Constitution which has arisen or is likely to arise. In such an event, the Federal Court has to pronounce in open court its opinion in the form of a declaratory judgment on the question so referred.

It is unusual in a common law country for the executive to be given the power to seek advice from the courts. Such advice may, however, be sought in exceptional circumstances. As Tun Mohamed Suffian pointed out:

> Constitutionally the Attorney-General is legal adviser to the King, and it is inconceivable that any constitutional problem is beyond him, for he has a whole host of legal officers to help research for and advise him and, moreover, his place in the government hierarchy is such that the Ministry of Finance is unlikely to refuse him money to obtain the best legal advice within and without the country. So it is reasonable to suppose that the King, who of course acts on government advice, before embarking on an important step such as seeking the opinion of the Supreme Court on a constitutional question would do so only where perhaps urgent political considerations require resort to this course or where an

[13] CJA 1964, s 87(1).
[14] CJA 1964, s 87(3).
[15] CJA 1964, s 87(2).

authoritative pronouncement on an important legal issue is clearly desirable to resolve uncertainty in that field.[16]

Article 130 has been invoked only once. This was in the *Government of Malaysia* v *Government of the State of Kelantan* [1968] 1 MLJ 129. In that case, the Government of Kelantan entered into a commercial arrangement with a company. The company was granted a mining and forest concession in return for an advance payment of royalty under a financial package. The Federal Government contended that the transaction amounted to borrowing, contrary to the Constitution. When the Federal Court was asked to advise on the matter, the court ruled that the transaction did not constitute 'borrowing' within the meaning of the Constitution. Later, an extended meaning was given to the word 'borrow' in Article 160 by the Constitution (Amendment) Act 1971 (Act A30) to negate the law established by the Federal Court in that case.

9.2.2 Court of Appeal

The Court of Appeal is established by Article 121(1B).

9.2.2.1 Constitution

It was created in 1994 by the Constitution (Amendment) Act 1994 (Act A885) and the Courts of Judicature (Amendment) Act 1994 (Act A886) to provide an additional level of appeal, and to relieve the workload of the Federal Court. Its principal registry, from 1 September 2003, has been in the Palace of Justice in Putrajaya.

The Court of Appeal consists of the President of the Court of Appeal and, unless the Yang di-Pertuan Agong otherwise orders, twenty-two other judges. A High Court judge may sit as a judge of the Court of Appeal where the President of the Court of Appeal considers that the interests of justice so require. Such a judge is nominated by the President after consulting the Chief Judge of the High Court concerned. Every proceeding in the Court of Appeal is heard and disposed of by three judges or such greater uneven numbers as the President may determine in any particular case.[17] Proceedings of the Court of Appeal must be decided in accordance with the opinion of the majority of the judges composing the court.

Forum of 3 or such greater uneven number of judges as determined by the President

[16] Mohamed Suffian, *An Introduction to the Legal System of Malaysia*, 2nd edn, Petaling Jaya: Penerbit Fajar Bakti Sdn Bhd, 1988, p 61. He noted that in civil law countries it is not unusual for the Executive to be given the power to seek the legal opinion of the Judiciary.

[17] CJA 1964, s 38.

9.2.2.2 Jurisdiction

The Court of Appeal has:

1. jurisdiction to determine appeals arising from the decisions of a High Court or a judge thereof (except decisions of a High Court given by a Registrar or other officer of the court, and appealable under federal law to a judge of the court); and
2. such other jurisdiction as may be conferred by or under federal law.

The Court of Appeal has only appellate jurisdiction

The Court of Appeal has only appellate jurisdiction. It has no original jurisdiction.[18]

1. Civil

Under s 67 CJA 1964, the Court of Appeal has jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or its appellate jurisdiction. Appeals to the Court of Appeal are, however, restricted by s 68. That section provides that no appeal lies in the following cases:

(a) where the amount or value of the subject-matter of the claim (exclusive of interest) is less than RM250 000, except with leave of the Court of Appeal;
(b) where the judgment or order is made by consent of the parties;
(c) where the judgment or order relates to costs only, which by law are left to the discretion of the High Court except with the leave of the Court of Appeal; and
(d) where by any written law for the time being in force, the judgment or order of the High Court is expressly declared to be final.

Further, no appeal lies from a decision of a judge in chambers in a summary way on an interpleader summons,[19] where the facts are not in dispute, except by leave of the Court of Appeal. However, an appeal will lie from a judgment given in court on the trial of an interpleader issue.

An appeal to the Court of Appeal is by way of rehearing a case, in which the Court of Appeal has all the powers and duties of a High Court.[20] The Court of Appeal may:

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[18] Per Mohamed Dzaiddin FCJ in *Lam Kong Co Ltd* v *Thong Guan Co Pte Ltd* [2000] 3 CLJ 769, 784; and per Augustine Paul FCJ in *Metramac Corporation Sdn Bhd* v *Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177, 196.

[19] A procedure used to decide how conflicting claims against the same person should be dealt with; eg when two or more people claim the same goods that are being held by the applicant.

[20] CJA 1964, s 69.

- order a new trial; or
- reverse or vary the decision of the High Court.

The power to order a new trial under s 71 may be exercised irrespective of whether the matter was tried by the High Court in the exercise of its original or appellate jurisdiction. Unless the Court of Appeal is of the opinion that some substantial wrong or miscarriage of justice has occurred, a new trial may not be granted only on the ground of improper admission or rejection of evidence. The Court of Appeal may reverse or vary a judgment or order of the High Court, or order a new trial on account of any error, defect, or irregularity which does not affect the merits or jurisdiction of the High Court.

2. Criminal

The Court of Appeal may hear and determine any criminal appeal against any decision made by the High Court in the exercise of its:

(a) original jurisdiction; and
(b) appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.[21]

An appeal may lie on a question of fact or a question of law or on a question of mixed fact and law.[22]

Under s 50(2) CJA 1964, an appeal may be made to the Court of Appeal with the leave of that court against the decision of the High Court in exercise of its revisionary jurisdiction concerning a criminal matter heard by the Magistrates' Courts. Such an appeal is confined only to questions of law which have arisen in the course of appeal or revision, and the determination of which by the High Court has affected the event of the appeal or revision. Notwithstanding the provision in subsection (2), no leave of the Court of Appeal is required where the appeal is made by the Public Prosecutor. Notice of an appeal by the Public Prosecutor must be given by, or with the consent in writing of, that officer only.[23]

The Court of Appeal has the power to:

(i) summarily dismiss appeals;
(ii) confirm, reverse, or vary the decision of the trial court;
(iii) order a retrial or remit the matter with its opinion thereon to the trial court; or
(iv) make such other order in the matter as may seem just and may, by that order, exercise any power which the trial court might have exercised.

[21] CJA 1964, s 50(1). See Courts of Judicature (Amendment) Act 1995 (A909).
[22] CJA 1964, s 50(4).
[23] CJA 1964, s 50(3).
[27] CJA 1964, s 18.

The Court of Appeal may also quash the sentence passed by the trial court and pass such other sentence warranted in law if it thinks that a different sentence should have been passed.[24]

9.2.3 High Courts

9.2.3.1 Constitution

Two High Courts of equal jurisdiction and status

There are two High Courts of equal jurisdiction and status, namely:

1. the High Court in Malaya which has its principal registry in Kuala Lumpur; and
2. the High Court in Sabah and Sarawak which has its principal registry at such place in these states as the Yang di-Pertuan Agong may determine.[25]

They are constituted under Article 121(1),[26] and their jurisdiction and powers are conferred by federal law. Each High Court tries only cases that arise from its own territory, but if the parties consent in writing, the court may try cases from the territory of the other High Court. The local jurisdiction of the High Court is defined in s 3 CJA 1964 and s 2(1) SCA 1948. The local jurisdiction of the High Court in Malaya means the territory comprising the states and federal territories in Peninsular Malaysia, whereas the local jurisdiction of the High Court in Sabah and Sarawak means the territory comprising the states of Sabah, Sarawak, and the Federal Territory of Labuan. In either case, the local jurisdiction includes the territorial waters and their air space above the states concerned.

The High Courts sit in key towns in each State in their respective territories. For administrative purposes, the High Courts may be organized into divisions, eg commercial, criminal, family, etc. Each High Court consists of a Chief Judge (CJ) and not fewer than four other judges. Article 122AA provides that the number of other judges shall not exceed sixty in the High Court in Malaya, and thirteen in the High Court in Sabah and Sarawak.

A judicial commissioner may be appointed under Article 122AB to either of the High Courts in the same manner as a High Court judge is appointed. The judicial commissioner has the same powers and enjoys the same immunities as a judge of the High Court. Every proceeding of the High Court, whether in its original or appellate jurisdiction, is heard and disposed of before a single judge except as provided for by any written law.[27]

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[24] CJA 1964, ss 60(1) and (2).
[25] Art 121(1)(a) and 121(1)(b).
[26] Amended by Constitution (Amendment) Act 1988 (Act A704).

9.2.3.2 Jurisdiction

The High Court has the following jurisdiction:

1. original;
2. appellate; and
3. revisionary and supervisory.

1. Original Jurisdiction

Unlimited original jurisdiction in civil and criminal matters

The High Court has unlimited jurisdiction in both civil and criminal matters. It can try any civil case of any value or any criminal case, no matter how grave. However, the High Court normally tries only cases outside the jurisdiction of the subordinate courts. Civil cases constitute the bulk of its work. In practice, it tries cases where the amount involved exceeds RM250 000. The number of criminal cases tried by the High Court is small compared to that tried by the subordinate courts. These are offences punishable with death and a few other very serious offences.

(a) Civil

The general civil jurisdiction of the High Court is set out in s 23 CJA 1964. Subject to the limitation contained in Article 128, the High Court has jurisdiction to try all civil matters, regardless of value, where:

(i) the cause of action arose;
(ii) the defendant or one of several defendants resides or has his place of business;
(iii) the facts on which the proceedings are based exist or are alleged to have occurred; and
(iv) any land, the ownership of which is disputed, is situated within the local jurisdiction.

The High Court has specific jurisdiction in matters enumerated in s 24 CJA 1964. Such jurisdiction includes:

(i) divorce and matrimonial causes;
(ii) admiralty matters;
(iii) bankruptcy and companies;
(iv) appointment and control of guardians of infants; and generally over the persons and property of infants;
(v) appointment and control of guardians and keepers of the person and estates of idiots, mentally disordered persons, and persons of unsound mind;
(vi) granting, altering, or revoking probates of wills and letters of administration of the estates of deceased persons leaving property within the court's territorial jurisdiction.

(b) Criminal

The general rule is that the High Court has jurisdiction over people (citizens and non-citizens) and offences committed within its territory. This is set out in s 22(1)(a)(i) CJA 1964. Thus, the High Court in Malaya tries only offences committed in Peninsular Malaysia and its counterpart in Sabah and Sarawak, only offences committed in East Malaysia.

Jurisdiction over people (citizens and permanent residents) and offences committed outside Malaysia (extraterritorial jurisdiction) are the exception to the general rule. Statutory provisions grant the High Court such jurisdiction. Section 22(1)(a) CJA 1964 confers jurisdiction on the High Court to try all offences as follows:

> (a) ...;
> (b) on the high seas on board any ship or any aircraft registered in Malaysia;
> (c) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft; and
> (d) by any person on the high seas where the offence is piracy by the law of nations.

The extraterritorial jurisdiction of the High Court is, however, extended by s 22(1)(b) CJA 1964 which adds to the above:

> ... offences under Chapter VI of the Penal Code, and under any of the written laws specified in the Schedule to the Extra-territorial Offences Act, 1976, or offences under any other written law the commission of which is certified by the Attorney-General to affect the security of Malaysia....

Chapter VI of the Penal Code concerns offences against the State while offences specified in the Schedule to Extraterritorial Offences Act 1976 (Act 163) are offences under the Official Secrets Act 1972 (Act 88)(Revised 1988) and Sedition Act 1948 (Act 15)(Revised 1968). Section 22(1)(b) CJA 1964 is far-reaching as the Attorney General may extend the extraterritorial jurisdiction of the High Court to any offence under any written law, committed abroad by citizens and permanent residents, merely by certifying that it affects the security of Malaysia.

Two other statutory provisions confer extraterritorial jurisdiction on local courts: Section 22 of the Prevention of Corruption Act 1961 (Act 57)(Revised 1971) and the Penal Code (Amendment) Act 1986 (Act A651) concerning bigamy committed abroad by Malaysians. Unlike a subordinate court whose power of sentencing is limited, the High Court may impose the maximum sentence allowed by law under s 22(2) CJA 1964.

2. Appellate Jurisdiction

Appeals from subordinate courts and quasi-judicial bodies

A High Court hears appeals from subordinate courts in both civil and criminal matters. It can also hear appeals from quasi-judicial bodies if so authorized by law.

(a) Civil

The appellate civil jurisdiction of the High Court is laid down in s 27 CJA 1964. There is no appeal to the High Court from a decision of a subordinate court in any civil cause or matter where the amount in dispute or the value of the subject-matter is less than RM10 000, except on a question of law. This monetary limit, however, does not apply to decisions of a subordinate court in proceedings concerning maintenance of wives or children.

(b) Criminal

Under s 26 CJA 1964, the High Court can hear appeals from subordinate courts according to any law then in force within the territorial jurisdiction of the High Court. Sections 304–306 of the Criminal Procedure Code (Act 593)(Revised 1999), however, impose some restrictions on appeals to the High Court. No appeal can be made to the High Court from a subordinate court concerning any offence punishable with fine only not exceeding RM25. A person who has pleaded guilty and been convicted cannot appeal, except as to the extent or legality of the sentence. Finally, there is no appeal against an acquittal except by, or with the written sanction of, the Public Prosecutor.

3. Revisionary and Supervisory Jurisdiction

Revisionary and supervisory jurisdiction constitute paternal jurisdiction to correct or prevent injustice

The High Court has revisionary jurisdiction over criminal and civil proceedings in the subordinate courts. Section 31 CJA 1964 gives the High Court power to revise criminal proceedings in subordinate courts in accordance with any law for the time being in force concerning criminal procedure. Section 32 gives it the power to call for and examine the record of any civil proceedings before any subordinate court to satisfy itself as to the correctness, legality, or propriety of any decision recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

Section 35 augments the High Court's revisionary jurisdiction with a more general supervisory jurisdiction over all subordinate courts. The section empowers the High Court, in the interests of justice, either of its own motion or at the instance of any interested party, to call for the record of any proceeding—whether civil or criminal—in any subordinate court, at any stage of such proceeding, and either transfer the same to the High Court, or give to the subordinate court directions for the further conduct of the case.

Thus, it would appear that the High Court's revisionary and supervisory jurisdiction overlaps. The general intention seems to be to give the High Court adequate control and supervision over the subordinate courts.

4. Review of the Decisions of Other Judicial and Quasi-judicial Bodies

The High Court also has jurisdiction to review decisions of quasi-judicial bodies or administrative tribunals. This is provided by s 25(2) CJA 1964 read together with s 1 of the Schedule to the Act. These confer power on the High Court to issue orders or writs (called prerogative writs), including writs of the nature of habeas corpus, mandamus, prohibition, *quo-warranto*, and certiorari.

Supervisory jurisdiction over Native Courts

The High Court, acting in a supervisory capacity, may exercise control over Native Courts through prerogative writs if it can be shown that there was a:

- lack of jurisdiction;
- blatant failure to perform some statutory duty; or
- breach of natural justice.

No supervisory jurisdiction over *Syariah* Courts

Before 10 June 1988 [the date of the coming into force of the Constitution (Amendment) Act 1988 (Act A704) which amended Article 121 of the Federal Constitution] the High Court also had supervisory jurisdiction over the *Syariah* courts. Such jurisdiction ceased when clause (1A) was added to Article 121. That clause removed from the High Court jurisdiction over any matter within the jurisdiction of the *Syariah* courts.

9.2.4 Sessions Courts

9.2.4.1 Constitution

The Sessions Courts are established under s 59 of the Subordinate Courts Act 1948 (Act 92)(SCA 1948). Each Sessions Court is presided over by a Sessions Court judge sitting alone.

9.2.4.2 Jurisdiction

The Sessions Court has authority to try both civil and criminal cases arising within the local limits of jurisdiction assigned to it, or if no such local limits have been assigned, arising in any part of the local jurisdiction of the respective High Court. It has the following jurisdiction:

1. original; and
2. supervisory.

1. Original Jurisdiction

The original jurisdiction can be over civil or criminal matters.

(a) Civil

The civil jurisdiction of a Sessions Court is set out in ss 65–70 SCA 1948. It has unlimited jurisdiction to try all actions of a civil nature concerning:

Unlimited original jurisdiction over specified civil matters

- motor vehicle accidents;
- landlords and tenants; and
- distress.

In all other actions of a civil nature, its jurisdiction covers matters where the amount in dispute or the value of the subject-matter does not exceed RM250 000 unless both parties mutually consent in writing.[28] Where in any action or suit any defence or counterclaim of the defendant involves matters beyond the jurisdiction of the Sessions Court, the court may nevertheless proceed to determine the plaintiff's claim and the defence or counterclaim raised, but no relief in excess of the court's jurisdiction may be awarded to the defendant on the counterclaim.[29] In the alternative, either party may apply for the case to be transferred to and tried in the High Court.

Qualified original jurisdiction over all other civil matters

A plaintiff may also relinquish any portion of his claim to bring his action within the jurisdiction of the Sessions Court. But if he does so, he may not make any further claim to the portion relinquished.[30] Thus, if the plaintiff's claim is for RM260 000, he may relinquish his claim for RM10 000 and he may not afterwards sue for the balance in any court. Parties may be motivated to do that by the prospect of a faster and less expensive disposal of the claim. Claims may not be split into two by a plaintiff nor may more than one suit be brought concerning the same cause of action against the same party.[31] Thus, if a creditor is owed RM300 000 he may not split the claim into two claims of RM150 000 each, and bring two suits against the debtor. If he wants to claim the full amount he must take the claim to the High Court.

Certain actions are outside the jurisdiction of the Sessions Court. These, enumerated under s 69 SCA 1948, are generally actions that are likely to raise difficult points of law which are best dealt with by the more experienced High Court judges. These are actions:

Specific proceedings expressly excluded from Sessions Court jurisdiction

1. concerning immovable property except as provided in SCA 1948;
2. for the specific performance or rescission of contracts;
3. for an injunction;
4. for the cancellation or rectification of instruments;
5. to enforce trusts;
6. for accounts;
7. for declaratory decrees except in interpleader proceedings;

[28] Section 65 as amended by Subordinate Courts (Amendment) Act 1994 (Act A887). This section replaced the old figure of RM100 000.
[29] SCA 1948, s 66(1).
[30] SCA 1948, s 67.
[31] SCA 1948, s 68.

8. for the issue or revocation of grants of representation of deceased persons' estates or the administration or distribution of such estates;
9. wherein the legitimacy of any person is in question;
10. wherein the guardianship or custody of infants is in question (except as specifically provided in any written law);
11. wherein the validity or dissolution of any marriage is in question (except as specifically provided in any written law).

The Sessions Court has jurisdiction to adjudicate in any action for the recovery of immovable property. In any such action, there may be added a claim for rent and for damages, eg for breach of any agreement relating to the premises. The Sessions Court has such jurisdiction regardless of the value of the immovable property involved. However, the Sessions Court does not have such jurisdiction in a case where there is a bona fide question of the title involved.[32]

(b) Criminal

The Sessions Court may try all offences other than those punishable with death and may pass any sentence allowed by the law except the sentence of death.[33]

2. Supervisory Jurisdiction

Under s 54 SCA 1948, the Sessions Court is vested with a limited supervisory role over the Magistrates' and Penghulu's Courts. A Sessions Court judge may call for and examine the record of any civil proceedings before the Magistrates' or Penghulu's Court within the local limits of the jurisdiction of the Sessions Court, to satisfy himself or herself as to the correctness, legality, or propriety of any decision recorded or passed, and as to the regularity of any proceedings of that court. If any judge of the Sessions Court is of the view that any decision of the Magistrates' or Penghulu's Court is illegal or improper, or that any such proceedings are irregular, he or she must forward the record, with such remarks as he or she thinks fit, to the High Court. The High Court may give such orders as are necessary to ensure that justice is done.[34]

Limited supervisory jurisdiction

9.2.4.3 Appeals

Appeals from the Sessions Court in civil and criminal cases go to the High Court.

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[32] A bona fide question of title is involved where the defendant alleges that the plaintiff's right, title, and interest in the land is different from that claimed by the plaintiff and where that difference is material to the case.

[33] SCA 1948, ss 63–4.

[34] SCA 1948, s 54.

9.2.5 Magistrates' Courts

The Magistrates' Courts are the lowest in the hierarchy of the courts, yet they are the most important. These courts are more numerous than other courts. They handle the greatest volume of work. In fact, for the majority of people, their exposure to the courts would be likely to be only the Magistrates' Courts because these courts deal with everyday matters such as road traffic.

9.2.5.1 Constitution

The Magistrates' Courts are established under s 76 SCA 1948. They may be presided over by first or second class magistrates. A Magistrates' Court is deemed to be the court of a first class magistrate and has all the powers and jurisdiction conferred on a first class magistrate by the SCA 1948 or any other written law. However, a second class magistrate cannot adjudicate a matter which is not within the jurisdiction conferred upon him or her.

9.2.5.2 Jurisdiction

The Magistrate's Courts have general jurisdiction to try civil and criminal cases within the local limits of jurisdiction assigned to them, or if no such local limits have been assigned, arising in any part of the local jurisdiction of the respective High Court. In addition, they may issue summons, writs, warrants or other process, and make any interlocutory or interim orders, including orders concerning adjournment, remand, and bail. They may also conduct inquests or inquiries of death. The Magistrates' Courts also have specific jurisdiction. This depends on the status of the magistrate.

1. First Class Magistrate

A first class magistrate has:

1. original; and
2. appellate jurisdiction.

(a) Original Jurisdiction

The original jurisdiction may be over a civil or criminal action.

(i) Civil

Under s 90 SCA 1948, a first class magistrate has jurisdiction to try all actions where the amount in dispute or value of the subject-matter does not exceed RM25 000. Nevertheless, such a magistrate may exercise jurisdiction in actions involving an amount or value exceeding RM25 000 if both parties agree in writing.[35] A first class

[35] SCA 1948, s 93(1) read together with s 65(3).

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[37] SCA 1948, s
[38] Proviso to s
[39] See SCA 194

magistrate also has the jurisdiction of a Sessions Court in specified matters subject to the limits imposed by s 93(1) SCA 1948.

(ii) Criminal

A first class magistrate may try all offences punishable with up to ten years of imprisonment or with a fine only. He or she may also try offences under ss 392 and 457 of the Penal Code. Section 392 concerns robbery and s 457 deals with lurking, house trespass, or housebreaking by night in order to commit an offence punishable with imprisonment. The maximum punishment for these offences is fourteen years' imprisonment.[36]

The sentencing powers of the first class magistrate are prescribed in s 87(1) SCA 1948. He or she may pass any sentence allowed by law not exceeding:

- five years' imprisonment;
- a fine of RM10 000;
- whipping up to twelve strokes; or
- any sentence combining any of the above-mentioned sentences.

If, however, the magistrate considers that because of any previous convictions or antecedents of the convicted person, a punishment in excess of that prescribed in s 87(1) is appropriate, the magistrate may award the full punishment allowed by the law, but he or she must record his or her reasons for doing so.[37] The magistrate may also award punishment in excess of that prescribed in s 87(1), provided power to do so is given by any law in force.[38]

(b) Appellate Jurisdiction

A first class magistrate has jurisdiction to hear and determine both civil and criminal appeals from any decision of the Penghulu's Court, within the local limits of his or her jurisdiction.[39]

The magistrate may dismiss a criminal appeal if he or she considers there is no sufficient ground for interfering. If the appeal is against a conviction, the magistrate may:

- reverse the finding and sentence, and acquit and discharge the appellant;
- order retrial by a court of competent jurisdiction; or
- alter the finding and make such order as he or she deems fit.

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[36] As a result of amendments to the SCA 1948 in 1978 (see Act A434) and again in 1979 (see Act A459), the offences of robbery and housebreaking were added to the list of cases triable in the first class Magistrates' Court. This was to ease the backlog of cases in the Sessions Court.

[37] SCA 1948, s 87(2).

[38] Proviso to s 87(1).

[39] See SCA 1948, s 86 and s 91.

In an appeal against sentence, the magistrate may reduce or vary, but not enhance, the sentence and in an appeal against any other order, alter or reverse the order.

2. Second Class Magistrate

A second class magistrate has only original jurisdiction.

(a) Civil

Under s 92 SCA 1948, a second class magistrate has jurisdiction to try actions of a civil nature where the plaintiff seeks to recover a debt or liquidated demand in money not exceeding RM3000, payable by the defendant.

(b) Criminal

The criminal jurisdiction of a second class magistrate is to try offences for which the maximum penalty is twelve months' imprisonment or which are punishable with a fine only.[40] If the magistrate thinks that the accused, if convicted, deserves a penalty which exceeds his or her powers of punishment, the case must be adjourned for trial by a first class magistrate.[41]

A second class magistrate may pass any sentence allowed by law:

(i) not exceeding six months' imprisonment;
(ii) a fine not exceeding RM1000; or
(iii) any sentence combining either of these sentences.

9.2.5.3 Appeals

Appeals against decisions of the Magistrates' Courts—in both civil and criminal matters—lie to the High Court.[42] Generally, no appeal can be made in any civil matter where the amount in dispute is RM10 000 or less, except on a question of law. However, this monetary limit does not apply to appeals in any proceedings concerning the maintenance of wives or children.

9.2.5.4 Small Claims Procedure

No small claims courts; only small claims procedure

Malaysia does not have small claims courts. What it has is a small claims procedure, ie a simplified procedure introduced into the Magistrates' Courts for the handling of small claims. The establishment of small claims courts was originally proposed. That proposal had to be shelved because of the shortage of funds, manpower, and premises.[43] Instead, the second class Magistrates' Courts were

[40] SCA 1948, s 88. The powers of second class magistrates have been made uniform throughout Malaysia since 1987 (see Act A671).
[41] SCA 1948, s 88.
[42] CJA 1964, ss 26–28.
[43] *New Straits Times*, 16 May 1987.

activated with enhanced jurisdiction.[44] The small claims procedure—a simplified, inexpensive, and speedy process—for individual plaintiffs to claim small sums (initially below RM3000 and without legal representation) was introduced.

The Order 54 procedure[45]—as it came to be known—came into effect on 1 August 1987 with the establishment of a pilot project in the Federal Territory of Kuala Lumpur.[46] What was commonly—but incorrectly—called a 'Small Claims Court' was set up in Jalan Duta, presided over by a senior magistrate. It proved to be a success.[47]

Since 1 January 1991, all small claims have been tried by first class magistrates. That year also brought another change: the total exclusion of legal representation—to keep the process informal and inexpensive—was compromised. Companies that sued for debts began to be allowed legal representation.[48] The change was made in accordance with relevant statutory provisions.[49]

In 1993, the ceiling for small claims was raised to RM5000. In addition, the scope of small claims (originally confined to a debt or liquidated demand in money) was broadened to include any claim other than a debt, such as damages, provided the amount did not exceed RM5000.[50] The small claims procedure in the Magistrates' Courts is mandatory for recovery of all claims below RM5000.[51]

9.2.6 Penghulu's Courts

The Penghulu's Courts exist only in West Malaysia.

9.2.6.1 Constitution

The Penghulu's Courts are established under Part VIII SCA 1948. Each court is presided over by a *penghulu* (headman) appointed by the respective authority for a *mukim* (administrative district) where the *penghulu* resides.

9.2.6.2 Jurisdiction

The Penghulu's Court has very limited original jurisdiction in both civil and criminal matters. This jurisdiction is limited to proceedings in

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[44] Registrar's Circular No 5 1987.
[45] In the Subordinate Court Rules 1980.
[46] Subordinate Courts (Amendment) Rules 1988 (PU (A) 67/88).
[47] Disposing of 2900 cases in its first three months; *New Straits Times*, 11 May 1987.
[48] Subordinate Courts (Amendment)(No 3) Rules 1990 (PU (A) 460/90) and Registrar's Circular No 4 of 1991.
[49] Section 38, Legal Profession Act 1976 (Act 166) and Companies Act 1965 (Act 125).
[50] Subordinate Courts (Amendment) Rules 1993 (PU (A) 193/93).
[51] *Tan Ah Chai* v *Loke Jee Yah* [1998] 4 CLJ 73 (HC). Followed in *Pushpaneela a/p VN Suppiah* v *Ong Yen Chong & Anor* [1999] 4 AMR 3867 (HC).

which all the parties are persons of an Asian race, and who speak and understand the Malay language.[52] In civil matters, the Penghulu's Court may hear proceedings in which the plaintiff seeks to recover a debt or a liquidated demand in money, with or without interest, not exceeding RM50.

In criminal matters, it may try minor offences which are specifically enumerated in the: *surat kuasa penghulu* (letter of authority) and which can be adequately punished by a fine not exceeding RM25.[53] Under s 95(3) SCA 1948, an accused person has the right to elect to be tried by a Magistrates' Court and he must be informed of this right before the commencement of the trial by the *penghulu*. Where a person elects to be tried by the Magistrates' Court, the *penghulu* must transfer the case to the Magistrates' Court.

An appeal against a decision of the Penghulu's Court lies with a first class magistrate.[54] In the event of any lawful order made by a Penghulu's Court not being obeyed, the court may report the matter (with a copy of the proceedings) to the Magistrates' Court. The Magistrates' Court may enforce the order as though it were its own.[55]

9.3 COURTS OF SPECIAL JURISDICTION

Only the Special Court and the Court For Children are discussed below.

9.3.1 Special Court

9.3.1.1 Constitution

The Special Court was established in 1993. It was established under Part XV of the Federal Constitution. Part XV was added to the Federal Constitution by the Constitution (Amendment) Act 1993 (Act A848) which was enacted to remove the immunity of the Malay Rulers from legal proceedings in their personal capacity. The establishment of the Special Court was a compromise reached between the Malay Rulers and the government following the alleged assault of a hockey coach, Douglas Gomez, by the Sultan of Johor on 30 November 1992.[56]

[52] SCA 1948, ss 94 and 95(2).
[53] SCA 1948, ss 95(1) and 96.
[54] SCA 1948, s 86.
[55] SCA 1948, s 97.
[56] See Abdul Aziz Bari, 'The 1993 Constitutional Crisis: A Redefinition of the Monarchy's Role and Position?' in Andrew Harding and HP Lee (eds), *Constitutional Landmarks in Malaysia. The First 50 Years 1957–2007*, Singapore: Lexis Nexis, 2007, pp 227–42.

Article 182 provides for a court comprising the Chief Justice of the Federal Court (the Chairman), the Chief Judges of the High Courts, and two other persons who hold or have held office of the Federal Court or a High Court appointed by the Conference of Rulers. The Special Court has its registry in Kuala Lumpur. The decision of the Special Court is by a majority of its members. Such decision is final and conclusive and cannot be challenged in any court on any ground.

9.3.1.2 Jurisdiction

The Special Court has only original jurisdiction. It has exclusive jurisdiction over all proceedings by or against the Yang di-Pertuan Agong or the Ruler of a state in his personal capacity.[57] Therefore, offences committed in the federation by the Yang di-Pertuan Agong or the Ruler of a state and all civil cases by or against the same no matter where the cause of action arose can only be tried by the Special Court. Such proceedings cannot be instituted without the consent of the Attorney General personally.[58] This is to ensure there is a prima facie case against the Yang di-Pertuan Agong or Ruler in question. Only citizens of Malaysia have the right to institute such proceedings.[59]

Exclusive jurisdiction over all proceedings by or against the Malay Rulers in their personal capacity

Where the Yang di-Pertuan Agong or Ruler of a state is charged with an offence under any law in the Special Court, he will cease to exercise the functions of the Yang di-Pertuan Agong or Ruler as the case may be. Where a Ruler is convicted of an offence and sentenced to imprisonment for more than one day, he will cease to be the Ruler of the state unless he receives a free pardon from the Conference of Rulers.[60]

9.3.2 Court For Children

9.3.2.1 Constitution

Court For Children (CFC) were established by the Child Act 2001 (Act 611)(CA 2001). The CFC replaced Juvenile Courts set up

Court For Children replaced Juvenile Courts

[57] Art 182 (3). A Regent is not the Ruler of a state for the purposes of Arts 181(2), 182, and 183: *DYTM Tengku Idris Shah ibni Sultan Salahuddin Abdul Aziz Shah* v *Dikim Holdings Sdn Bhd & Anor* [2002] 2 MLJ 11 (FC); therefore, jurisdiction to hear proceedings by or against a Regent in his personal capacity lies with the ordinary courts established by Art 121 and under the SCA 1948. The Special court is the proper forum to hear proceedings by a Ruler suing in his personal capacity but not when the Ruler is represented by his attorney under power of attorney; in the latter case, the ordinary courts have jurisdiction; *Dato' Hari Menon* v *Texas Encore LLC & Ors* [2005] 2 CLJ 688 (HC).

[58] Art 183.

[59] *Faridah Begum bte Abdullah* v *Sultan Haji Ahmad Shah Al Mustain Billah* [1996] 1 MLJ 617, Special Court.

[60] Eighth Schedule, para 1A(3) read together with Art 42(12).

under the Juvenile Courts Act 1947 (Act 90), one of the statutes repealed by the CA 2001. CFC were set up with the paramount aim of protecting the interests of the children who appear before them. Thus, the CA 2001 provides measures that are intended to take children away from the adult criminal justice system and to protect them from publicity. To mention a few:

- A child offender who is arrested and is not released on bail pending trial before a CFC must be detained in a place designated under the CA 2001 which may include accommodation in a police station, cell or lock-up, separate from adult offenders;[61]
- A CFC must, if practicable, sit in a building or room different from that in which sittings of ordinary courts are held;[62]
- Proceedings in a CFC are not open to the public. The only persons permitted to be present at any sitting of such court are:
  1. court members and officers;
  2. the children who are parties to the case in question, their parents, guardians, advocates, and witnesses and other persons directly involved in that case; and
  3. such other persons as may be determined by the court;[63]
- Unless authorized, media reporting CFC proceedings must not reveal any particulars that may lead to the identification of any child (whether offender or witness) concerned in those proceedings.[64]

A child means a person under eighteen years and in relation to criminal proceedings, means a person who has attained the age of criminal responsibility as prescribed in the Penal Code, ie ten years.[65]

A CFC comprises a magistrate who must be assisted by two advisers, one of whom must be a woman. The advisers are appointed by the responsible Minister from a panel of persons resident in the state or territory concerned. The presence of the two advisers is crucial. The absence of either one or both renders the proceedings unlawful. The advisers have to advise the court concerning any consideration affecting the order to be made upon a finding of guilt or other related treatment of the child offender and, if necessary, to advise the parent or guardian of such child.

[61] CA 2001, ss 2(1) and 58.
[62] CA 2001, s 2(1)(a).
[63] CA 2001, s 12(3).
[64] CA 2001, s 15(1).
[65] Penal Code, s 82 Act 574.

9.3.2.2 Jurisdiction and Powers

Jurisdiction over all offences by child offenders except those punishable with death

A CFC has the jurisdiction to try all offences by child offenders, except those punishable with death.[66]

Except as modified or extended by the CA 2001, the Criminal Procedure Code applies to CFC as if such courts were Magistrates' Courts.[67] The CA 2001 prohibits the words 'conviction' and 'sentence' from being used in relation to a child offender found guilty. 'A finding of guilt' and 'order made upon a finding of guilt' are used in their stead.

Where an offence has been proved, the CFC must:

- consider a probation report; and
- seek the opinion of each of the advisers

before deciding on the order to be imposed. The probation report is prepared by a probation officer. It must contain information concerning the child's general conduct, home surroundings, school record, and medical history to enable the court to act in the child's best interests. The opinion of both advisers must be recorded and considered. The court is not bound to accept the opinion of either or both but must record its reasons for dissenting.

There are several orders the court may impose upon a finding of guilt. The more severe of these include sending the child to an approved institution such as the Henry Gurney School; whipping with not more than ten strokes of a light cane (but only if the offender is a male); and any term of imprisonment which could be awarded by a Sessions Court if the offender is aged fourteen years and above and the offence is punishable with imprisonment.

Prohibited from pronouncing or recording a sentence of death

Under s 97(1) CA 2001, the CFC may not pronounce or record a sentence of death against a child found guilty of an offence.[68] In lieu of a sentence of death, subsection (2) of the same provision requires the court to sentence the child to be detained in prison during the pleasure of the Yang di-Pertuan Agong or Ruler or Yang di-Pertua Negeri, as the case may be, depending on the venue of the offence.

Section 97(1) CA 2001 reflects the ban on the death penalty for children imposed by Article 37 of the United Nations Convention on the Rights of Children 1989, which Malaysia has acceded to. Unexpectedly, s 97(2) was declared unconstitutional by the Court of Appeal in *Kok Wah Kuan* v *Public Prosecutor* [2007] 4 CLJ

[66] These offences must be tried in the ordinary courts.

[67] CA 2001, s 11(6).

[68] Except where a child is accused or charged with a security offence. In such a case, the child, regardless of age, will be dealt with, tried, and sentenced in accordance with the provisions of the Essential (Security Cases) Regulations 1975.

454. That case concerns the murder of a tuition teacher's daughter, aged eleven, by one of the teacher's pupils. The offender was almost thirteen years old when he committed the murder in 2002. Upon being found guilty by the High Court in 2003, he was ordered to be detained during the pleasure of the Yang di-Pertuan Agong under s 97(2) CA 2001.

The Court of Appeal upheld the finding of guilt by the High Court but set aside the order of imprisonment on the grounds that s 97(2) CA 2001 was unconstitutional. The Court of Appeal arrived unanimously at that conclusion on the following premises: the doctrine of separation of powers[69] is an integral part of the Federal Constitution; the judicial power of the federation continues to vest in the judiciary despite the amendment of Article 121(1) by the Constitution (Amendment) Act 1988 (Act A704) which ceased to expressly vest such judicial power in the courts; and s 97(2) CA 2001 clearly contravenes the doctrine by consigning to the Yang di-Pertuan Agong, Ruler or Yang di-Pertua Negeri (essentially, the executive), the judicial power to determine the measure of the sentence that is to be served by the child offender. Since s 97(2) is invalid, a lacuna or gap exists in the CA 2001 concerning the sentence to be meted out to the child found guilty of murder. The Court of Appeal said it had no option but to order the release of the offender in question.

Calls by the government and the public for a review and amendment of the CA 2001 followed the decision of the Court of Appeal. Such agitation proved quite unnecessary. The Federal Court, presiding as a bench of five judges over the Attorney General's appeal, made short shrift of the rationale underlying the Court of Appeal decision.[70] Abdul Hamid Mohamad PCA delivering the judgment of the Federal Court, decreed that even though the doctrine of separation of powers had influenced the framers of the Federal Constitution, it is not a provision of the constitution. Seeking to justify that decree he rationalized that under the British constitutional system that is practised in Malaysia, separation of powers does not fully exist.[71] The Federal Court decision ended the child offender's brief

[69] First put forward by Montesquieu, a French jurist. According to the theory, the state has three primary functions: legislative, executive, and judicial, corresponding to the three branches of government. These three functions should be kept separate. Were it otherwise (as where one branch exercises not only its own function but also that of another), arbitrary government is likely to result.

[70] *Pendakwa Raya* v *Kok Wah Kuan* [2007] 6 AMR 269.

[71] One may well ask: Is not the only aspect of the doctrine of separation of powers that is strictly observed in England, an independent judiciary exercising judicial power (which indisputably includes imposing a penalty or punishment upon a finding of fault or guilt) without interference from the executive or legislature?

spell of freedom—three months—during which fortuitous sojourn at home he celebrated his eighteenth birthday.

The Public Prosecutor, any child or his parent or guardian, aggrieved by any finding or order of a CFC, may appeal to the High Court in accordance with the provisions set out in the Criminal Procedure Code concerning criminal appeals to the High Court from a Magistrates' Court.

Questions

1. (a) What are superior courts and why are they so called? Discuss the jurisdiction and powers of the superior courts in Malaysia.
   (b) Explain what is meant by the supervisory, revisionary, and review powers of the superior courts. In what circumstances would such powers be exercised?
2. Which courts have appellate jurisdiction? When may an appeal be made to:
   (a) The Court of Appeal; and
   (b) The Federal Court.

   What orders may these two courts make in the exercise of their appellate jurisdiction?
3. (a) Define subordinate courts. Discuss the constitution and jurisdiction of these courts.
   (b) Read *Tan Ah Chai* v *Loke Jee Yah* [1998] 4 CLJ 73 and answer the following questions:
      (i) Explain the rationale of the small claims procedure.
      (ii) Does legal representation of defendant companies contradict this rationale?

      If it does, why is legal representation of defendant companies made the exception to the general rule? Suggest how this exception for defendant companies can be deleted so that the rationale of the small claims procedure can be fully realized.
4. (a) Explain the rationale for establishing a special court for the
      (i) Malay Rulers; and
      (ii) Children.
   (b) (i) Discuss whether there are exceptions, if any, to the jurisdiction and powers of the Court For Children over child offenders; and
      (ii) the reasons for these exceptions.

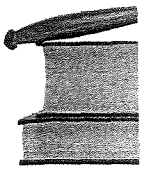
Reading List

Basic Reading

Halsbury's Laws of Malaysia, Vol 30, Singapore: LexisNexis, 2005, pp 5–335.

Sethu, RR, 'Redefining the Appellate Role of the Federal Court', *MLJ*, 4(1999): cxlv–clxxii.

Wu Min Aun, *The Malaysian Legal System*, 3rd edn, Petaling Jaya: Pearson Malaysia Sdn Bhd, 2005, Chapter 9.



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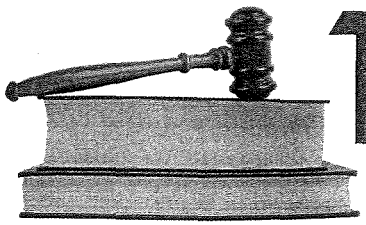

10 STATE COURTS

Chapter Objectives

Discuss the:

- constitution
- jurisdiction, and
- powers

of the *Syariah* Courts and Native Courts in Sabah and Sarawak; and

- conflict of jurisdiction between the civil courts and *Syariah* Courts.

10.1 *SYARIAH* COURTS

10.1.1 Introduction

SYARIAH COURTS are established by state law except in the Federal Territories of Kuala Lumpur, Labuan, and Putrajaya. In the Federal Territories, the *Syariah* Courts are established by federal law.

Syariah Courts have jurisdiction only over Muslims

Under the Federal Constitution, *Syariah* Courts 'have jurisdiction only over persons professing the religion of Islam'.[1] They have jurisdiction only within the respective states or territories in the case of the Federal Territories. Since *Syariah* Courts and Islamic law (except in the Federal Territories) are state matters, there is no uniformity in the administration of *Syariah* Courts or of Islamic law throughout Malaysia. A federal department, the *Jabatan Kehakiman Syariah Malaysia* (Department of *Syariah* Judiciary Malaysia) which is subsumed under the Prime Minister's Department has been set up to coordinate the administration of *Syariah* Courts at the national level. Among its functions is to administer the Joint Service Scheme.[2] This scheme enables the promotion of *Syariah* Court officers and their transfer between those states and the Federal Territories that have opted for the scheme.

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[1] See, Item 1 of the List 11—State List in the Ninth Schedule to the Federal Constitution.
[2] Set up under the Joint Service (Islamic Affairs Officers) Act 1997 (Act 573).

Problems arising from limited territorial jurisdiction

The limited territorial jurisdiction of the *Syariah* Courts has necessitated provisions in the relevant state and federal legislation for the service, and enforcement, of summonses, warrants, and other related documents issued by a *Syariah* Court in one state in the other states.[3] The problem of limited territorial jurisdiction may also be overcome through reciprocal arrangements between the states. A suggestion has been made for the enactment of a federal law to provide for the service and enforcement of summonses, warrants, and judgments of *Syariah* Courts throughout Malaysia and, if possible, outside Malaysia, eg in neighbouring countries.[4]

Civil jurisdiction concerns largely family law

The civil jurisdiction of *Syariah* Courts is limited to matters stated in Item 1 of List 11 (State List) under the Ninth Schedule to the Federal Constitution (which, apart from charities, trusts, and *wakaf*, generally relate to family law). *Syariah* Courts do not have criminal jurisdiction except in so far as conferred by federal law. The *Syariah* Courts (Criminal Jurisdiction) Act 1965 (Act 355) has conferred a limited criminal jurisdiction upon *Syariah* Courts, ie in respect of offences committed by Muslims against the precepts of Islam. Under this Act, the *Syariah* Courts have jurisdiction to deal with cases punishable with imprisonment up to three years, or fine up to RM5000 or whipping up to six strokes or a combination of all these. The offences may be prescribed by any written law. States have enacted legislation creating these offences.[5]

Criminal jurisdiction is confined to such as is conferred by federal law

Presently, there are variations in the structure of *Syariah* Courts. In most states, a three-tier structure exists. Such a structure has been proposed for all states. The discussion below is based on the three-tier structure in the Federal Territories of Kuala Lumpur, Labuan, and Putrajaya.

10.1.2 *Syariah* Courts in the Federal Territories

Syariah Courts in the Federal Territories of Kuala Lumpur, Labuan, and Putrajaya are established under s 40 of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505)(AIL(FT) Act 1993). They are established by the Yang di-Pertuan Agong on the advice of the Minister responsible for the administration of Islam

[3] See, eg *Syariah* Civil Procedure Code Enactment 1991 of Selangor (Enactment No 7 of 1991), ss 47–51; *Syariah* Court Civil Procedure (Federal Territories) Act 1998 (Act 585), ss 52–55.

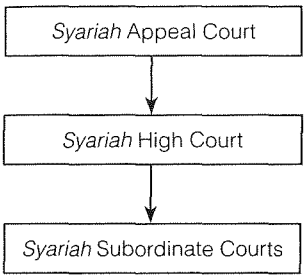
[4] Ahmad Mohamed Ibrahim 'Recent Developments, in the Administration of Islamic Law in Malaysia', in Ahmad Mohamed Ibrahim and Abdul Monir Yaacob (eds), *The Administration of Islamic Laws*, Kuala Lumpur: IKIM Publishing Unit, 1997, p 10.

[5] See eg the *Syariah* Criminal Offences (Selangor) Enactment 1995 (Enactment No 9 of 1995) and the *Syariah* Criminal Offences (Federal Territories) Act 1997 (Act 559).

in the Federal Territories (the Minister). The courts, in order of prominence, are the:

- *Syariah* Appeal Court;
- *Syariah* High Court; and
- *Syariah* Subordinate Courts.

Figure 10.1 Hierarchy of the *Syariah* Courts in the Federal Territories



10.1.2.1 *Syariah* Appeal Court

The constitution and jurisdiction of the *Syariah* Appeal Court are set out below.

1. Constitution

The *Syariah* Appeal Court is presided over by the Chief *Syariah* Judge who is appointed by the Yang di-Pertuan Agong on the advice of the Minister after consulting the Majlis Agama Islam Wilayah Persekutuan (the Council of Islamic Religion of the Federal Territories) (the Majlis).

A person qualifies to be appointed as Chief *Syariah* Judge if that person is:

(a) a Malaysian citizen; and

(b) for a period of not less than ten years preceding such appointment, has been a Judge of the *Syariah* High Court or a *kadi* or a registrar or a *Syariah* prosecutor of a state, or sometimes one and sometimes the other; or is a person learned in Islamic law.[6]

Every case in the *Syariah* Appeal Court is heard by the Chief *Syariah* Judge (as Chairman) and two judges selected by him. The two judges are selected from a standing panel of seven judges. Such a panel is appointed for a term of three years by the Yang di-Pertuan Agong on the advice of the Minister after consultation with the Majlis.[7] Nevertheless, the Chief *Syariah* Judge may

[6] AIL (FT) Act 1993, ss 41(2) and 43(2).
[7] AIL (FT) Act 1993, s 42.

appoint any judge of the *Syariah* High Court to be a member of the *Syariah* Appeal Court for any particular proceedings if he considers it desirable to do so.[8]

The Chief *Syariah* Judge presides over every case. In the event he is unable to act, he appoints the most senior of the Judges of the *Syariah* Appeal Court to act on his behalf.[9]

2. Jurisdiction

The *Syariah* Appeal Court has:

(a) appellate;
(b) supervisory and revisionary jurisdiction.

(a) Appellate Jurisdiction

The *Syariah* Appeal Court may hear any appeal against a decision of the *Syariah* High Court made in the exercise of its original jurisdiction.[10] The *Syariah* Appeal Court may also hear and determine any question of law of public interest which has arisen in the course of an appeal against a decision of a *Syariah* Subordinate Court to the *Syariah* High Court and the determination of which by the latter has affected the result of the appeal. The hearing and determination of such a question by the *Syariah* Court of Appeal is, however, subject to leave being granted by that court.[11]

(b) Supervisory and Revisionary Jurisdiction

The *Syariah* Appeal Court may call for and examine, at any stage of any proceedings (whether civil or criminal) in the *Syariah* High Court, the records of such proceedings, and give such directions as justice may require. The *Syariah* Appeal Court may do so either of its own motion or at the instance of any party. In such a case, the proceedings in the *Syariah* High Court shall be stayed pending further order of the *Syariah* Appeal Court.[12]

10.1.2.2 *Syariah* High Court

The constitution and jurisdiction of the *Syariah* High Court are outlined below.

1. Constitution

The *Syariah* High Court is presided over by a *Syariah* High Court judge. Judges of the *Syariah* High Court are appointed by the Yang di-Pertuan Agong on the advice of the Minister after consultation with the Majlis.[13]

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[8] AIL (FT) Act 1993, s 54(2).
[9] AIL (FT) Act 1993, s 54(3).
[10] AIL (FT) Act 1993, s 52(1).
[11] AIL (FT) Act 1993, ss 52(2) and 52(3).
[12] AIL (FT) Act 1993, s 53.
[13] AIL (FT) Act 1993, s 43(1).

The qualifications for appointment of the *Syariah* Chief Judge stated above apply equally to the appointment of *Syariah* High Court judges.[14]

2. Jurisdiction

The *Syariah* High Court has:

(a) original;
(b) appellate;
(c) supervisory and revisionary jurisdiction.

(a) Original Jurisdiction

The original jurisdiction of the *Syariah* High Court extends to both civil and criminal cases.

(i) Civil

The *Syariah* High Court may hear all matters listed in s 46(2)(b) of the AIL (FT) Act 1993. Apart from *wakaf*, these matters relate to personal and family law. The court's jurisdiction includes other matters concerning which jurisdiction is conferred by any written law.

(ii) Criminal

The *Syariah* High Court has jurisdiction over offences committed by Muslims which are punishable under:

- the *Syariah* Criminal Offences (Federal Territories) Act 1997 (Act 559);
- the Islamic Family Law (Federal Territories) Act 1984 (Act 303); or
- any other written law prescribing offences against the precepts of Islam.[15]

Examples of offences of a religious nature over which the *Syariah* High Court has jurisdiction are *khalwat* (close proximity between two persons of the opposite sex who are not prohibited from marrying), consumption of liquor, and failure to fast during Ramadan.

(b) Appellate Jurisdiction

The *Syariah* High Court may hear appeals against any decision of a *Syariah* Subordinate Court.

(i) Civil

In civil matters, the *Syariah* High Court may hear an appeal by an aggrieved person

- where the amount claimed is not less than RM1000;
- concerns personal status; or
- concerns maintenance of dependants.

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[14] AIL (FT) Act 1993, s 43(2).
[15] AIL (FT) Act 1993, s 46(2(a).

However, no appeal can be made against a decision made by consent.[16]

On any appeal, the *Syariah* High Court may confirm, reverse, or vary the decision of the trial court or make any other order which the trial court ought to have made. It may also order a retrial.[17]

(ii) Criminal

In criminal matters, the *Syariah* High Court may hear an appeal by the prosecution or the accused against an acquittal, conviction, or sentence.[18] The *Syariah* High Court has the power to dismiss the appeal, convict and sentence the accused, order the trial court to make further inquiry, alter the sentence, reverse any order of the trial court, or order a retrial.[19]

(c) **Supervisory and Revisionary Jurisdiction**

Under s 51 of the AIL (FT) 1993, the *Syariah* High Court may, either of its own motion or at the instance of any interested party, at any stage in any proceedings in any *Syariah* Subordinate Court, call for and examine any records thereof and give such directions as justice may require. When the *Syariah* High Court exercises its power under this provision, all proceedings in the trial court shall be stayed pending further order of the *Syariah* High Court.

10.1.2.3 *Syariah* Subordinate Court

The constitution and jurisdiction of the *Syariah* Subordinate Court are discussed below.

1. Constitution

The *Syariah* Subordinate Court is presided over by a *Syariah* Subordinate Court judge. *Syariah* Subordinate Court judges are appointed by the Yang di-Pertuan Agong on the recommendation of the Chief *Syariah* Judge. No special qualifications are required. Section 44(1) of the AIL (FT) 1993 states merely that such judges may be appointed from among members of the general public service of the federation.

2. Jurisdiction

A *Syariah* Subordinate Court has only original jurisdiction.

(a) Civil

[16] AIL (FT) Act 1993, s 48(1)(b).
[17] AIL (FT) Act 1993, s 48(2)(b).
[18] AIL (FT) Act 1993, s 48(1)(a).
[19] AIL (FT) Act 1993, s 48(2)(a).

The civil jurisdiction of the *Syariah* Subordinate Court covers all such proceedings as the *Syariah* High Court is authorized to hear. However, its jurisdiction is limited to proceedings in which:

- the amount or value of the subject-matter in dispute does not exceed RM 50, 000; or
- the monetary value of the subject-matter cannot be estimated.[20]

(b) Criminal

The *Syariah* Subordinate Court has jurisdiction over offences committed by Muslims under:

- the Syariah Criminal Offences (Federal Territories) Act 1997 (Act 559); or
- any other written law prescribing offences against the precepts of Islam for which the maximum punishment does not exceed RM2000 or imprisonment for a term of one year, or both.[21]

10.1.3 Conflict of Jurisdiction between Civil and *Syariah* Courts

Coexistence of civil and *Syariah* Courts raises jurisdictional problems

The coexistence of civil courts and *Syariah* Courts poses jurisdictional problems and the possibility of conflicting decisions.

Civil courts encroached upon the jurisdiction of *Syariah* Courts before 1988

Before Article 121 of the Federal Constitution was amended by the Constitution (Amendment) Act 1988 (Act A704) which came into force on 10 June 1988, the civil courts from time to time encroached upon the jurisdiction of the *Syariah* Courts. In some cases, the civil courts applied the common law or legislation based on English law to the exclusion of Islamic law. Among the most often cited cases are:

- *Ainan bin Mahmud* v *Syed Abu Bakar bin Habib Yusoff & Ors* [1939] MLJ 209 which held that s 112 of the Evidence Enactment (which in effect creates a presumption of legitimacy where a child is born during the continuance of a valid marriage) overrides the rule of Islamic law that a child born within six months of marriage is illegitimate.
- *Nafsiah* v *Abdul Majid* [1969] 2 MLJ 175 where the High Court not only held it had jurisdiction over a matter concerning marriage between Muslims but awarded damages to a woman seduced by a man on his promise to marry even though such an action would not lie under Islamic law.

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[20] AIL (FT) Act 1993, s 47(2)(b).
[21] AIL (FT) Act 1993, s 47(2)(a).

- *Myriam* v *Mohamed Ariff* [1971] 1 MLJ 265 where the High Court applied the Guardianship of Infants Act 1961 (which expressly provided that nothing in the Act which is contrary to Islam or Malay custom shall apply to any Muslim person below eighteen years).

The encroachment by the civil courts upon the jurisdiction of the *Syariah* Courts caused great concern among those interested or involved in the administration of Islamic law.[22]

Clause (1A) of Article 121 removes from the civil courts jurisdiction over any matter within the jurisdiction of the *Syariah* Courts

A committee chaired by Tan Sri Syed Nasir Ismail (as he then was) was established by the government to look into the position of *Syariah* Courts and recommend measures to raise their status.[23] One of the measures taken as a result of the work of that committee was the addition of clause (1A) to Article 121. Clause (1A) takes away from the two High Courts and inferior courts jurisdiction over any matter within the 'jurisdiction' of the *Syariah* Courts. It also prevents the civil courts from reviewing decisions of the *Syariah* Courts.[24]

While clause (1A) ousts the jurisdiction of the civil courts over a matter which falls under the jurisdiction of the *Syariah* Courts, it does not take away the jurisdiction of the civil courts to interpret any written law enacted for the administration of Islamic law.[25] Thus, the civil courts have continued to interpret the relevant State Enactments (and Federal Acts in the case of the Federal Territories; hereafter, only State Enactments are mentioned for convenience) to determine whether a matter falls within the jurisdiction of the civil courts or *Syariah* Courts.[26]

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[22] See, in particular, the writings of Ahmad Ibrahim, 'Islamic Law in Malaysia', *JMCL*, 8 (1981): 21–51; Ahmad Ibrahim, 'Towards an Islamic Law for Muslims in Malaysia', *JMCL*, 12 (1985): 37–52; Ahmad Ibrahim, 'The Future of the *Syariah* and *Syariah* Courts in Malaysia', *JMCL*, 20 (1993): 41–58.

[23] Ahmad Ibrahim, 'Recent Developments in the Administration of Islamic Law in Malaysia', in Ahmad Ibrahim and Abdul Monir Yaacob (eds), *The Administration of Islamic Laws*, Kuala Lumpur: IKIM Publishing Unit, 1997, pp 1–19 at p 6.

[24] Per KC Vohrah J in *Nor Kursiah bte Baharuddin* v *Shahril bin Lamin & Anor* [1997] 1 MLJ 537, 542; per Gopal Sri Ram JCA in *Sukma Darmawan Sasmitaat Madja* v *Ketua Pengarah Penjara Malaysia & Anor* [1999] 2 MLJ 241; per Rahmah Hussain Hj in *Genga Devi a/p Chelliah* lwn *Santanam a/l Damodaram* [2001] 2 AMR 1485, 1490–1991; per Abdul Hamid Mohamad HMR in *Kamariah bte Ali* lwn *Kerajaan Negeri Kelantan, Malaysia* [2002] 3 MLJ 657, 673; per Raus Sharif H in *Kaliammal a/p Sinnasamy* lwn *Pengarah Jabatan Agama Islam Wilayah Persekutuan (Jawi) & 2 Yg Ln* [2006] 1 AMR 498, 508.

[25] Per Hashim Yeop A Sani CJ in *Dalip Kaur* v *Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1, 7. See, *Wan Khairani binti Wan Mahmood* v *Ismail bin Mohamed & Anor* [2008] 1 AMR 430 (CA).

[26] See, eg *Mohamed Habibullah bin Mahmood* v *Faridah bte Dato Talib* [1992] 2 MLJ 793 (SC); *Soon Singh a/l Bikar Singh* v *Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 2 AMR 1211 (FC); *Chang Ah Mee* v *Jabatan Hal Ehwal Agama Islam, Majlis Ugama Islam Sabah & Ors* [2003] 5 MLJ 106 (HC); *Lina Joy* lwn *Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585 (FC).

Unfortunately, clause (1A) itself has raised problems of interpretation and application. The phase 'within the jurisdiction of the *Syariah* Courts' is ambiguous. In *Sukma Darmawan Sasmitaat Madja* v *Ketua Pengarah Penjara, Malaysia & Anor* [1999] 2 MLJ 241 the Federal Court held, in relation to criminal jurisdiction, that the phrase 'within the jurisdiction of the *Syariah* Courts' must be read as 'within the exclusive jurisdiction of the *Syariah* Courts'. It is only if an offence falls under the exclusive jurisdiction of the *Syariah* Courts that the jurisdiction of the civil courts is ousted. Otherwise, the prosecuting authorities have the discretion to proceed either under the relevant civil legislation or Islamic law legislation provided the offender is not prosecuted and punished twice for the same offence.

Clause (IA) of Article 121 has raised problems of interpretation and application

The ambiguity in the phrase 'within the jurisdiction of the *Syariah* Courts' has led to conflicting judicial decisions on the meaning of the word 'jurisdiction' and on how the jurisdiction of the *Syariah* Courts is determined.

How is the jurisdiction of the *Syariah* Court determined?

In one group of cases, the civil courts take the view that the word 'jurisdiction' is limited to jurisdiction that is expressly conferred upon the *Syariah* Courts by the relevant State Enactment enacted under Article 74(2) of the Federal Constitution.[27] To determine the jurisdiction of the *Syariah* Courts, the civil courts need only refer to the enabling enactment. This approach may be referred to as the express jurisdiction approach. Such an approach is associated most with *Mohamed Habibullah bin Mahmood* v *Faridah bte Dato Talib* [1992] 2 MLJ 793.[28]

The express jurisdiction approach

In the other group of cases, the civil courts ruled that 'jurisdiction' means jurisdiction over all matters enumerated in Item 1 in the State List under the Ninth Schedule to the Federal Constitution, irrespective of whether or not the state legislature has enacted legislation under Article 74(2) to confer jurisdiction over the matters upon the *Syariah* Courts. Reference to Item 1 in the State List is all it takes to determine the jurisdiction of the *Syariah* Courts. This approach, which may be referred to as the implied jurisdiction

The implied jurisdiction approach

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[27] See, eg *Ng Wan Chan* v *Majlis Ugama Islam Wilayah Persekutuan & Anor* [1991] 3 MLJ 174 (HC); *Dalip Kaur* v *Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1 (SC); *Mohamed Habibullah bin Mahmood* v *Faridah bte Dato Talib* [1992] 2 MLJ 793 (SC); *Lim Chan Seng* v *Pengarah Jabatan Agama Islam Pulau Pinang & Satu Kes Yang Lain* [1996] 3 CLJ 231 (HC); and *Abdul Shaik bin Md Ibrahim & Anor* v *Hussein bin Ibrahim & 2 Ors* [1999] 2 AMR 2471 (HC).

[28] Per Harun Hashim SCJ at p 800:

'I am therefore of the opinion that when there is a challenge to jurisdiction ... the correct approach is to firstly see whether the *Syariah* Court has jurisdiction and not whether the state legislature has power to enact the law conferring jurisdiction on the *Syariah* Court.'

approach, is associated most with *Md Hakim Lee* v *Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1998] 1 MLJ 681.[29]

The remedy prayed for approach

Before the Federal Court decision in *Majlis Ugama Islam Pulau Pinang dan Seberang Perai* v *Shaik Zolkaffily bin Shaik Natar & Ors* [2003] 3 MLJ 705, apart from the two subject-matter approaches discussed above, there was another approach to determine which of the courts, civil or *Syariah*, had jurisdiction. This may be termed the remedy prayed for approach. It was propounded by the Supreme Court in *Majlis Agama Islam Pulau Pinang* lwn *Isa Abdul Rahman & Satu Yang Lain* [1992] 2 MLJ 244 (which was decided at about the same time as *Mohamed Habibullah*).[30]

Analysis of the cases decided before *Soon Singh a/l Bikar Singh* v *Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 2 AMR 1211 (FC) and *Shaik Zolkaffily* (above) yields the following guidelines on the delineation of jurisdictional boundaries of civil and *Syariah* Courts:

1. Where there is a challenge to the jurisdiction of the civil court on the grounds that the subject-matter falls within the jurisdiction of the *Syariah* Court, the civil court looks to the relevant state legislation to ascertain whether the *Syariah* Court has been expressly conferred jurisdiction over the subject-matter;
2. Even when the relevant state legislation has expressly conferred jurisdiction over the subject-matter upon the *Syariah* Court, the civil court may still exercise jurisdiction over the subject-matter if:
   (a) one party to the proceedings is a non-Muslim;[31] or

[29] Per Abdul Kadir Sulaiman J at p 685:
'... the jurisdiction of the *syariah* court is much wider than those [matters] expressly conferred upon it by the respective state legislature. The *syariah* court shall have jurisdictions (sic) over persons professing the religion of Islam in respect of any of the matters included in para 1 [of the State List]. It is not to be limited only to those expressly enacted.... The fact that the legislature is given the power to legislate on these matters but it does not as yet do so, will not detract from the fact that those matters are within the jurisdiction of the *syariah* court.... The fact that the *syariah* courts have not been expressly conferred with the jurisdiction to adjudicate on the issue raised, by the state legislature, does not mean that the jurisdiction must be exercised by the courts in art. 121(1). The issue is not one whether a litigant can get his remedies but one of jurisdiction of the courts to adjudicate–the threshold jurisdiction to be seized of the matter.'

[30] In proceedings by the respondents in the High Court for, among other remedies, an injunction to prevent the appellant from demolishing a mosque (part of a *wakaf*), the Supreme Court upheld the jurisdiction of the High Court (which was challenged by the appellant) on the grounds that (1) the Administration of Muslim Law Enactment 1959 (Penang) did not provide for the remedy of injunction; and (2) as the Specific Relief Act 1950 gave the power to issue an injunction exclusively to the High Court, only the High Court had jurisdiction to hear the respondents' claim.

[31] See, eg *Tan Sung Mooi (F)* v *Too Miew Kim* [1994] 3 CLJ 708 (SC).

(b) the *Syariah* Court does not have the power to grant the remedy prayed for by the plaintiff.[32]

The Federal Court decisions in *Soon Singh* and *Shaik Zolkaffily* have thrown confusion and uncertainty into the delineation of the jurisdictional boundaries of civil and *Syariah* Courts.

Soon Singh was a Sikh who embraced Islam. Subsequently, he reverted to his original faith. He applied to the High Court for a declaration that he was no longer a Muslim. The Jabatan Agama Islam Kedah objected to the jurisdiction of the High Court on the grounds that apostasy comes under the jurisdiction of the *Syariah* Court. The High Court upheld that objection, relying on the *fatwa* issued by the *Fatwa* Committee of the Majlis Agama Islam Negeri Kedah in *Dalip Kaur* v *Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1 (SC)[33] and on the separate judgment of Mohamed Yusoff SCJ in the same case. The latter had voiced the view that the only forum qualified to determine the religious status of a Muslim convert who had purportedly renounced Islam is the *Syariah* Court.[34]

On appeal, the Federal Court upheld the decision of the High Court. Having analysed all the major cases on Article 121 (1A), the Federal Court:

1. while agreeing with the express jurisdiction approach associated with *Mohamed Habibullah*,
2. made apostasy an exception when it said that the jurisdiction of the *Syariah* Courts to deal with conversion out of Islam, although not expressly provided in the state enactments can be read into them by implication from the provisions concerning conversion to Islam.

Thus, in the case of apostasy the Federal Court in *Soon Singh* applied the implied jurisdiction approach established by Kadir Sulaiman J in *Md Hakim Lee.*

The Federal Court in *Soon Singh* that apostasy falls within the *Syariah* Court's jurisdiction on the basis of the implied jurisdiction approach

Shaik Zolkaffily concerned an application to the High Court by Muslim plaintiffs against the Majlis Ugama Islam Pulau Pinang. The plaintiffs applied for a declaration concerning a piece of land the subject-matter of a will. The High Court and Court of Appeal held the civil court had jurisdiction on the basis of:

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[32] See, eg *Majlis Agama Islam Pulau Pinang* lwn *Isa Abdul Rahman & Satu Yg Lain* [1992] 2 MLJ 244; *Barkath Ali bin Abu Backer* v *Anwar Kabir bin Abu Backer* [1997] 4 MLJ 389.

[33] The *Fatwa* Committee in response to two of the questions posed ruled that (1) a person who renounces Islam by deed poll and reverts to his original faith is an apostate; (2) nevertheless, he remains a Muslim until his renunciation is affirmed by a decision of the *Syariah* Court: ibid, p 6.

[34] Ibid, p 10.

1. the express jurisdiction approach, and
2. the remedy prayed for approach ie the declaration sought could not be granted by the *Syariah* Court.

The Federal Court allowed the appeal against the decision of the Court of Appeal. The Federal Court ruled that the *Syariah* Court had jurisdiction if the subject-matter is in Item 1 of the State List under the Ninth Schedule to the Federal Constitution even if the *Syariah* Court cannot grant the relief sought. The Federal Court said that if a plaintiff is deprived of a remedy sought in the proceedings brought before the *Syariah* Court, it is not the function of the civil court to legislate and confer jurisdiction upon itself; it is for the legislature to provide the remedy in the relevant legislation.

The Federal Court in *Shaik Zolkaffily* approved the implied jurisdiction approach

The decision of the Federal Court in *Shaik Zolkaffily* approved the implied jurisdiction approach established in *Md Hakim Lee* and applied by the Federal Court itself in relation to apostasy in *Soon Singh*. In the instant case, the Federal Court affirmed the implied jurisdiction approach at the expense of the express jurisdiction approach (associated with *Mohamed Habibullah*) and the remedy prayed for approach (applied by the Supreme Court in *Isa Abdul Rahman*).

The Federal Court has affirmed the correctness of *Soon Singh* in relation to apostasy in *Lina Joy* v *Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585. Azlina bte Jailani, the plaintiff, was born a Muslim. She applied twice, unsuccessfully, to change her name on the grounds she had converted to Christianity. On the advice of the National Registration Department (NRD) officer, she made a third effort, this time stating simply she wanted a name change. She was given a replacement identity card (IC) with her new name, Lina Joy. However, the front of the replacement IC stated Islam as her religion and the reverse showed her original name. In early 2000 Lina Joy applied to the NRD for deletion of 'Islam' and her original name. Her application was dismissed. She was informed her application was incomplete without a *Syariah* Court order affirming she had renounced Islam.

Lina Joy applied to the High Court for several declarations concerning violation of her right to freedom of religion guaranteed by the Federal Constitution. She also sought an order that she had renounced Islam. The High Court dismissed her applications.[35] She appealed.

In the Court of Appeal the parties by common consent agreed to narrow down the issues to just one: whether the NRD has the right to require her to present a *Syariah* Court order affirming she

[35] [2004] 2 MLJ 119.

is an apostate before deleting 'Islam' from her replacement IC. The Court of Appeal, by a majority decision, dismissed her appeal.[36]

The appeal to the Federal Court focused on three issues; among others, whether *Soon Singh* was correct in adopting the implied jurisdiction approach propounded in *Md Hakim Lee* (HC) in preference to *Ng Wan Chan* (HC)[37] and *Lim Chan Seng* (HC)[38] which applied the express jurisdiction approach in apostasy cases.

The Federal Court, in a majority decision, affirmed the correctness of *Soon Singh*. The majority reasoned that since apostasy relates to Islamic law, and Islamic law is one of the matters in Item 1 of the State List under the Ninth Schedule to the Federal Constitution, apostasy clearly falls with in the jurisdiction of the *Syariah* Court. By virtue of Article 121(1A), the civil court has no jurisdiction over the subject-matter.

The Federal Court in *Lina Joy* affirmed the correctness of *Soon Singh*

Soon Singh and *Lina Joy* have resolved the jurisdictional problem posed by apostasy cases where all the parties are Muslims. However, the Federal Court decisions in these cases, and in *Shaik Zolkaffily*, have not resolved all the jurisdictional problems arising from the coexistence of the civil and *Syariah* Courts. Two factual situations raising jurisdictional problems have been highlighted.[39] They are:

The Federal Court's approach in *Soon Singh*, *Shaik Zolkaffily*, and *Lina Joy* has not resolved all jurisdictional problems arising from the co-existence of civil and *Syariah* Courts

1. Cases concerning religious status and matrimonial matters (which fall under the jurisdiction of the *Syariah* Court) in which one of the parties is a non-Muslim; and
2. Cases which raise issues concerning Islamic law as well as civil law.

These are discussed below.

1. Cases dealing with a subject-matter which falls within the jurisdiction of the *Syariah* Court but in which one party is a non-Muslim raise a problem because of the constitutional limitation imposed upon the *Syariah* Court, ie it has jurisdiction only over Muslims.[40]

In apostasy cases a problem did not arise, in the past, where no challenge was made to the jurisdiction of the civil court[41] or,

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[36] [2005] 6 MLJ 193.

[37] *Ng Wan Chan* v *Majlis Ugama Islam Wilayah Persekutuan & Anor* [1991] 3 MLJ 174.

[38] *Lim Chan Seng* v *Pengarah Jabatan Agama Islam Pulau Pinang & Satu kes yang lain* [1996] 3 CLJ 231.

[39] See, Abdul Hamid Mohamad J. in *Lim Chan Seng* [1996] 3 CLJ 231 at pp 245, 254, 260, 261; and in *Abdul Shaik bin Md Ibrahim & Anor* v *Hussein bin Ibrahim & 2 Ors* [1999] 2 AMR 2472, 2484; see, also, Dato' Abdul Hamid bin Haji Mohamad, 'Civil and *Syariah* Courts in Malaysia: Conflict of Jurisdictions', *MLJ*, 1 (2002): cxxx, cxxxvii.

[40] See above, p 203.

[41] See, *Dalip Kaur* v *Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1.

presently, where the non-Muslim party submits to the jurisdiction of the *Syariah* Court (although this does raise the question whether individual submission can bestow jurisdiction expressly denied by the Federal Constitution).[42]

The problem arises where either the non-Muslim party refuses to submit to the jurisdiction of the *Syariah* Court[43] or the jurisdiction of the civil court is challenged as may be seen in *Kaliammal a/p Sinnasamy lwn Pengarah Jabatan Agama Islam Wilayah Persekutuan (Jawi) & 2 Yg Lain* [2006] 1 AMR 498.

M Moorthy died on 20 December 2005. He was a former army commando and one of only two members of Malaysia's first Everest team to reach the peak in 1997. S Kaliammal, his widow, was informed of his conversion to Islam only after his death. She applied to the High Court for declarations, among others, that the deceased lived as, and died, a Hindu and for an order requiring the Kuala Lumpur General Hospital to release his remains to her for burial according to Hindu rites. S Kaliammal relied on *Ng Wan Chan* (above) to support her submission that the High Court had jurisdiction to determine the religious status of the deceased.

Jabatan Agama Islam Wilayah Persekutuan (Jawi), in the meantime, obtained an *ex parte* order from the *Syariah* High Court that as the deceased had converted to Islam, his remains must be released to Jawi for burial according to Islamic rites. Jawi also challenged the jurisdiction of the civil court to deal with the subject-matter.

The High Court dismissed S Kaliammal's applications except one. It held that the *Syariah* Court had jurisdiction to determine the validity of the deceased's conversion to Islam because the

[42] *Nyonya binti Tahir Case* where the *Syariah* High Court in Negeri Sembilan held that the deceased, Nyonya binti Tahir, who had long renounced Islam, lived as and died a Buddhist, was not a Muslim when she died and that her remains should be released to her family for burial according to Buddhist rites. For the first time in the history of the *Syariah* Courts in Malaysia, two non-Muslims (children of Nyonya binti Tahir) gave statements during the *Syariah* High Court proceedings on the deceased's lifestyle to assist the court reach a decision on her religious status; *New Straits Times*, 24 January 2006, p 2.

[43] *Rayappan Anthony Case* which saw a tussle between Rayappan's widow and the Majlis Agama Islam Selangor (MAIS) over the remains of Rayappan. Rayappan was a Roman Catholic who embraced Islam in 1990 when he took a Muslim woman as his second wife, after abandoning his first wife and family. In 1999, Rayappan left his second wife, returned to his first wife and family, and reverted to his original faith. His family was prevented from claiming his remains after the *Syariah* High Court in Selangor ordered his remains to be released to MAIS for burial according to Islamic rites. MAIS then applied for a review of that ruling in the interest of justice as it wanted to subpoena three daughters of Rayappan to give evidence in the *Syariah* High Court on the religious status of their father. The daughters issued subpoenas refused to submit to the jurisdiction of the *Syariah* Court on the grounds that they were non-Muslims. The tussle ended when MAIS dropped its claim that Rayappan was a Muslim when he died, citing lack of evidence to substantiate its case; *New Straits Times*, 1 December 2006, p 7; 2 December 2006, p 13; 5 December 2006, p 13; 6 December 2006, p 4; 8 December 2006, p 6.

relevant legislation had expressly conferred upon such court jurisdiction over the matter. *Ng Wan Chan* was distinguished. In the instant case, the *Syariah* Court had issued an order that the deceased was a Muslim. The civil court could not review that *Syariah* Court decision.

M Moorthy alias Mohamad bin Abdullah was buried according to Islamic rites after the High Court decision. His widow's appeal to the Court of Appeal is still pending.[44] As the law stands at 31 December 2007, a non-Muslim who wishes to have the religious status of a deceased next of kin—alleged to be a Muslim convert—determined, has no access to a judicial forum.

In matrimonial matters, the Federal Court decision in *Subashini a/p Rajasingam* v *Saravanan a/l Thangathoray and 2 Other Appeals* [2008] 1 AMR 561 affirmed the decision of the Supreme Court in *Tan Sung Mooi (F)* v *Too Miew Kim* [1994] 3 CLJ 708 that conversion to Islam does not allow converts to evade their legal obligations under a civil marriage.[45] R Subashini and T Saravanan married in 2001. The marriage was registered under the Law Reform (Marriage and Divorce) Act 1976 (Act 164). They had two minor sons. Sometime in mid-2006 Saravanan embraced Islam, taking the name Muhammad Shafi. He also converted their elder son. He then applied to the *Syariah* Court to dissolve their marriage and obtain custody of the children. Upon hearing of Muhammad Shafi's pending application to the *Syariah* Court, Subashini applied to the High Court to dissolve their marriage, to obtain custody of the children, and for maintenance. To ensure her divorce petition was not rendered academic, Subashini applied for an injunction to stop Muhammad Shafi from obtaining relief at the *Syariah* Court.

The High Court dismissed Subashini's application.[46] The Court of Appeal, by a majority, upheld the High Court decision that the injunction sought by Subashini was unconstitutional as it would prevent the *Syariah* Court from carrying out its duties.[47]

The Federal Court, in a landmark judgment, unanimously ruled that the civil court has jurisdiction to dissolve a civil marriage where one spouse has converted to Islam. Also unanimously, the Federal Court held that the converted spouse could convert his or her minor children without the consent of the other spouse. By a

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[44] Some eight months after filing notice of appeal, S Kaliammal was informed her case would be heard by a new panel of the Court of Appeal because members of the previous panel who heard her appeal had either retired or been promoted to the Federal Court; *New Straits Times*, 23 May 2007, p 10.

[45] Followed in *Kung Lim Siew Wan (p)* lwn *Choong Chee Kuan* [2003] 6 MLJ 260 (HC).

[46] [2007] 7 CLJ 584.

[47] [2007] 2 MLJ 705.

majority decision, the Federal Court held that the spouse who has embraced Islam may apply to the *Syariah* Court to dissolve his or her civil marriage. However, the *Syariah* Court order dissolving such marriage would have no legal effect in the civil court other than as evidence of the fact of the dissolution of the marriage under Islamic law.[48]

2. Which court decides cases which raise issues concerning both civil and Islamic law?

In *G Rethinasamy* v *Majlis Agama Islam, Pulau Pinang* [1993] 2 MLJ 166, the plaintiff, a non-Muslim, applied to the High Court for a declaration that he was the registered owner of a portion of land, and for vacant possession. The defendants raised defences of estoppel, adverse possession, and *wakaf* (a matter within the jurisdiction of the *Syariah* Court). The High Court was able to adjudicate upon all the issues only because the defendants did not challenge its jurisdiction.

Several potential solutions to the problem posed by cases raising issues concerning both civil and Islamic law have been suggested in judgments and extrajudicially:

- If a question concerning Islamic law arises in proceedings before a civil court for an order (not within the jurisdiction of the *Syariah* Court to issue), the parties involved may either call Islamic law experts to give evidence or the court may refer the question to the relevant *fatwa* committee for a ruling.[49]
- The problem should be solved by the legislature. Pending legislative solution, if in a case before the civil court an issue on Islamic law arises, the party raising the issue should file a case in the *Syariah* Court for a decision by the latter. Such a decision should be applied by the civil court in determining the case before it.[50]
- Such cases should be heard by the civil court sitting with a *Syariah* judge who decides on Islamic law issues; such deci-

[48] For criticisms of the Federal Court judgment by a non-lawyer read the comments of Dr Syed Ali Tawfik Al-Attas, Director General of the Institute of Islamic Understanding of Malaysia (IKIM) in an interview entitled 'This has nothing to do with religion', in the *New Straits Times*, 31 December 2007, pp 8–9.

[49] The Supreme Court in *Majlis Agama Islam Pulau Pinang* lwn *Isa Abdul Rahman* [1992] 2 MLJ 244, 249. In *Dalip Kaur* v *Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1, the High Court referred questions relating to renunciation of Islam to the *Fatwa* Committee of Kedah.

[50] Vice versa, if in a case before the *Syariah* Court, a civil law issues arises. Per Abdul Hamid Mohamad FCJ in delivering the judgment of the Federal Court in *Latifah bte Mat Zin* v *Rosmawati bt Sharibun & Anor* [2007] 4 AMR 621, 639. NB. The problem remains unresolved in cases where one party is a non-Muslim.

sions bind the civil court which decides all other issues and the case as a whole.

- Unify the civil and *Syariah* Courts at all levels—in effect, federalizing the *Syariah* Courts. In a case raising civil and Islamic law issues, two judges should sit, one from each discipline. The civil law judge decides civil law issues; the *Syariah* judge decides Islamic law issues. The final judgment or judgment of the court is to be given by both, jointly.[51]

10.2 NATIVE COURTS

These courts only exist in Sabah and Sarawak.

10.2.1 Introduction

The Native Courts in Sabah and Sarawak are established by state legislation, ie the Sabah Native Courts Enactment 1992 (No 3 of 1992)(SNCE 1992) and the Sarawak Native Courts Ordinance 1992 (No 9 of 1992)(SNCO 1992), respectively. These statutes are substantially the same; however, the latter is more elaborate, particularly, on the hierarchy of courts.

Native Courts have no jurisdiction over a matter within the jurisdiction of the civil or *Syariah* Courts.[52]

Like *Syariah* Courts, Native Courts do not have jurisdiction over criminal offences except in so far as conferred by federal law. Under the relevant federal law, ie Native Courts (Criminal Jurisdiction) Act 1991 (Act 471), the Native Courts are conferred jurisdiction to try any offence which, under any written law, is punishable with imprisonment for a term not exceeding two years or with a fine not exceeding RM5000 or a combination thereof. However, such jurisdiction does not include jurisdiction over an offence under the Penal Code (Act 574).

Criminal jurisdiction is confined to such as is conferred by federal law

A Native Court is not a subordinate court over which the High Court may exercise supervisory power.[53]

Nevertheless, the High Court may exercise control over the Native Courts through prerogative writs if it can be shown that there was:

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[51] Per Abdul Hamid Mohamad in *Lim Chan Seng* v *Pengarah Jabatan Agama Islam Pulau Pinang & Satu Kes Yang Lain* [1996] 3 CLJ 231; and in *Abdul Shaik bin Md Ibrahim & Anor* v *Hussein bin Ibrahim & 2 Ors* [1999] 2 AMR 2472, 2484; see, also, Dato' Abdul Hamid bin Haji Mohamad, 'Sistem Kehakiman dan Perundangan di Malaysia: Satu Wawasan', *MLJ*, 4 (2001): clxxx–cxcii; Dato' Abdul Hamid bin Haji Mohamad, 'Civil and *Syariah* Courts in Malaysia: Conflict of Jurisdiction', *MLJ*, 1 (2002): cxxx–cxliv.

[52] Sabah Native Courts Enactment 1992, s 9 and Sarawak Native Courts Ordinance 1992, s 5.

[53] *Ongkong Anak Salleh* v *David Panggau Sandin & Anor* [1983] 1 MLJ 419, 422, per Seah J.

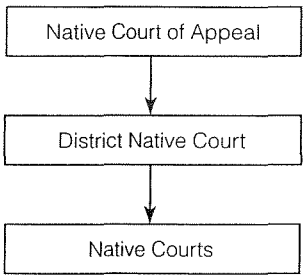
- lack of jurisdiction,
- blatant failure to perform some statutory duty, or
- breach of natural justice.[54]

10.2.2 Native Courts in Sabah

Under the SNCE 1992 the power to establish Native Courts vests in the Yang di-Pertua Negeri. That enactment provides for a three-tier hierarchy of courts. In descending order, they are the:

- Native Court of Appeal;
- District Native Court; and
- Native Court.

Figure 10.2 Hierarchy of the Native Courts in Sabah



10.2.2.1 Native Court of Appeal

1. Constitution

The Native Court of Appeal comprises a High Court judge as President, and two other members who are either District Chiefs or Native Chiefs. All are appointed by the Minister responsible for the administration of native affairs.

2. Jurisdiction and Powers

The Native Court of Appeal has jurisdiction over the whole of Sabah. It exercises only appellate jurisdiction.

An appeal lies from any order of the District Native Court to the Native Court of Appeal. An appeal lies as of right on a question of native customary law. An appeal on a question of fact or mixed law and fact or against a sentence of imprisonment, however, requires the leave of the Native Court of Appeal.

The Native Court of Appeal may:

(a) dismiss an appeal,
(b) set aside or vary an order,

[54] *Haji Laugan Tarki bin Mohd Noor* v *Mahkamah Anak Negeri Penampang* [1988] 2 MLJ 85, 87 per Hashim Yeop A Sani SCJ.

(c) reduce or increase any sentence of punishment, or fine or order for compensation, or
(d) order a rehearing by the same or a differently constituted Native Court.[55]

Before exercising its powers on any appeal, the Native Court of Appeal may request the Native District Court or Native Court from which the appeal lies for a written report amplifying any order upon the case either generally or giving an opinion upon a particular point arising from the appeal. In addition, the Native Court of Appeal may summon any witness to give evidence on the existence of any law or custom affecting any matter on appeal.[56]

10.2.2.2 District Native Court

1. Constitution

A District Native Court is presided over by the District Officer. He sits with two other members, either District Chiefs or Native Chiefs resident within the district, appointed by the State Secretary.

2. Jurisdiction and Powers

The District Native Court has jurisdiction within the district for which it is constituted. It has appellate and revisionary jurisdiction.

(a) Appellate Jurisdiction

Any order of the Native Court may be appealed to the District Native Court in the district in which such Native Court is established. An appeal to the District Native Court lies as of right in matters of native customary law, but an appeal on a question of fact or mixed law and fact or against a sentence of imprisonment requires the leave of the Native District Court.

The District Native Court has the same powers as the Native Court of Appeal in the exercise of its appellate jurisdiction.[57]

(b) Revisionary Jurisdiction

All proceedings in the Native Courts are subject to revision by the District Native Court. If the latter finds any such proceedings irregular, improper, or unconscionable, it may quash or vary the same or direct a rehearing.[58] For the purpose of the revision, the District Native Court has the power to call for and examine the record of proceedings of a Native Court to satisfy itself as to the correctness, legality, or propriety of any order passed, and as to the regularity

[55] SNCE 1992, s 23(1)(a)–(d).
[56] SNCE 1992, s 19.
[57] SNCE 1992, s 23(1).
[58] SNCE 1992, s 16(1).

of such proceedings.[59] In exercising its revisionary power, a District Native Court has a discretion whether to allow the parties a right to be heard. However, no final order to the prejudice of any person may be made unless such person has been given an opportunity to be heard.[60]

In the exercise of its appellate or revisionary jurisdiction, the District Native Court may:

(i) recall any witness;
(ii) take further evidence itself;
(iii) direct the Native Court to take further evidence;
(iv) summon any person whom it deems fit to act as an assessor to advise it; or
(v) direct a combination of the above.[61]

10.2.2.3 Native Court

1. Constitution

The Yang di-Pertua Negeri is empowered to establish Native Courts at such places as he may deem fit and prescribe the territorial jurisdiction of such courts.[62] This provision is to enable Native Courts to be set up in such places as may be convenient for the people.

Like the two courts above it in the hierarchy, the Native Court comprises three members, ie Native Chiefs or Headmen resident within the territorial jurisdiction of the Native Court. They are appointed by the State Secretary. The latter may, however, appoint a District or Native Chief who is not resident within the territorial jurisdiction of the Native Court where:

(a) local Native Chiefs may have a personal interest in the case or;
(b) local Native Chiefs may be reluctant to hear the case due to the local sensitivity of the subject-matter.[63]

2. Jurisdiction and Powers

The SNCE 1992 vests the day-to-day administration of native customary law in the Native Courts. The rationale is to engage the Native Chiefs who are the elders in the community in judging disputes concerning native customary law within their locality, a subject-matter they are knowledgeable about.

[59] SNCE 1992, s 16(2).
[60] SNCE 1992, s 16(3).
[61] SNCE 1992, s 17(3)(a)–(d).
[62] SNCE 1992, s 3(1).
[63] SNCE 1992, s 3(2).

Native Courts have only original jurisdiction. Such jurisdiction is limited to a cause or matter arising or occurring, or a breach committed, within their territorial jurisdiction.[64]

The general jurisdiction of the Native Courts covers all cases of breach of native customary law where all the parties involved are natives. Such jurisdiction extends to breach of native customary law relating to religious, matrimonial, or sexual matters involving a non-native. However, proceedings may only be instituted with the written sanction of the District Officer on the advice of two Native Chiefs.

The Native Courts' general jurisdiction covers all cases of breach of native customary law where all parties are natives

The SNCE 1992 has expanded the jurisdiction of the Native Courts to include cases of native customary law concerning:

1. bethrothal, marriage, divorce, nullity of marriage, and judicial separation;
2. adoption, guardianship, or custody of infants, maintenance of dependants, and legitimacy; and
3. gifts or succession whether testate or intestate.

In addition, Native Courts may deal with other cases if jurisdiction is conferred upon them by the SNCE 1992 or other written law.[65]

For offences against native customary law, a Native Court may impose:

(a) a fine,
(b) a term of imprisonment,
(c) both fine and imprisonment, or
(d) any other punishment authorized by native customary law which is not repugnant to natural justice and humanity.[66]

The fine or imprisonment imposed must not exceed the amount or term, or the combination thereof, authorized by federal law, ie the Native Courts (Criminal Jurisdiction) Act 1991 (Act 471).

In addition to any penalty imposed, the Native Court may order the offender to pay compensation, in cash or kind, authorized by native customary law to the injured person.[67] If the offender who is ordered to pay the penalty or compensation defaults, the Native Court may order the recovery of the penalty or compensation by the sale of any property belonging to the offender.[68] The Native Court may also subject such defaulter to imprisonment.[69] However,

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[64] SNCE 1992, s 6(2).
[65] SNCE 1992, s 6(1).
[66] SNCE 1992, s 10(1).
[67] SNCE 1992, s 12.
[68] SNCE 1992, s 13.
[69] SNCE 1992, s 14.

no sentence of imprisonment by a Native Court will have effect unless endorsed by a Magistrate.[70]

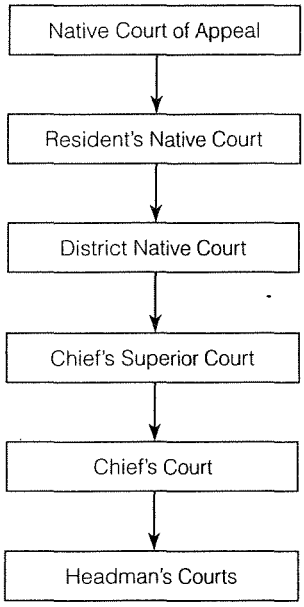
In cases not involving offences, a Native Court may make such order as may be just in accordance with native customary law.

10.2.3 Native Courts in Sarawak

In Sarawak, the Native Courts are established under the Sarawak Native Courts Ordinance 1992 (No 9 of 1992)(SNCO 1992). In descending order they are the:

- Native Court of Appeal
- Resident's Native Court
- District Native Court
- Chief's Superior Court
- Chief's Court
- Headman's Court

Figure 10.3 Hierarchy of the Native Courts in Sarawak



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The Native Court of Appeal and Resident's Native Court are appellate courts. The four courts below them are primarily courts of original jurisdiction.

Each Native Court comprises a presiding officer and two or more assessors. Assessors for all levels (except the Native Court of Appeal and the Headman's Court) are appointed by the presiding

[70] SNCE 1992, s 11.

officers. Rule 34 of the Native Courts Rules 1993 provides for the establishment of a panel of assessors in every district. Appointment of assessors to the panel is made by the Resident of a Division upon the recommendation of the relevant District Officer.

The presiding officers must record and consider the opinions of the assessors but they are not bound to follow the opinions of the assessors or anyone of them. However, the presiding officers must record their reasons for dissenting.[71]

10.2.3.1 Native Court of Appeal

The constitution, jurisdiction, and powers of this court will be considered in turn.

1. Constitution

The Native Court of Appeal comprises:

(a) a President, appointed by the Yang di-Pertua Negeri,
(b) the President of the Majlis Islam or the Ketua Majlis of the Majlis Adat Istiadat Sarawak, and
(c) any person who is or has been appointed a *Temenggung* and nominated by the President in consultation with the Chief Registrar, to hear any particular appeal.

Should any of the persons in (b) above not be able to sit in any particular case, the President shall, after consulting the Chief Registrar, nominate a *Temenggung* to replace him.[72]

The President of the court must be a High Court judge or a person who has held, or is qualified to hold, that office. No person may be appointed President for a period exceeding three years but such person is eligible for reappointment.

2. Jurisdiction and Powers

The Native Court of Appeal has appellate and revisionary jurisdiction.

(a) Appellate Jurisdiction

Only appeals concerning land and native status lie to the Native Court of Appeal.

On the termination of the appeal, the Native Court of Appeal (and other courts exercising appellate jurisdiction) may:

(i) dismiss the appeal
(ii) rehear the case itself or order the case to be heard by any lower court

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[71] SNCO 1992, s 21.
[72] SNCO 1992, s 13(3)(a).

(iii) hear further evidence, or order the trial court or any other Native Court having jurisdiction, to hear further evidence
(iv) order a retrial
(v) set aside, reverse, amend, or vary the decision of the lower court, or
(vi) make such other order as it may deem just.[73]

(b) Revisionary Jurisdiction
When it appears that in any original, revisional, or appellate proceedings under the SNCO 1992, an error material to the outcome of the case or a miscarriage of justice has occurred, the Native Court of Appeal may exercise any of the powers of revision vested in the High Court. It may do so either upon the application of an aggrieved party or of its own motion. The Native Court of Appeal may refuse to exercise this jurisdiction where the aggrieved party has not exhausted his or her right of appeal. The power to revise any proceedings is limited to one revision and must be exercised within twelve months of such proceedings.[74]

10.2.3.2 Resident's Native Court

The constitution, jurisdiction, and powers of this court are considered in turn below.

1. Constitution
The Resident's Native Court is presided over by a person who is holding, or acting in, the office of Resident of a Division. Under the Subordinate Courts Act 1948 (Act 92) the Residents (and District Officers) are *ex officio* First Class Magistrates. To relieve Residents from the burden of hearing Native Court cases, the Yang di-Pertua Negeri may appoint ex-Residents or such persons as he may deem fit and proper to preside over the Resident's Native Court. The presiding officer is assisted by not less than two, and not more than four, assessors.[75]

2. Jurisdiction and Powers
The Resident's Native Court has:
(a) original,
(b) appellate, and
(c) revisionary jurisdiction.

[73] SNCO 1992, s 14(1)(a)–(f).
[74] SNCO 1992, s 16.
[75] SNCO 1992, s 13(1)(d).

(a) Original Jurisdiction

Section 20 of the SNCO 1992 vests in the Resident's Native Court special jurisdiction to determine:

(i) whether a non-native may be deemed to have acquired native status for the purpose of s 9 of the Land Code (Cap 81);

(ii) whether a person who is subject to a particular system of personal law has become subject to a different personal law because of subsequent events or his conduct or mode of life; and

(iii) whether a person who is subject to the personal law of a particular native community has ceased to be so subject.

(b) Appellate Jurisdiction

Appeals against decisions of the District Native Court concerning land matters lie to the Resident's Native Court.[76]

(c) Revisionary Jurisdiction

The Resident's Native Court (and any appellate court other than the Native Court of Appeal) may, upon an application by an aggrieved party or by the Attorney General or of its own motion, investigate any case heard by an inferior court and may upon such investigation exercise any of the powers which it might have exercised had there been an appeal. These powers may not, however, be exercised after the expiration of twelve months from the conclusion of the case heard by the inferior court.[77]

10.2.3.3 The District Native Court, the Chief's Superior Court, the Chief's Court, and the Headman's Court

These courts are collectively referred to below as Native Courts and are discussed together as they are classified in the SNCO 1992 as courts of original jurisdiction (although all except the Headman's Court have appellate jurisdiction too) and because they handle the cases concerning breach of native customary law.

1. Constitution

The District Native Court comprises an *ex officio* First Class Magistrate and two assessors.

A Chief's Superior Court comprises a *Temenggung* or *Pemanca* sitting with two assessors, or both *Temenggung* and *Pemanca* sitting with one assessor.

A Chief's Court comprises a *Penghulu* and two assessors.

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[76] SNCO 1992, s 5(3) (b).
[77] SNCO 1992, s 15.

A Headman's Court comprises a headman and two assessors. (ii)

The composition of the above courts[78] may be modified as indicated below in a case involving a community following an Iban system of personal law:[79]

A Chief's Superior Court may comprise a *Temenggung* or *Pemanca*, or both, sitting in either case with two assessors. (iii)

A Chief's Court may comprise a *Penghulu* sitting with two *Tuai Rumah* to assist him.

A Headman's Court may comprise only a *Tuai Rumah*. (iv)

In other cases, ie in which the native system of personal law applicable is the law of a particular community, the presiding Native Chief or Headman shall be a member of that community. Provision is made, however, that subject to the directions of the Resident within whose Division such case arises, any person who is or has been a Sarawak Administrative Officer or any person who is knowledgeable about the native system of personal law of a particular community may be appointed to preside over a Native Court even though he is not a member of that community. (v)

Whatever be the case, where any question of native customary law is involved, at least one assessor shall be a member of the community the personal law of which is relevant to the determination thereof. Where that is not possible, the assessor could be some other native who in the opinion of the Resident is well versed in that system of personal law.[80]

2. Jurisdiction

The territorial jurisdiction of each Native Court covers causes or matters arising within the local area of jurisdiction of the court. Such jurisdiction extends to causes and matters arising elsewhere when the defendant is originally resident within such area. Causes or matters concerning land must be heard in the Native Court exercising jurisdiction in the area in which such land is located.[81]

(a) Original Jurisdiction

Under s 5(1) of the SNCO 1992, the Native Courts have jurisdiction over:

(i) cases involving native customary law (other than the *Ordinan Undang-Undang Keluarga Islam* 2001) in which all the parties are subject to any native system of personal law;

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[78] SNCO 1992, s 4(1).
[79] SNCO 1992, s 4(6).
[80] SNCO 1992, s 4(3).
[81] SNCO 1992, s 7.

[82] Empeni Lai
Laws in Sarawa
[83] SNCO 199
[84] SNCO 199

(ii) cases involving native customary law (other than the *Ordinan Undang-Undang Keluarga Islam* 2001) concerning any religious, matrimonial, or sexual matter where one party is a native;
(iii) any civil case (not being a case under the jurisdiction of any *Syariah* Court under the *Ordinan Mahkamah Syariah* 1991) in which the value of the subject-matter does not exceed RM2000;
(iv) any criminal case of a minor nature which is specifically enumerated in the codified customary laws of the various Dayak communities and which can be adequately punished by a fine not exceeding that which a Native Court may impose; and
(v) any matter concerning which jurisdiction has been conferred upon the Native Court by any written law.

Proviso (ii) to s 5(1) provides that the judgment of the Chief's Superior Court in cases concerning native customary law is final and cannot be a subject of appeal. This means that the only appeals that lie to the District Native Court (and the two appellate courts) from the lower courts are those concerning land disputes. The rationale is twofold: (1) relieve the courts higher in the hierarchy of the burden of handling breach of native customary law cases and (2) to expedite settlement of such cases.[82]

Disputes between natives concerning:
(i) any land held under native customary rights or which is within a native communal reserve declared under s 6 of the Land Code (Cap 81);
(ii) any claim for compensation to be paid under the Land Code for termination of native customary rights over land; and
(iii) any right to inherit under native customary law to any land held under native customary rights or within a native communal reserve;

must be heard in the first instance by a District Native Court.[83] Any dispute between natives over land, not included in the above classification, to which there is no title issued by a Land Office must be heard in the first instance by a Chief's Court.[84]

Expressly excluded from the jurisdiction of the Native Courts are:

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[82] Empeni Lang, 'Administration of Native Courts and Enforcement of Native Customary Laws in Sarawak', *JMCL*, 25 (1998): 114.
[83] SNCO 1992, s 5(3)(a).
[84] SNCO 1992, s 5(3)(c).

(a) all matters falling within the jurisdiction of the *Syariah* Courts under the *Ordinan Mahkmah Syariah* 1991 (No 4 of 1991);
(b) offences under the Penal Code (Act 574);
(c) offences alleged to have caused death;
(d) marriage or divorce under the Law Reform (Marriage and Divorce) Act 1976 (Act 164) and the Registration of Marriages Ordinance 1952 (unless the claim relates to bride price or adultery, and based only on native customary law);
(e) land with title or interest in land registered under the Land Code (Cap. 81);
(f) breach of native customary law where the maximum penalty authorized is less severe than the minimum penalty prescribed for such offence;
(g) breach of the *Ordinan Undang-Undang Keluarga Islam* 2001 or the Malay custom of Sarawak; and
(h) any proceedings taken under any written law in force in Sarawak.[85]

3. Powers of Native Courts

Among the powers of the Native Courts are the power to:

- impose a penalty
- award compensation
- order the recovery of the penalty or compensation from a defaulter, and
- subject such defaulter to imprisonment.

The penalties that the Native Courts may impose are as follows:

- District Native Court : Imprisonment not exceeding two years and a fine not exceeding RM5000.
- Chief's Superior Court : Imprisonment not exceeding one year and a fine not exceeding RM3000.
- Chief's Court : Imprisonment not exceeding six months and a fine not exceeding RM2000.
- Headman's Court : Fine not exceeding RM300.

The above limits do not prevent the Native Courts from awarding compensation in excess thereof, if authorized under the relevant native customary law.[86]

[85] SNCO 1992, s 28.
[86] SNCO 1992, s 11(1).

Where a person who is penalized or ordered to pay compensation defaults, a Native Court may order the recovery of the penalty or compensation by the sale of the property belonging to the defaulter provided the order for seizure and sale of the property is signed by a presiding officer and endorsed by a magistrate.[87] A Native Court may also subject such defaulter to imprisonment in accordance with the prescribed scale.[88] However, the power to impose imprisonment as prescribed can only be exercised by a Native Court presided over by a Magistrate.

Questions

1. Do the High Court in Malaya and the High Court in Sabah and Sarawak have review, revisionary, and supervisory powers over
   (a) *Syariah* Courts; and
   (b) Native Courts?
2. Examine the legislative purpose for adding clause (1A) to Article 121 via the Constitution (Amendment) Act 1988 (Act A 704).
   (a) Has the legislative purpose been achieved?
   (b) If the answer to (a) is in the negative, suggest potential solutions to the jurisdictional problems that arise from the coexistence of the civil and *Syariah* Courts in multiracial and multi-religious Malaysia.
3. Consider the legal implications and feasibility of integrating the *Syariah* Courts into the federal judicial system.

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[87] SNCO 1992, s 17.
[88] SNCO 1992, s 18.

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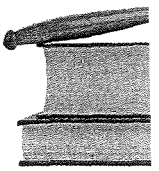

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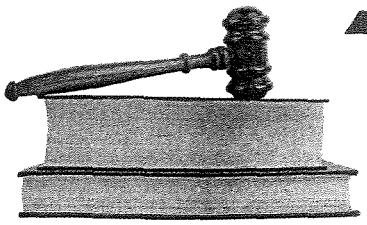

11 JUDGES AND THE JUDICIAL SERVICE

Chapter Objectives

Discuss the:

- **role of judges**
- **concept of independence of the judiciary**
- **qualifications,**
- **appointment, and**
- **tenure**

of judges of the superior courts and judicial officers of the subordinate courts

- **Judges' Code of Ethics 1994**
- **Institution of temporary judges**

11.1 JUDGES OF THE SUPERIOR COURTS

THE federal judiciary is 200 years old. Its origins may be traced back to 1808 when the first Recorder of the Court of Judicature of Prince of Wales' Island (Penang), Sir Edmond Stanley, was appointed.[1]

Judiciary means the judges. Collectively, the judges are referred to as 'the Bench'. Judiciary also means the branch of government vested with judicial power to interpret and apply the law. In this chapter the term judiciary is used interchangeably with the phrase judges of the superior courts. These judges, in order of precedence, are the:

- Chief Justice of the Federal Court
- President of the Court of Appeal
- Chief Judge of the High Court in Malaya
- Chief Judge of the High Court in Sabah and Sarawak
- Judges of the Federal Court
- Judges of the Court of Appeal

[1] The first magistrate of Prince of Wales' Island was appointed in 1801; see, James Foong, *The Malaysian Judiciary—A Record from 1786 to 1993*, 2nd edn, Petaling Jaya: Sweet & Maxwell Asia, 2002, pp 1–2.

- Judges of the High Court (including Judicial Commissioners: see below, p 273)

11.1.1 Role of Judges

Neutral umpire

The primary function of a judge is to ensure a fair trial. In the adversarial mode of trial under the common law tradition applicable in Malaysia, the judge acts as a referee, making sure that the rules of evidence and procedure are followed, and deciding which party wins.

Additional duties of the judge in a federation, and in a country with a written constitution

Judges have the duty to adjudicate not only disputes between individuals but also disputes between individuals and the government. In Malaysia, which is a federation, judges have the additional duty of deciding disputes between the federation and a component state, as well as disputes between the component states.

As explained earlier (see Chapter 3), the judiciary in a country with a written constitution, such as Malaysia, has more onerous responsibilities than its counterpart in a country without a written constitution. Whereas the latter interprets ordinary legislation, the former not merely has to interpret but also defend the constitution and protect the people's fundamental rights enshrined therein.

Since a written constitution is the supreme law of the land, the judiciary is entrusted with the heavy responsibility of ensuring that the acts of every organ of government comply with the constitution. In performing this task, ie judicial review, the judiciary has to examine and declare the constitutionality, ie legality of legislative, executive, and judicial acts.

An independent judiciary is crucial to ensure that these onerous responsibilities, especially of pronouncing judgment on the validity or otherwise of legislative and executive acts, are discharged.

11.1.2 Independence of the Judiciary

The concept

The concept of independence of the judiciary means, in essence, a judiciary free from pressure from any quarter to decide any case on its merits strictly in accordance with the law and individual conscience.

Independence of the judiciary is not an end in itself. Public confidence in the impartiality of the judiciary is vital. That confidence is shown when a losing party accepts the decision of a judge with the knowledge that the trial had been conducted fairly.[2]

In Malaysia the independence of the judiciary is protected by the Federal Constitution and ordinary legislation.

[2] HP Lee, 'The Judicial Power and Constitutional Government—Convergence and Divergence in the Australian and Malaysian Experience', *JMCL*, 32 (2005): 1 at p 9.

Independence of the judiciary is protected by the Federal Constitution and ordinary legislation

Judges of the superior courts enjoy security of tenure (see below, p 269). They are not public servants.[3] Consequently, they are exempt from the general rule set out in Article 132(2A) of the Federal Constitution that members of the public services hold office during the pleasure of the Yang di-Pertuan Agong, ie in theory; they can be dismissed for any or no reason.[4]

To secure the independence of the judiciary, the Federal Constitution:

- sets out the procedure for the removal of judges of the superior courts (see below, p 269);
- provides guarantees on the judges' remuneration and pension;
- restricts public discussion of the judges' conduct; and
- empowers the judiciary to punish for contempt of court.

The remuneration, pension and other benefits of office of the judges of the superior courts, as required by Article 125(6), are provided by an Act of Parliament, ie The Judges' Remuneration Act 1971 (Act 45). The remuneration of these judges is charged on the Consolidated Fund. This means the remuneration is payable every year without the necessity for annual parliamentary approval unlike the salary of public servants. Further, these judges are entitled to their pension; public servants are only eligible for theirs. Under Article 125(7), the judges' remuneration, pension, and other benefits may not be altered to their disadvantage after their appointment.

Article 127 restricts discussion on judicial conduct in Parliament. The conduct of a judge of one of the superior courts may not be discussed in either House of Parliament except on a substantive motion of which notice has been given by not less than one-quarter of the total number of members of that House, and not at all in the State Legislative Assembly. The Court of Appeal in *Majlis Peguam Malaysia & Ors* v *Raja Segaran a/l Krishnan* [2005] 1 MLJ 15 explained that open discussion on judicial conduct is tantamount to questioning the wisdom of the Yang di-Pertuan Agong in his selection. Further, open criticism of the judiciary could invoke public misgivings and erode public confidence in the judicial system.

Article 126 and s 13 of the Courts of Judicature Act 1964 (Act 91)(Revised 1972)(CJA 1964) empower each of the superior courts to punish for contempt of itself. Contempt of court covers any act or writing calculated to bring a court into contempt, or to lower

[3] An officer in the Judicial and Legal Service resigns from that service upon elevation to the bench of the High Court or higher court.

[4] All Articles subsequently mentioned in this chapter refer to Articles in the Federal Constitution.

the authority of a judge, or to obstruct or interfere with the administration of justice.[5] Contempt of court is classified as a criminal offence. However, disobedience to the judgment, order, or other process of court, and involving a private injury has been classified as civil contempt.[6]

In addition to the above constitutional provisions, s 14(1) of the CJA 1964 accords judges and other judicial officers immunity from being sued or prosecuted for any act done by them in the discharge of their judicial duty. They are entitled to that protection, whether or not the act done by them is within their jurisdiction provided at the time it was done they in good faith believed they had jurisdiction to do that act complained of.

11.1.3 Qualifications of Judges

Under Article 123, a person qualifies for appointment as a judge of the Federal Court, Court of Appeal, or High Court if:

- that person is a citizen, and
- for the ten years preceding such appointment he or she has been an advocate of those courts or any of them or a member of the Judicial and Legal Service of the federation or the legal service of a state, or sometimes one and sometimes another.

An advocate and solicitor or a member of the Judicial and Legal Service for ten years preceding the appointment

The requirement of being an advocate of any of the superior courts or a member of the Judicial and Legal Service for the ten years preceding appointment as a judge in Article 123 became an issue in *Badan Peguam Malaysia* v *Kerajaan Malaysia* [2008] 2 AMR 561; [2008] 2 MLJ 285 (Case of Dr Badariah Sahamid).

Dr Badariah Sahamid was appointed judicial commissioner on 1 March 2007. Before the appointment she was an Associate Professor in the Faculty of Law, University of Malaya. She had taught law since obtaining her first degree from that university in 1978. She was called to the Malaysian Bar in 1987 but had never practised as an advocate or been in the Judicial and Legal Service.

The Bar Council challenged the legality of Dr Badariah's appointment as judicial commissioner. In its view, such an appointment contravened Article 122AB read together with Article 123 as Dr Badariah did not fulfil the requirement of being in active practice at the Bar or in the Judicial and Legal Service for at least ten years preceding her appointment.

The Bar Council filed an action at the High Court seeking a declaration that the appointment of Dr Badariah as judicial commissioner

[5] *Attorney General* v *Arthur Lee Meng Kuang* [1987] 1 MLJ 206, 208 (SC); *Lee Gee Lam* v *Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia,* [1993] 3 MLJ 265, 275.

[6] *Halsbury's Laws of Malaysia*, Vol 30, Singapore: Lexis Nexis, 2005, p 116.

was void. The Bar Council's action was challenged by the government. The matter was referred by the High Court to the Federal Court under s 84 of the CJA 1964 as it involved a constitutional issue.

The Federal Court sat as a bench of five judges. In a majority decision of 3 : 2, the Federal Court declared the appointment of Dr Badariah as judicial commissioner valid. The majority ruled that active practice as an advocate or in the Judicial and Legal Service for at least ten years preceding the appointment is unnecessary. A candidate qualifies to be appointed as judicial commissioner or judge ten years after being called to the Bar. The main criterion is being called to the Bar and enrolled as an advocate.

The majority judgment did not include that of the Chief Justice. Abdul Hamid Mohamad CJ, in a strong dissenting judgment, ruled the appointment of Dr Badariah invalid. He said that while the court acknowledges Dr Badariah's academic qualifications, the issue is who qualifies under existing law. In his opinion, the requirement that a candidate must be an advocate for at least ten years preceding appointment as judicial commissioner or judge means an advocate who practises law. That requirement is intended to enable the advocate or officer to gain experience at the Bar or in the service before he or she is appointed as a High Court judge or judicial commissioner. He said the time may have arrived for categories of persons other than advocates and members of the Judicial and Legal Service to be included as persons who qualified for appointment as judges. However, that is a policy matter for the government to decide.

> It is not right for the court to rewrite the Constitution on the pretext of interpreting it to sneak in someone under the existing categories when the person does not really belong to either of them.[7]

As the learned Chief Justice pointed out, the majority judgment runs counter to a decision of the Federal Court in *All Malayan Estates Staff Union* v *Rajasegaran & Ors* [2006] 6 MLJ 97 decided only the previous year that chairpersons of the Industrial Court must be in active practice for at least seven years before their appointment.

Consequent to the Federal Court judgment approving the appointment of Dr Badariah as judicial commissioner, the Bar Council filed an application on 21 March 2008 to the Federal Court to review its 3 : 2 majority ruling.[8]

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[7] [2008] 2 AMR 561, p 575.
[8] *New Straits Times*, 6 January 2008, p 12; *New Straits Times*, 8 April 2008, p 17.

11.1.4 Selection and Appointment of Judges

The process of selection and appointment of judges of the superior courts is set out in Article 122B:

- The Chief Justice of the Federal Court, the President of the Court of Appeal, the Chief Judges of the High Courts, and the other judges of these courts shall be appointed by the Yang di-Pertuan Agong 'acting on the advice of the Prime Minister, after consulting the Conference of Rulers'. [Article 122B(1)]
- The Prime Minister shall consult the Chief Justice before tendering his advice concerning these appointments except in the appointment of the Chief Justice. [Article 122B(2)]
- In the case of the Chief Judge of a High Court, the Prime Minister 'shall consult the Chief Judge of each of the High Courts and, if the appointment is to the High Court in Sabah and Sarawak, the Chief Minister of each of the States of Sabah and Sarawak. [Article 122(3)]
- Appointments of judges to the Federal Court, the Court of Appeal, and a High Court, other than the heads of these courts, require consultation with their respective heads. [Article 122(4)]

The requirement of consultation specified in Article 122B(1) has been clarified by HRH Sultan Azlan Shah of Perak (former Lord President of the Federal Court and Yang di-Pertuan Agong):[9]

> The Prime Minister submits the names of the candidates to the Conference of Rulers. The Conference then submits its views to the Prime Minister before he tenders his advice to the Yang di-Pertuan Agong. Therefore, the views of the Conference are, strictly speaking, given to the Prime Minister. It is then for him to consider these views before he makes the final recommendation to the Yang di-Pertuan Agong....
>
> .. when the Prime Minister submits the name to the Yang di-Pertuan Agong, the Yang di-Pertuan Agong is duty-bound, under Article 40(1), to accept the advice of the Prime Minister.[10]

The Prime Minister selects judges of the superior courts

Under the present system which came into force after the Federal Constitution was amended by the Constitution (Amendment) Act 1960 (No 10 of 1960), it is only in theory that the Yang di-Pertuan Agong selects and appoints judges of the superior courts. In reality, it is the Prime Minister who selects these judges. The selection is the Prime Minister's prerogative. The Prime Minister obtains views on

[9] Commenting on the *obiter dicta* of Lamin Mohd Yunus PCA in *In the Matter of an Oral Application by Dato' Seri Anwar bin Ibrahim to Disqualify a Judge of the Court of Appeal*, [2000] 2 MLJ 481, 484 (CA).

[10] HRH Sultan Azlan Shah, 'The Role of Constitutional Rulers and the Judiciary Revisited', in V Sinnadurai, (ed), *Constitutional Monarchy, Rule of Law and Good Governance*, Kuala Lumpur: Professional Law Books, 2004, pp 397–8.

the potential candidate from various sources, official and unofficial, and makes his assessment before making his decision. He may reject the recommendation of the Chief Justice without having to explain his reasons.[11] The final decision is his and his alone.[12]

The present system may be contrasted with that recommended by the Reid Commission. The latter recommended that the power to appoint the Chief Justice should be vested in the Yang di-Pertuan Agong, and that the other judges should be appointed by the Yang di-Pertuan Agong after consultation with the Chief Justice.[13] The Working Party revised that recommendation. The revised recommendation was incorporated as Article 122 in the Merdeka Constitution:

> (3) In appointing the Chief Justice the Yang di-Pertuan Agong may act as his discretion, but after consulting the Conference of Rulers and considering the advice of the Prime Minister, and in appointing the other judges of the Supreme Court he shall, after consulting the Conference of Rulers, act on the recommendation of the Judicial and Legal Service Commission.
>
> (4) Before acting, in accordance with Clause (3), on the recommendation of the Judicial and Legal Service Commission the Yang di-Pertuan Agong shall consider the advice of the Prime Minister and may once refer the recommendation back to the Commission in order that it may be reconsidered.

The White Paper, 'Constitutional Proposals for the Federation of Malaya', published after the London Conference (13–21 May 1957) and detailing the amendments to the Reid Commission's recommendations, explained:

> The revised proposals are designed to maintain the independence of the judiciary from the executive and legislative authorities.[14]

Within three years of independence, the Constitution (Amendment) Act 1960 transferred the power of appointing the Chief Justice and other judges of the superior courts to the Prime Minister. That Amendment Act also abolished the Judicial and Legal

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[11] Former Chief Justice Tun Mohamed Dzaiddin Abdullah revealed in his testimony before the Royal Commission of Inquiry into the VK Lingam Video Clip that former Prime Minister Tun Dr Mahathir Mohamad had twice rejected, without giving reasons, his recommendation that the late Tan Sri Abdul Malek Ahmad, the most senior in the Federal Court and respected in the legal fraternity for his intellect and integrity, be elevated to Chief Judge of Malaya; *New Straits Times*, 30 January 2008, p 8.

[12] Statement made by former Prime Minister Tun Dr Mahathir Mohamad in his testimony before the Royal Commission of Inquiry into the VK Lingam Video Clip; *New Straits Times*, 18 January 2008, p 6; see also explanation by former Chief Justice Tun Ahmad Fairuz Sheikh Abdul Halim in response to criticism that the post of Chief Judge of Malaya had remained vacant following the retirement of Tan Sri Siti Norma Yaacob on January 2007:

'Consultation means you consult. It is not binding on you. The Prime Minister consults me and it is not binding on him. I cannot force the Prime Minister to accept what I want. It is not binding, the Prime Minister still decides.'

New Straits Times, 11 August 2007, p 10.

[13] Reid Commission Report, Chapter XII ('Summary of Recommendations), paras 54–5.

[14] Cmd 210 (1957), published in Malaya as Council Paper No 42 of 1957, para 31.

Service Commission. The government defended these amendments by pointing to the system practised in the United Kingdom and other countries which practice parliamentary democracy. The government gave an assurance in Parliament that it was not its intention to bring 'political influence' into the appointment of judges.[15]

Professor HP Lee, one of the leading scholars in Malaysian constitutional law, in his analysis of this amendment in 1976, wrote:

> Despite this assurance, sober thought must be given to the fact that avenues have been provided whereby an unscrupulous party coming into power could deal a sad blow to the independence of the Judiciary.[16]

These words have proven to be prophetic in the light of revelations before the Royal Commission of Inquiry into the VK Lingam Video Clip (see below).

Calls for establishment of a Judicial Appointments Commission

The present process of selection, appointment, and promotion of judges of the superior courts has been criticized as too discretionary and totally lacking in transparency. From 2000 onwards calls have been made by ex-judges, Members of Parliament, non-governmental organizations and the Human Rights Commission of Malaysia (Suhakam)[17] for a more accountable, objective, and transparent system through the establishment of a Judicial Appointments Commission. The Bar Council of Malaysia has been particularly vocal in pressing for the setting up of such a body, eg in the wake of each of the following incidents:

- 1996 anonymous *Surat Layang* (Poison-Pen Letter) addressed to the then Chief Justice, Tun Mohamed Eusoff Chin, and circulated in the legal fraternity accusing several judges of corruption, abuse of power, and personal misconduct.[18]
- July 2003 judicial promotions exercise in which there was an en bloc bypass of senior judges.
- 11 June 2006 *New Sunday Times* Interview with former High Court Judge Datuk Syed Ahmad Idid in which he broke his ten-year silence and disclosed, first, that his resignation in 1996 had been forced upon him when he was discovered to be the writer of the 1996 *Surat Layang* and, second, that he was informed by the then Attorney General, the late Tan Sri Mohtar Abdullah, that the latter had been pressured to dismiss the allegations in the *Surat Layang* as untrue.

[15] Parliamentary Debate (Dewan Rakyat), 22 April 1960 col 309.

[16] HP Lee, 'Constitutional Amendments in Malaysia', *Mal LR*, 18 (1976): 59, 80.

[17] Suhakam's proposals on a permanent Judicial Commission for the appointment and promotion of judges were included in their report on a forum on 'The Right to an Expeditious and Fair Trial', submitted to the Chief Justice's office in September 2005; *New Straits Times*, 28 January 2007, p 20 and *Sunday Star*, 30 September 2007, p F34.

[18] For details see Wu Min Aun, 'Judiciary at the Crossroads', in Wu Min Aun (ed), *Public Law in Contemporary Malaysia*, Petaling Jaya: Longman, 1999, pp 101–5.

- 2007 VK Lingam Video Clip, purportedly recorded on 20 December 2001, which allegedly detailed a mobile phone conversation between a prominent lawyer and a senior judge discussing the elevation of that judge and the appointment of several other judges.

The release of the eight-minute video clip on 19 September 2007 revived speculation which had erupted from time to time about alleged corruption among judges and irregularities in the appointment of members of the judiciary. On 27 September 2007, two days after announcing its intention, the government appointed an Independent Panel to investigate the authenticity of the video clip. The three-member panel was headed by the former Chief Judge of Malaya, Tan Sri Haidar Mohamed Noor.[19]

One day before the appointment of members of the Independent Panel, some 2000 members of the Malaysian Bar took part in a three and a half kilometre 'Walk for Justice' (only the third such walk in the sixty-year history of the Malaysian Bar) from the Palace of Justice to the Prime Minister's Department in Putrajaya in support of their leaders who submitted two memoranda to the Prime Minister urging the government to set up:

- a Royal Commission of Inquiry to investigate not only the authenticity of the VK Lingam Video Clip but all allegations of judicial impropriety since the 1988 judicial crisis which saw the dismissal of then Lord President of the Supreme Court, Tun Mohamed Salleh Abas, and two other Supreme Court Judges;[20] and
- a Judicial Appointments Commission for the appointment and promotion of judges of the superior courts.

All three members of the Independent Panel submitted separate reports (which were not made public). However, it was reported that all unanimously proposed the setting up of a Royal Commission of Inquiry.[21] Based on these reports, the government set up a Royal Commission of Inquiry under the Commissions of Enquiry Act 1950 (Act 119).

The Royal Commission of Inquiry, established on 12 December 2007, was again headed by Tan Sri Haidar Mohamed Noor. It comprised four other members.[22] Its terms of reference, much narrower in scope than had been requested by the Bar Council, were to:

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[19] The other two members were former Court of Appeal Judge Datuk Mahadev Shankar and social activist Tan Sri Lee Lam Thye.

[20] Tan Sri Wan Suleiman Pawan Teh and Datuk George Edward Seah.

[21] *Sunday Star*, 18 November 2007, p F3.

[22] Former Chief Judge of Sabah and Sarawak, Tan Sri Amar Steve Shim Lip Kiong, former Court of Appeal Judge Datuk Mahadev Shankar, former Solicitor General Puan Sri Zaitun Zawiyah Puteh, and Suhakam Commissioner Professor Emeritus Datuk Dr Khoo Kay Kim.

- ascertain the authenticity of the video clip;
- identify the speaker, the person he was speaking to, and the persons mentioned in the conversation between them;
- ascertain the truth or otherwise of the content of the conversation;
- determine whether any act of misbehaviour had been committed by the person or persons identified or mentioned in the video clip; and
- recommend any appropriate course of action to be taken against such person or persons should he or they be found to have committed any misbehaviour.

Unlike the Independent Panel, the Royal Commission was empowered under the Commissions of Enquiry Act 1950 to subpoena people to testify before it. The Royal Commission inquiry lasted seventeen days after twenty-one witnesses testified, including former Prime Minister Tun Dr Mahathir Mohamad and three retired Chief Justices.[23]

Testimony given before the Royal Commission scandalized the nation.[24] To lawyers such revelations merely reinforced rumours which had long circulated in their midst.

The Royal Commission, scheduled to submit its report to the Yang di-Pertuan Agong by 11 March 2008, has been twice granted an extension, each time of one month. Whatever its findings, it is hoped the Royal Commission will recommend not merely the setting up of a Judicial Appointments Commission but also removing the power to select judges of the superior courts from the Prime Minister and vesting it instead in the Judicial Appointments Commission.

The United Kingdom created a Judicial Appointments Commission under the Constitutional Reform Act 2005 to take over the Lord Chancellor's function, preserved for nine hundred years, of selecting judges. The Judicial Appointments Commission comprises fifteen members, including six lay persons. It started work in 2006.

[23] Tun Mohamed Eusoff Chin (1994–2000), Tun Mohamed Dzaiddin Abdullah (2000–3), and Tun Ahmad Fairuz Sheikh Abdul Halim (2003–7).

[24] Including revelations by the secretary of the lawyer in the Video Clip, identified as Datuk VK Lingam, that a New Zealand holiday taken by Datuk VK Lingam and former Chief Justice Tun Mohamed Eusoff Chin and their families in 1994 was pre-planned and arranged by her; that Datuk VK Lingam wrote the judgment for a defamation case won by his client to whom the judge awarded RM10 million in damages (triggering the trend for multimillion ringgit defamation suits); and her claim that she was given RM3000 by an officer of the Anti-Corruption Agency (ACA) after she was told that the ACA had to close an investigation concerning Datuk VK Lingam's alleged close relationship with judges (concerning which the secretary had thrice given statements to the ACA in 1998) because high-ranking government officers were involved; *New Straits Times*, 13 February 2008, pp 1 and 12.

Appointment based solely on merit is one of the key features of the new selection process. If in 1960 the government of Malaysia changed the process for selection and appointment of judges on the grounds of following the practice in the United Kingdom, logic demands the setting up of a similar Judicial Commission in Malaysia following the change in the United Kingdom. But it is not logic alone that calls for change in Malaysia. The VK Lingam Video Clip underscores the urgent need for change.

Prime Minister announced long-awaited measures for reform of the judiciary in April 2008

Recognizing the urgency for reform of the judiciary after the Barisan Nasional lost its two-thirds majority in the March 2008 general election, Prime Minister Datuk Seri Abdullah Ahmad Badawi—without waiting for the report of the Royal Commission on the VK Lingam Video Clip—announced at a Bar Council dinner on 17 April 2008 two much awaited steps to bring closure to the judicial crisis of 1988 (see below) and to restore public trust in the judiciary:

- the establishment of a Judicial Appointments Commission for the appointment and promotion of judges of the superior courts, and
- the recognition by his administration of the six judges of the Supreme Court who were suspended (three of whom, including Lord President Tun Mohamed Salleh Abas, were subsequently dismissed) in 1988 as 'towering judicial personalities' for their commitment towards upholding justice. In acknowledgement of the pain and loss they endured, the Prime Minister announced the decision of his administration to grant the six judges concerned goodwill *ex gratia* payment.[25]

A renaissance has begun for a judiciary to whom, it is anticipated, judicial power will be formally restored and for a country which has had to suffer a judiciary stripped of its repute and public respect.

11.1.5 Tenure

Security of tenure till age of 66

Judges of the superior courts once appointed hold office until the age of sixty-six years. Their tenure may be extended by not more than six months thereafter if the Yang di-Pertuan Agong so approves.[26]

Removal from office only for breach of a provision of the Judges' Code of Ethics

A judge may at any time resign his or her office voluntarily by tendering his or her resignation to the Yang di-Pertuan Agong.[27] However, he or she may be dismissed by the Yang di-Pertuan Agong

[25] *New Straits Times*, 18 April 2008, p 2; *Star*, 18 April 2008, p N12.
[26] Article 125(1).
[27] Article 125(2).

only on the grounds of breach of any provision of the code of ethics (before 1994, 'misbehaviour') or of inability, from infirmity of body or mind or any other cause, properly to discharge the functions of his office—and then only on the recommendation of a tribunal.[28]

The procedure for removing a judge from office is elaborate. It is set out in Article 125 as follows:

- There is a representation made to the Yang di-Pertuan Agong by the Prime Minister or by the Chief Justice after consulting the Prime Minister;
- The removal must concern a breach of the code of ethics or inability, from infirmity of body or mind or any other cause, properly to discharge the judicial functions;
- A tribunal is appointed by the Yang di-Pertuan Agong and the representation is referred to it; and
- The tribunal makes a recommendation on the basis of which the Yang di-Pertuan Agong may remove the judge.

Article 125 specifies that the tribunal must comprise not less than five persons who hold or have held office as judge of one of the superior courts (including, if the Yang di-Pertuan Agong thinks fit, judges and former judges from any part of the Commonwealth). The tribunal is presided over by the Chief Justice or the member most senior in accordance with the order of precedence laid down.

Article 125 of the Federal Constitution prescribes tribunal procedure for removing a judge from office

There are two modes for removing a judge from office: (1) tribunal procedure and (2) parliamentary address procedure. The latter applies, eg in Australia and the United Kingdom. In both countries, the procedure requires an address of both Houses of Parliament. The Reid Commission had recommended the parliamentary address procedure requiring a resolution passed by two-thirds of members of each House of Parliament.[29] The framers of the Merdeka Constitution disagreed. They considered a special tribunal as more effective in securing judicial independence than a parliamentary majority obedient to the will of the executive.

Tribunal procedure safeguards judicial independence only in theory

Theoretically, the tribunal procedure suffices to safeguard judicial independence. However, the manner in which the Lord President of the Supreme Court, Tun Mohamed Salleh Abas, and two other Supreme Court judges[30] were dismissed has raised serious doubts about the effectiveness of the tribunal procedure as set out in Article 125.

[28] Article 125(3).
[29] Reid Commission Report, para 125.
[30] Tan Sri Wan Suleiman Pawan Teh and Datuk George Edward Seah.

The Federal Constitution did not define 'misbehaviour' in the pre-1994 version of Article 125. Neither is the composition of the tribunal nor tribunal procedure spelt out in detail.

In consequence, the Tribunal on Tun Salleh (First Tribunal) and the Tribunal on the other two Supreme Court judges (Second Tribunal) applied a broad test of 'misbehaviour' when hearing the questionable allegations made in the representation against the judges concerned. In breach of the principles of natural justice, Tan Sri Abdul Hamid Omar, then Chief Justice of the High Court of Malaya and generally regarded as likely to succeed to the Lord President's post (as he did in fact) upon Tun Salleh's removal, presided over the First Tribunal. The proceedings of both tribunals were held in camera and, unlike the Second Tribunal which adopted the criminal standard of proof beyond reasonable doubt, the First Tribunal adopted the less stringent civil standard of proof on a balance of probabilities.[31] After his dismissal, Tun Salleh reflected:

> Looking back at our recent Malaysian experience I am convinced more than ever, that removal by a Parliamentary address provides a better safeguard for judges despite being an apparent anachronism, provided that there is a reasonably free press. Parliamentary proceedings are held in public and these constitute some measure of protection for the judges.[32]

11.1.6 Code of Ethics

The Judges' Code of Ethics 1994[33] was enacted under Article 125(3B).[34] That Article empowered the Yang di-Pertuan Agong, on the recommendation of the Chief Justice, the President of the Court of Appeal, and the Chief Judges, after consulting the Prime Minister, to prescribe a code of ethics which governs judicial conduct and applies to judges of the superior courts throughout the period of their service. Breach of any provision of the code may lead to sanctions, including dismissal under Article 125(3).

Pursuant to the code, a judge must not:

1. subordinate his judicial duties to his private interests;

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[31] For details of the dismissals see, eg AJ Harding, 'The 1988 Constitutional Crisis in Malaysia', *ICLQ*, 39 (1990): 57; Lawyers' Committee for Human Rights, *Malaysia: Assault on the Judiciary*, New York, 1990; HP Lee, *Constitutional Conflicts in Contemporary Malaysia*, Kuala Lumpur: Oxford University Press, 1995, Chapter 3; FA Trindade, 'The Removal of the Malaysian Judges', *LQR*, 106 (1990): 51; Tun Salleh Abas and K Das, *May Day for Justice*, Kuala Lumpur: Magnus Books, 1989; Tun Salleh Abas, *The Role of the Independent Judiciary*, Kuala Lumpur: Promarketing Publications, 1989; Visu Sinnadurai, 'The 1988 Judiciary Crisis and its Aftermath', in Andrew Harding and HP Lee, *Constitutional Landmarks in Malaysia—The First 50 Years 1957–2007*, Singapore: Lexis Nexis, 2007, pp 173–95.

[32] Tun Salleh Abas, *The Role of the Independent Judiciary*, pp 46–7.

[33] PU(B) 600/1994.

[34] Introduced by s 21 of the Constitution Amendment Act 1994 (Act A885).

2. conduct himself in such a manner as is likely to bring his private interests into conflict with his judicial duties;
3. conduct himself in any manner likely to cause a reasonable suspicion that:
   (a) he has allowed his private interests to come into conflict with his judicial duties so as to impair his usefulness as a judge; or
   (b) he has used his judicial position for his personal advantage;
4. conduct himself dishonestly or in such manner as to bring the judiciary into disrepute or to bring discredit to it;
5. lack efficiency or industry;
6. inordinately and without reasonable explanation delay in the disposal of cases, the delivery of decisions, and the writing of grounds of judgment;
7. refuse to obey a proper administrative order or refuse to comply with any statutory direction;
8. absent himself from his court during office hours without reasonable excuse or without the prior permission of the Chief Justice, the President of the Court of Appeal, or the Chief Judge, as the case may be, and
9. be a member of any political party or participate in any political activity.

The Judges' Code of Ethics has yet to be implemented

The code, in effect, lists acts or omissions which constitute 'misbehaviour', that vague concept that the Federal Constitution hitherto never defined. However, the code itself is not free from vagueness. And, it has never been implemented.

Review of the code started in mid-2001 because of complaints of delay in writing judgments and concern over extraneous remarks included in a judgment in an election petition.[35] The review was undertaken largely to devise an enforcement mechanism to enable the Chief Justice to take disciplinary action against a judge for breach of the code falling short of the sanction of dismissal.[36] In 2005, Article 125(3A) was introduced to enable the Chief Justice 'to refer the judge to a body constituted under federal law to deal with such breach'.[37]

11.1.7 Temporary Judges

The general rule is that a judge's post is permanent (ie until the age of sixty-six, and a possible six-month extension thereafter). However, the Federal Constitution allows temporary appointments:

[35] *New Straits Times*, 14 June 2001, pp 1 and 10.
[36] *New Straits Times*, 26 September 2002, p 14.
[37] Constitution (Amendment) Act 2005 (Act A1260).

1. Under Article 122(1A), a person who has held high judicial office in Malaysia may be appointed as an additional judge of the Federal Court. The appointment made by the Yang di-Pertuan Agong acting on the advice of the Chief Justice of the Federal Court, is for a specific period or purpose. The person may be appointed even if over the age of sixty-six.
2. Under Article 122 AA(2) read together with Article 122B, a person may sit as a judge of a High Court if designated for the purpose. Such person must be qualified for appointment as a judge and designated by the Yang di-Pertuan Agong acting on the advice of the Prime Minister, after consulting the Conference of Rulers and the Chief Judge of the High Court concerned.
3. A person qualified for appointment as a judge of a High Court may be appointed as a judicial commissioner under Article 122 AB. Judicial commissioners are appointed by the Yang di-Pertuan Agong acting on the advice of the Prime Minister, after consulting the Chief Justice of the Federal Court but without reference to the Conference of Rulers. They are appointed for a specified period (usually two years) or purpose on a contract basis. This means they do not enjoy security of tenure. Otherwise, they enjoy the same powers and immunities as High Court judges.

Judicial commissioners were introduced in the early 1990s as a temporary measure to fill vacancies from time to time. They came, however, to be regarded as being 'on probation'. Based on their service record, they could be elevated to the bench of the High Court. Regrettably, the appointment of judicial commissioners as a prelude to elevation has become the norm. Direct appointment as a High Court judge has long stopped.

11.2 JUDICIAL OFFICERS OF THE SUBORDINATE COURTS

The judicial officers presiding over the subordinate courts are the:

- Sessions Court judges; and
- Magistrates.

Sessions Court judges are appointed by the Yang di-Pertuan Agong on the recommendation of the Chief Judge of the relevant High Court.[38] Sessions Court judges, other than those appointed

[38] S 59 Subordinate Courts Act 1948 (Act 92)(hereafter SCA 1948).

temporarily, must be members of the Judicial and Legal Service of Malaysia.[39]

There are two classes of magistrates: (1) first class and (2) second class. In the Federal Territories magistrates are appointed by the Yang di-Pertuan Agong, those in the states are appointed by the respective Rulers or Yang di-Pertua Negeri; but the first class magistrates only on the recommendation of the Chief Judge. First class magistrates (other than those appointed temporarily), like Sessions Court judges, must be members of the Judicial and Legal Service. Second class magistrates are not legally qualified. They are civil or public servants and court officials who perform magisterial functions in addition to their administrative duties.

Judicial officers do not enjoy security of tenure

Unlike judges of the superior courts, judicial officers of the subordinate courts hold office at the pleasure of the Yang di-Pertuan Agong, ie in theory they can be dismissed for any or no reason. Nevertheless, their independence as officers discharging judicial functions is secured by an independent Judicial and Legal Service Commission established under Article 138.

The Judicial and Legal Service Commission was created in 1957, abolished in 1960, and revived in 1963. It comprises:

The Judicial and Legal Service Commission

1. the Chairperson of the Public Services Commission, as Chairperson;
2. the Attorney General, if a career officer; otherwise, the Solicitor General; and
3. one or more members appointed by the Yang di-Pertuan Agong after consultation with the Chief Justice of the Federal Court from among judges, ex-judges, or persons qualified to the judges of one of the superior courts.

The Judicial and Legal Service Commission appoints, confirms, promotes, transfers, and disciplines members of the Judicial and Legal Service. Members of this service are qualified lawyers. They serve in the subordinate courts (eg as judges of the Sessions Courts, first class magistrates and senior assistant registrars) and the legal service (eg as deputy public prosecutors, federal counsel, and assistant parliamentary draftspersons). Officers in the judicial branch of the service are answerable to the Chief Justice of the Federal Court; those in the legal branch, to the Attorney General. In the past, the officers in the judicial and legal branches of the service were interchangeable to give them a varied experience. Now, such interchange is the exception rather than the norm.

[39] SCA 1948, s 60.

In August 2006, Chief Justice Tun Ahmad Fairuz Sheikh Abdul Halim, after chairing the annual judges' conference, announced that the judiciary intended to propose to the government the abolition of the Judicial and Legal Service. Judicial officers of the subordinate courts, like judges of the superior courts, should be members of the judiciary, not the executive, and be under the control of, and accountable to, the Chief Justice of the Federal Court.[40] It is not known if the government has been presented with an official proposal.

Questions

1. (a) Are the existing provisions in the Federal Constitution and other legislations adequate to secure the independence of the judiciary?
   (b) Can constitutional and other legal provisions, by themselves, guarantee an independent judiciary?
2. Will the setting up of the proposed Judicial Appointments Commission, by itself, bring about an accountable, objective, and transparent mechanism for the appointment and promotion of judges of the superior courts?
3. If the Federal Constitution were to be reformed or rewritten, should the tribunal procedure for removing judges from office be replaced by the parliamentary address procedure such as that adopted in Australia and the United Kingdom?
4. What objections are there, if any, to the present practice of appointing judicial commissioners as 'judges on probation'?

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[40] *New Straits Times*, 22 August 2006, p 8.

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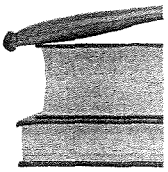

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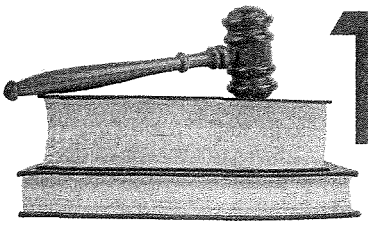

12 THE LEGAL SERVICE

Chapter Objectives

- Trace the origin of the office of the Attorney General
- Provide a brief historical account of the development of the office of the Attorney General
- Discuss the appointment, qualifications, functions, and powers of the Attorney General
- Consider the accountability of the Attorney General
- Introduce the Solicitor General and other officers in the legal service

12.1 THE ATTORNEY GENERAL

12.1.1 Introduction

Office established under Article 145

THE Attorney General is the head of the legal branch of the Judicial and Legal Service. He or she is assisted by the Solicitor General (at present, two Solicitors General) and other legal officers. The office of the Attorney General is established under Article 145 of the Federal Constitution.[1]

12.1.2 Origin of the Office of the Attorney General

The origin of the office of the Attorney General may be traced back to a provision in the Agreement for the Constitution of a Federal Council 1902 following the formation of the Federated Malay States (FMS) in 1895. Clause 5A of that agreement provided for the Legal Adviser of the FMS to attend the sittings of the Federal Council (a political body) established by that agreement to 'assist in the discussion of any legal questions which may arise in the course of its proceedings' but who was not entitled to vote.

The Supplemental Agreement of 9 July 1924 empowered the High Commissioner of the FMS to nominate the Legal Adviser of

[1] All Articles subsequently mentioned refer to Articles in the Federal Constitution.

the FMS, in his capacity as the head of a public department, to be an unofficial member of the Federal Council. Failing such nomination, the Legal Adviser was to have the same role in that council as provided in the 1909 agreement.

12.1.3 Historical Account of the Development of the Office of the Attorney General

The Legal Adviser of the FMS metamorphosed into the Attorney General of the Malayan Union (MU). The latter post was created with the establishment of the MU on 1 April 1946. In accordance with ss 17 and 39 of the MU Order-in-Council 1946,[2] the Attorney General became one of three *ex officio* members of the two primary political institutions of the MU, the Legislative Council and the Council of Rulers.

When the Federation of Malaya was formed to replace the short-lived MU on 1 February 1948, the Attorney General was accorded a constitutional status and functions. The Federation of Malaya Agreement 1948[3] (FMA) which established the federation made the Attorney General an *ex officio* member of the Federal Legislative and Federal Executive Councils. The FMA provided that the Attorney General:

- was to be appointed by the High Commissioner for and on behalf of the Malay Rulers
- must be a person qualified to be appointed a judge of the Supreme Court
- was duty bound to advise the federal government, and perform duties conferred upon him by the FMA and any law in force as well as such duties of legal character as were assigned to him by the High Commissioner
- had the right of audience, and took precedence over all other counsel, in all the courts whether federal, state, or settlement.

These provisions were the basis for the provisions pertaining to the Attorney General in the present Federal Constitution.

All the Attorney Generals of the Federation of Malaya were career officers. However, clause 84(1) of the FMA left it open for the Attorney General to be appointed from outside the public service.

Commonwealth countries have either a political or a non-political Attorney General. In countries opting for the latter, the political functions normally exercised by a political Attorney General are

[2] No 2 of 1946, MU Gazette Extraordinary, 1 April 1946.
[3] GN No 5 of 1948 (FM).

exercised by a Minister of Justice or Minister of Law leaving the Attorney General to discharge the professional functions of giving legal advice to the government, representing the government in the courts and, possibly, assuming responsibility for public prosecution.

The Reid Commission preferred a non-political Attorney General for an independent Federation of Malaya on the grounds that a country exercising responsible government for the first time would find it difficult to keep the political and the professional functions of the Attorney General distinct. Nevertheless, the Reid Commission did not expressly exclude the appointment of a political Attorney General.

The Working Party, while accepting the Reid Commission's recommendation, made certain important modifications. These pertained to the Attorney General's power to prosecute and his removal from office.

The Reid Commission's recommendation as amended was incorporated as Article 145 in the Merdeka Constitution. The non-political character of the office of the Attorney General was made very clear by placing Article 145 in Part X of the Federal Constitution (headed 'Public Services').

Article 145 as at 31 August 1957 provided that the Attorney General who must be a person qualified to be a judge of the Supreme Court:

- shall be appointed by the Yang di-Pertuan Agong, after consultation with the Judicial and Legal Service Commission
- shall advise the government on legal matters and shall have power, exercisable at his discretion, to institute, conduct, or discontinue any proceedings for an offence, other than proceedings before a [*Syariah*] Court or a court martial [after Malaysia Day, Native Court was added to the list of exceptions]
- shall hold office until the age of sixty-five years or such later time, not exceeding six months thereafter, as the Yang di-Pertuan Agong may approve
- may resign at any time but shall not be removed from office except on the same grounds and in the same manner as a judge of the Supreme Court.[4]

The Attorney General's post in the Merdeka Constitution

Article 145 was amended within three years of Merdeka by s 26 of the Constitution (Amendment) Act 1960 (No 10 of 1960):

[4] The White Paper, 'Constitutional Proposals for the Federation of Malaya', Cmd 210 (1957), explained that this safeguard was necessary because the Attorney General should act in an impartial and quasijudicial spirit in discharging his duties.

1960 constitutional amendments

- selection of the Attorney General was removed from the Judicial and Legal Service Commission (which was abolished) and vested in the Prime Minister
- such selection was no longer confined to officers of the Judicial and Legal Service[5]
- tenure till the age of sixty-five and the prohibition against dismissal from office except on the same grounds and in the same manner as a Supreme Court judge were removed and substituted with tenure at the pleasure of the Yang di-Pertuan Agong.

1988 constitutional amendments

Another important amendment was made in 1988 in response to the decisions of the High Court[6] and Supreme Court[7] in *Public Prosecutor* v *Dato' Yap Peng*. In that case the courts declared s 418A of the Criminal Procedure Code (CPC) unconstitutional because it conferred on the Attorney General, a member of the executive, a judicial power, ie the power to determine the courts in which or the venue at which any proceedings which the Attorney General has power to institute shall be instituted or transferred. As Article 121(1) expressly vested the judicial power of the federation in the courts, s 418A CPC contravened Article 121(1) and was, therefore, void. Parliament, through two amendments overturned the decisions of the courts. First, it amended Article 121(1). Judicial power ceased to be expressly vested in the courts. Second, it amended Article 145 by adding clause (3A). That clause authorizes federal legislation to confer on the Attorney General the very judicial power the subject of dispute.[8]

12.1.4 Appointment, Qualifications, and Tenure

Currently, the Prime Minister selects the Attorney General

The Attorney General is appointed by the Yang di-Pertuan Agong on the advice of the Prime Minister. Only a person qualified to be a judge of the Federal Court can be appointed to the office.[9]

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[5] The rationale was given as follows by Deputy Prime Minister Tun Abdul Razak when tabling the Constitution (Amendment) Bill for Second Reading in the Dewan Rakyat:

'The Government is of the view that with the progress of our country and of our democratic institutions, it may prove desirable at some future date to have an Attorney General as a member of the Government and a member of this House. It may be convenient, and it may be desirable, for the chief legal adviser to the Government to sit in this House to explain and answer legal matters. Now, this amendment makes it possible, should it prove desirable in future, to appoint an Attorney General from outside the judicial and legal service.'

Official Reports, Parliamentary Debates, Dewan Rakyat, April-June 1960, Cols 309–10.

[6] [1987] 2 MLJ 311.

[7] [1987] 2 MLJ 316.

[8] See, HP Lee, *Constitutional Conflicts in Contemporary Malaysia*, Kuala Lumpur: Oxford University Press, 1995, Chapter 3, pp 50–2.

[9] Article 145(1).

It is implicit from Article 145(5) that the Attorney General could be a political or non-political appointee. In either case, the Attorney General holds office at the pleasure of the Yang di-Pertuan Agong. This means the Attorney General has no security of tenure (contrary to the Reid Commission's recommendation as modified by the Working Party: see above), and, unless a minister in the Cabinet, no security of remuneration. This is quite unlike a judge of the Federal Court.

The Attorney General does not enjoy security of tenure of the pleasure of the executive

The Attorney General may resign at anytime. Otherwise, an Attorney General who is a member of the Judicial and Legal Service may be dismissed in the same manner as public servants; but if the Attorney General was also a Cabinet minister, then he may be dismissed only on the advice of the Prime Minister.

Malaysia has experienced both types of Attorney General: the political and non-political. The first local Attorney General, appointed in 1963, was Tan Sri Abdul Kadir Yusof, then a member of the Judicial and Legal Service. Subsequently, he retired from the service and entered Parliament, first as a senator and later as a Member of Parliament. He was appointed simultaneously Minister of Law and Attorney General. So was his successor, Tan Sri Hamzah Abu Samah. Their successors have been non-political appointees.[10]

12.1.5 Functions and Powers

The Attorney General has to:

- advise the government on legal matters;
- perform other duties of a legal character assigned by the government; and
- discharge the functions conferred by the Federal Constitution or any other written law.[11]

In performing these functions the Attorney General has the right of audience in, and takes precedence over all other persons before, any courts or tribunal.

The Attorney General is the public prosecutor

The function that has provoked controversy concerns criminal prosecutions. The Attorney General is the public prosecutor under s 376 of the Criminal Procedure Code (Act 593). Article 145(3) of the Federal Constitution confers on the Attorney General the power 'exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a *Syariah* Court, a native court or a court martial'. This power

[10] Tan Sri Abu Talib (1980–93); Tan Sri Mohtar Abdullah (1994–9); Datuk Seri Ainum Mohd Saaid (2000–1); and Tan Sri Abdul Ghani Patail (2001–present).

[11] Article 145(2).

is made more formidable by Article 145(3A) which, as explained above, authorizes federal legislation to confer on the Attorney General, a member of the executive, what is, in fact, a judicial power, ie power to determine the courts in which or the venue at which any proceedings which he is empowered to institute shall be instituted or transferred. Article 145(3A), in effect, legitimizes s 418A of the Criminal Procedure Code.

The courts have given Article 145(3) a very broad interpretation; one which confers on the Attorney General absolute control over criminal prosecutions. The Attorney General has complete discretion, unchallengeable in court, whether to prosecute, and if so, under which provision to bring charges.[12] Likewise, the Attorney General has unfettered discretion to choose the forum in which the accused is to be tried without having to provide any reasons for his choice.[13] The Attorney General's discretion in choosing the forum is also not subject to judicial review.[14]

Other than the constitutional functions discussed above, the Attorney General is the protector and defender of public interests. This role, founded on the common law, is, in theory, very important. A member of the public who seeks judicial intervention to protect a public right or interest can sue the violator of that right or interest even if such person does not have an actual interest in the matter. That person can sue in the name of the Attorney General by way of relator action. The litigant's lack of standing or *locus standi* is cured by the Attorney General lending his name to the action.

The Attorney General is the protector of public interests, in theory

Unfortunately, the relator action is a rarity in Malaysia.[15] It is unrealistic to expect the Attorney General to lend his name as plaintiff in a relator action against the government to whom he owes a duty to give advice and to defend in court. In the words of VC George J in *Lim Kit Siang* v *United Engineers (M) Bhd & 3 Ors (No 2)* [1988] 1 MLJ 50 at p 59:

> It is an inconsistency which suggests that relator actions using the name of the Attorney General is something which should be regarded as being archaic and impracticable, a historical vestige of interest perhaps to students of legal history.

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[12] See, eg *Long bin Samat & Ors* v *Public Prosecutor* [1974] 2 MLJ 152 (FC); *Public Prosecutor* v *Hettiarachigae LS Perera* [1977] 1 MLJ 12 at p 158 per Suffian LP; *Johnson Tan Han Seng* v *Public Prosecutor* [1977] 2 MLJ 66 at p 70 per Suffian LP; *Teh Cheng Poh* v *Public Prosecutor* [1979] 1 MLJ 50 (PC); *Dato' Seri Anwar bin Ibrahim* v *Public Prosecutor* [2000] 2 MLJ 486 (CA).

[13] See, eg *Public Prosecutor* v *Datuk Haji Harun bin Idris* [1976] 2 MLJ 116 at p 119 per Abdoolcader J; and *Public Prosecutor* v *Lim Shui Wang* [1979] 1 MLJ 65 at p 67 (FC).

[14] See, eg *Mohamed Nordin bin Johan* v *Attorney General, Malaysia* [1983] 1 MLJ 68 (F.C.); and *Abdul Ghani bin Ali @ Ahmad* v *Public Prosecutor* [2001] 3 MLJ 561 (FC).

[15] So far, only in *Attorney General at and by the Relation of Pesurohjaya Ibu Kota, Kuala Lumpur* v *Wan Kam Fong* [1967] 2 MLJ 72.

12.1.6 The Accountability of the Attorney General

In *Long bin Samat & Ors* v *Public Prosecutor* [1974] 2 MLJ 152, Suffian LP said at p 158:

> Anyone who is dissatisfied with the Attorney General's decision not to prosecute, or not to go on with a prosecution or his discretion to prefer a charge for a less serious offence when there is evidence of a more serious offence which should be tried in a higher courts should seek his remedy elsewhere, but not in the courts.

And, concerning the Attorney General's role as the protector and defender of public interests, Salleh Abas LP in *Government of Malaysia & UEM* v *Lim Kit Siang* [1988] 2 MLJ 12 said at pp 26–7:

> Our system requires the public to trust the impartiality and fair mindedness of the Attorney General. If he fails in his duty to exhibit this sense of fairness and to protect public interests of which he is the guardian, the matter can be raised in Parliament or elsewhere.

The above views raise a question often asked: To whom is the Attorney General accountable for the discharge of his functions and exercise of his power 'in an impartial and quasijudicial spirit'?[16]

An Attorney General who is a Member of Parliament and the Cabinet is, of course, answerable to Parliament. The career (or contract) Attorney General occupies an anomalous position. VC George J in *Lim Kit Siang v United Engineers (M) Bhd & 3 Ors (No 2)*[1988] 1 MLJ 50 at p 58 explained it as follows:

> He is a civil servant appointed by His Majesty the Yang di-Pertuan Agong on the advice of the Prime Minister. He is not answerable to anybody, not to any Minister or Ministry, not even to the Prime Minister, not to Parliament and not to the people (in that his is not a political appointment). However, he holds office during the pleasure of the Yang di-Pertuan Agong, which in effect means during the pleasure of the Executive.

Or, in the inimitable words of the late Tan Sri Harun Hashim, a former judge of the Supreme Court:

> ... In short, a civil servant Attorney General is not accountable to Parliament or for that matter answerable to anybody except God.[17]

The Attorney General is not answerable to anyone but God

In the past, Malaysia had a Ministry of Justice or Ministry of Law. Such ministry was abolished in 1980 or, more to the point, downsized to a division, the Legal Affairs Division, in the Prime Minister's Department. A minister in the Prime Minister's Department responsible for legal affairs is the de facto Law Minister who exercises the political functions normally exercised by a political

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[16] Borrowing the words used in the White Paper, 'Constitutional Proposals for the Federation of Malaya', Cmd 210 (1957), p 17, para 52.

[17] 'The Benchmark', *New Straits Times*, 20 April 2000.

Attorney General.[18] However, as VC George J explained, the Attorney General is not answerable to the Law Minister or Ministry.

12.2 THE SOLICITORS GENERAL AND OTHER LEGAL OFFICERS

The Attorney General is assisted by Solicitors General and other legal officers

The Attorney General is assisted by the Solicitors General and a staff of legal officers. On 1 June 2007 a second Solicitors General was appointed, for the first time, to ease the mounting workload of the Attorney General. The Solicitors General and other legal officers are members of the Judicial and Legal Service.

The Solicitors General is authorized under the Federal Constitution to perform any of the duties and exercise any of the powers of the Attorney General in his or her absence.[19]

The office of the Solicitors General and other legal officers can be traced back to Part VIII of the Federation of Malaya Agreement 1948 which carried the heading 'Law Officers'. Clause 85 of that agreement provided for the appointment of the Solicitors General, Federal Counsel, and Legal Advisers in the Malay states and the Straits Settlements.

Below the Solicitors General the most prominent of the legal officers in the Attorney General's Chambers is the Parliamentary Draftsperson. The latter heads the Drafting Division which drafts Parliamentary Bills.

There are seven divisions in the Attorney General's Chambers in Putrajaya: advisory, litigation, criminal prosecution, drafting, international affairs, law revision and reform, and management.

At state level, the federal government is represented in legal matters by the State Legal Advisers (called the State Attorney General in Sabah and Sarawak). The office of the State Legal Adviser is established under the State Constitutions. These provide that the State Legal Adviser is an *ex officio* member of the State Executive Council. Most State Constitutions also provide that the State Legal

[18] The minister responsible for legal affairs is in charge of, eg the Anti-Corruption Agency (ACA), the Legal Aid Bureau, the Judicial and Legal Training Institute (ILKAP), and the Kuala Lumpur Regional Centre for Arbitration. He is not in charge of the judiciary except the office of the Chief Registrar of the Federal Court. Former Court of Appeal President, Tan Sri Mohd Lamin Yunus, explained the Attorney General's function vis-à-vis the courts in these prosaic words: '... when we need tables and chairs or a new court room we go to him': *The Star*, 1 June 2002, p 8. It should be noted that Datuk Zaid Ibrahim, a legal practitioner and former Member of Parliament was made a senator after the 2008 general election so that he could be appointed the de facto law minister entrusted with the task of reforming the judiciary: *New Straits Times*, 19 March 2008, p 1.

[19] Article 160(1) read together with the Eleventh Schedule and s 40A of the Interpretation and General Clauses Ordinance 1948 (MU Ordinance No 7 of 1948).

Adviser is to be appointed by the Ruler or Yang di-Pertua Negeri on the recommendation of the Judicial and Legal Service Commission, after considering the advice of the Menteri Besar or Chief Minister. Before tendering his advice, the Menteri Besar or Chief Minister is required to consult the federal government.

In giving advice on state matters, the State Legal Adviser is completely independent of the Attorney General. As Senior Federal Counsel, however, the State Legal Adviser is responsible to the Attorney General for advising on federal matters within the state.

Questions

1. Refer to the case *Dato' Seri Anwar Ibrahim* v *Public Prosecutor* [2000] 2 MLJ 486 (CA); Tommy Thomas, 'The Attorney General—the Most Powerful Person in Malaysia?', *INSAF*, Vol 16 No 3 (1983): 20–1; and Fan Yew Teng, *The Rape of Law*, Kuala Lumpur: Egret Books, 1990.

   If the Federal Constitution were to be redrafted or rewritten, what should the provisions of Article 145 be to ensure that the holders of the office of the Attorney General discharge their functions and exercise their powers 'in an impartial and quasijudicial spirit'?.
2. Is a political Attorney General preferable to the career or professional Attorney General engaged on a contract basis?
3. Should the Judicial and Legal Service be abolished, and officers of the judicial service become members of the judiciary and be accountable to the Chief Justice of the Federal Court while officers of the legal service remain part of the executive, as proposed by former Chief Justice of the Federal Court, Tun Ahmad Fairuz Sheikh Halim in August 2006? (See Chapter 11)

   Examine the pros and cons of that proposal.

Reading List

Abdul Aziz Bari, *Malaysian Constitution. A Critical Introduction*, Kuala Lumpur: The Other Press, 2003, pp 117–18.

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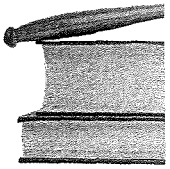

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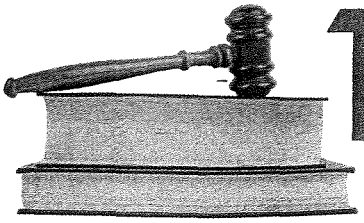


13 THE LEGAL PROFESSION

Chapter Objectives

- Explain the term 'legal profession'
- Introduce the legal profession in Malaysia
- Describe the three main organs which govern the administration of, the admission into, and conduct of, the legal profession in Peninsular Malaysia
- Examine the admission into the legal profession in Peninsular Malaysia
- Explore the self-regulation of the legal profession in Peninsular Malaysia

13.1 MEANING OF THE TERM 'LEGAL PROFESSION'

THE term 'legal profession' is usually used to distinguish practising lawyers from other legally trained persons who do not practise law but work, eg in banks, corporations, the Judicial and Legal Service, and other government departments. Thus, in this chapter, the term 'legal profession' refers only to legal practitioners.

13.2 INTRODUCTION TO THE LEGAL PROFESSION IN MALAYSIA

Like the federal judiciary, the legal profession dates back to the grant of the First Charter of Justice of 1807 which set up the Court of Judicature in Penang. And, like the federal judiciary, the legal profession is of English origin. However, unlike the English legal profession which historically is divided into two separate branches—barristers (who specialize in litigation) and solicitors (who traditionally did not appear in court)—no such division exists in the Malaysian legal profession. The latter is described as 'fused', ie a legal practitioner in Malaysia is both an 'advocate and solicitor of the High Court'. Malaysian legal practitioners do the work done by English barristers and solicitors. In big law firms in Malaysia,

A fused profession

the members may specialize: some in litigation, others in solicitor's work (primarily conveyancing and corporate law which is the more lucrative practice).

There are three separate bodies of legal practitioners in Malaysia:

Three separate Bars

- Malaysian Bar,
- Sabah Bar (known as Sabah Law Association), and
- Sarawak Bar (known as the Advocates Association of Sarawak).

The Malaysian Bar is subject to the Legal Profession Act 1976 (Act 166)(LPA 1976) and the rules made thereunder.[1] The Sabah Law Association is governed by the Advocates and Solicitors Enactment of Sabah (Reprint 1966)(Cap 2) and the Advocates Association of Sarawak by the Advocates and Solicitors Ordinance of Sarawak (Reprint 1966)(Cap 110).

The existence of three separate Bars, like the existence of two High Courts (one in Peninsular Malaysia and the other in East Malaysia), lies in negotiations between the Federation of Malaya and the then Crown colonies of North Borneo (now Sabah) and Sarawak leading to the formation of Malaysia. They are really relics of Malaysian history.

Members of the Malaysian Bar who are advocates and solicitors of the High Court in Malaya are entitled to practise only in Peninsular Malaysia, not in Sabah and Sarawak. Likewise, advocates and solicitors of the High Court in Sabah and Sarawak are not entitled to practise in Peninsular Malaysia. Furthermore, no member of the Bar in Sabah is entitled to practise in Sarawak, and vice versa.

The discussion below focuses on the legal profession in Peninsular Malaysia.

13.2.1 The Malaysian Bar

The Malaysian Bar is a corporate body established under s 41 LPA 1976. Every advocate and solicitor of the High Court in Malaya is automatically a member of the Malaysian Bar and remains a member so long as he or she has a valid practising certificate.[2] Each member has to pay an annual subscription and contributions to the Compensation, Discipline and Legal Aid Funds, as determined from time to time by the Bar Council.

[1] For example, Legal Profession (Practice and Etiquette) Rules 1978 [PU(A) 369/1978]; Legal Profession (Publicity) Rules 2001 [PU(A) 345/2001]; and Legal Profession (Discipline Fund) Rules 1994 [PU(A) 249/1994].

[2] LPA 1976, s 43.

Among the many objectives of the Malaysian Bar, the most prominent are these:

Some objectives of the Malaysian Bar

- to uphold the cause of justice;
- to maintain and improve the standards of conduct and learning of the legal profession;
- where requested so to do, to express its view on matters affecting legislation and the administration and practice of the law;
- to represent, protect, and assist members of the legal profession and to promote the interests of the legal profession;
- to protect and assist the public in all matters relating to the law.

The Malaysian Bar is a self-governing and self-regulatory body. The LPA 1976 establishes three main organs to govern the administration of, the admission into, and the conduct of members of, the legal profession namely, the:

Three main organs of the Malaysian Bar

- Bar Council,
- Legal Profession Qualifying Board, and
- Disciplinary Board.

The Bar Council and Legal Profession Qualifying Board are discussed immediately below, whereas the Disciplinary Board is discussed on p 295.

13.2.2 Bar Council

The executive body

The Malaysian Bar is managed by the Bar Council which is its executive body. The Bar Council, established under s 47 LPA 1976, turned sixty in 2007. It is the successor to the Bar Council set up under the Advocates and Solicitors Ordinance 1947 (No 4 of 1947). The latter was set up to coordinate the activities of the Bar Committees of the Federated Malay States (FMS), and to fulfil tasks going beyond those assigned to the Bar Committee of each component state of the FMS.

Some important functions of the Bar Council are to:

- make rules to regulate the practice and conduct of legal practitioners;
- manage the Malaysian Bar and its funds;
- deal with complaints of misconduct against legal practioners;
- institute, conduct or defend any legal proceedings by and against the Malaysian Bar; and
- settle any debts due or any claims made by or against the Malaysian Bar.

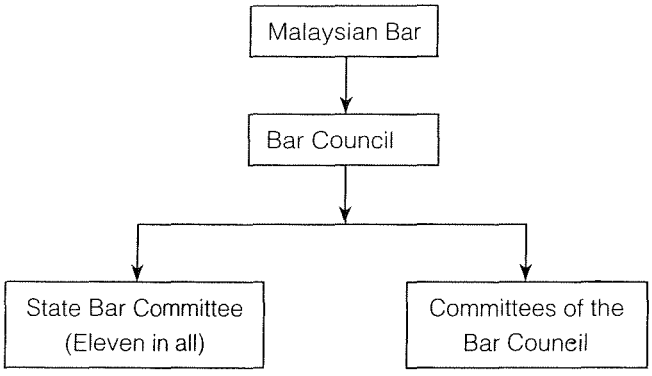
The Bar Council comprises:

- the immediate past President and Vice-President of the Malaysian Bar;
- the chairperson of each State Bar Committee and members elected to represent each State Bar Committee; and
- elected members.[3]

The officers of the Bar Council, ie the President, Vice-President, and Secretary are elected by the Bar Council members.[4] The President is also the Chairperson of the Bar Council and presides at all meetings of the Bar Council and the Malaysian Bar.

Various committees are appointed to assist the Bar Council to discharge its statutory functions.[5] Although membership of these committees is not confined to members of the Bar Council, these committees are normally made up of Bar Council members.

Figure 13.1. Structure of the Malaysian Bar



13.2.3 Legal Profession Qualifying Board

The Legal Profession Qualifying Board (QB) is established under s 4 LPA 1976. The QB comprises:

- the Attorney General who is the Chairperson;
- two judges nominated by the Chief Justice;
- the Chairperson of the Bar Council; and
- a full-time member of the academic staff of a Faculty of Law nominated by the Minister of Higher Education.[6]

Main functions of the QB

The main functions of the QB are to:

- prescribe the proper standards of education and training of persons to qualify them for admission into the legal profession;

[3] LPA 1976, s 47.
[4] LPA 1976, s 54.
[5] LPA 1976, s 58.
[6] LPA 1976, s 7.

- provide courses of instruction and conduct examination which must be undertaken by aspirants to become qualified persons for the purpose of the LPA 1976.

The determination of questions concerning admission into the legal profession and of the proper standards of education and training necessary for persons to practise law is considered too important to be left entirely to the Malaysian Bar. To avoid the propagation of short-term interests and to protect the broader public interests these matters are entrusted to a widely representative body, ie the QB.

13.3 ADMISSION INTO THE LEGAL PROFESSION

The practice of law in Peninsular Malaysia is the monopoly of advocates and solicitors of the High Court in Malaya. They have the exclusive right to appear in court.[7] Any 'unauthorized person' who acts as an advocate and solicitor or performs the work of one commits an offence punishable, on conviction, with a fine not exceeding RM2500 or to a term of imprisonment not exceeding six months or both.[8] In addition, such unauthorized persons are denied the fruits of their unlawful labour as they are not allowed to sue for the costs of their services.[9]

Since the legal profession enjoys a monopoly over the practice of laws, standards of professional competence must be prescribed and maintained. The LPA 1976 lays down three stages for entry into the legal profession. An aspirant must:

- have acquired the requisite academic and professional qualifications;
- be called to the Bar, ie admitted by the High Court as an advocate and solicitor and have his or her name entered on the Roll of Advocates and Solicitors; and
- be issued a practising certificate by the Registrar of the High Court.[10]

Two categories of persons eligible for admission into the legal profession

There are two categories of persons who are eligible for admission into the legal profession:

- 'qualified persons'; and
- 'articled clerks' who have served the required term and passed the necessary examinations.

[7] LPA 1976, s 35(1).
[8] LPA 1976, s 37.
[9] LPA 1976, s 40.
[10] Such certificate, or Sijil Annual, is renewable annually by the Bar Council: LPA 1976, s 32.

13.3.1 'Qualified Persons'

A 'qualified person' is one of the following:

- the holder of the Bachelor of Laws (LL B) degree from the University of Malaya, the former University of Malaya in Singapore, and the University of Singapore (renamed the National University of Singapore);
- a barrister-at-law of one of the Inns of Court in England; or
- the possessor of such other qualifications as may, by notification in the *Gazette*, be declared by the QB to be sufficient to make a person a qualified person for the purpose of the LPA 1976.

There are additional requirements which 'qualified persons' must satisfy before they can be admitted by the High Court as advocates and solicitors. They must:

1. be at least eighteen years old;
2. be of good character; and
   (a) have not been convicted in Malaysia or elsewhere of a criminal offence; in particular, an offence involving fraud or dishonesty;
   (b) have not been adjudicated bankrupt and have not been found guilty of any of the acts or omissions mentioned in the provisions of s 33 of the Bankruptcy Act 1967 (No 55 of 1967);
   (c) have not done any other act which, if a barrister or solicitor in England, would render them liable to be disbarred, disqualified, or suspended from practice; or
   (d) have not been, or are not liable to be, disbarred, disqualified, or suspended in their capacity as legal practitioners in any other country;
3. be either citizens or permanent residents of Malaysia; and
4. have satisfactorily served in Malaysia the prescribed period of pupillage.

Pupillage is apprenticeship to a legal practitioner who has been in active local practice for not less than seven years. The period of practice, commonly referred to as 'reading in chambers' or 'chambering', is nine months. During such period the 'qualified person' is known as a 'pupil' and the legal practitioner to whom such person is apprenticed is the 'master'. The nine-month pupillage period may be shortened (up to a maximum of six months) in specified cases. Full exemption is granted only to a 'qualified person' who has served in the Judicial and Legal Service for at least one year

provided his or her application for admission as an advocate and solicitor is supported by the Attorney General.[11]

Since 1 January 1984 a 'qualified person', unless exempted, is also required to pass a Bahasa Malaysia qualifying examination.

13.3.2 'Articled Clerks'

An 'articled clerk' is a person who has entered into articles (a service agreement) with an advocate and solicitor. An advocate and solicitor who takes an articled clerk is known as a 'principal'. The provision for articled clerks merely preserves an alternative but anachronistic avenue into the legal profession. It was intended to provide an opportunity to lawyers' clerks to become lawyers themselves at a time when there were no law schools in the country.

A person may enter into articles if he or she:

- is at least seventeen years;
- is of good character; and
- satisfies the educational qualifications prescribed by the QB.[12]

Articles are served with an advocate and solicitor who has been in active practice for a period of not less than seven years immediately preceding the commencement of articles. A principal is restricted to only two articled clerks at any one time. This is to ensure the principal gives attention to the clerks articled to him or her. No principal is allowed to take or retain any articled clerk after he or she has ceased from active practice or while the articled clerk is employed by another advocate and solicitor.

The period of articles or service for an articled clerk who is a graduate of a university recognized by the QB is three years. For every other person the period is five years. During the period of articles, the articled clerks are required to devote themselves under their principal's direction to the study of law. They are prohibited from holding any office or engaging in employment of any kind without special leave in writing from the Bar Council. However, they are not prevented from receiving remuneration from their principal.

No articled clerk shall be admitted and enrolled as an advocate and solicitor unless he or she has:

- satisfactorily served the prescribed period of articles; and
- attended such courses of instruction and passed such examinations as may be prescribed by the QB.

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[11] LPA 1976, s 13(4).
[12] LPA 1976, s 20.

In addition, after 1 January 1984, articled clerks must pass or be exempted from the Bahasa Malaysia qualifying examination.

13.3.3 Ad hoc admission in special cases

Non-Malaysian citizens who are qualified persons may be admitted by the High Court on an ad hoc basis to practise as an advocate and solicitor in Peninsular Malaysia in special cases.[13] However, a non-Malaysian shall not be so admitted unless:

- for the particular case concerning which the application for admission is made such person has, in the opinion of the High Court, special qualifications or experience of a nature not available among advocates and solicitors in Malaysia; and
- he or she has been instructed by an advocate and solicitor in Malaysia.

13.4 SELF-REGULATION OF THE LEGAL PROFESSION

The legal profession is not only self-governing. It is also a self-regulatory profession in that disciplinary proceedings against errant members of legal firms are conducted by organs established under the LPA 1976.

The rules of professional practice, etiquette, conduct, and discipline of advocates and solicitors, legal firms, clerks, and pupils (hereafter only advocates and solicitors are mentioned for convenience) are found in the LPA 1976[14] and rules made thereunder.[15]

The Malaysian Bar plays a vital role in the regulation of the legal profession. It determines, inculcates, and maintains the proper standards of practice, etiquette, conduct, and discipline of advocates and solicitors. Apart from making rules regulating these matters, the Malaysian Bar through the Bar Council makes rules concerning related issues such as professional indemnity covering every legal practitioner against any class of professional liability. The Malaysian Bar also establishes and administers the Compensation Fund[16] and the Discipline Fund.[17]

[13] LPA 1976, s 18.
[14] Part VI.
[15] For example, Legal Profession (Practice and Etiquette) Rules 1978 [PU(A) 369/1978].
[16] Out of which sums may be paid to mitigate a loss suffered by a person because of dishonesty or breach of trust on the part of any advocate and solicitor or any clerk or servant of an advocate and solicitor.
[17] Out of which all costs, charges, and expenses for disciplinary proceedings are defrayed.

The body primarily responsible for the discipline of advocates and solicitors is the Disciplinary Board (DB) established under s 93(1) LPA 1976.

The Disciplinary Board

The DB, made up of seventeen members, comprises:

(a) the chairperson who is appointed by the Chief Judge after consultation with the Bar Council. Such person must be a judge or retired judge of the High Court or Court of Appeal or the Federal Court or any other person who is qualified to be a judge of any of these courts;
(b) the President of the Malaysian Bar or any member of the Bar Council as his or her representative; and
(c) fifteen members of the Malaysian Bar of not less than fifteen years' standing appointed by the Chief Judge for a term of two years after consultation with the Bar Council.[18]

The quorum of the DB is seven members, of whom one member must be from paragraph (a), one from paragraph (b), and five from paragraph (c).

The chairperson of the DB normally presides at meetings. In his or her absence, the President of the Malaysian Bar (or his or her representative) presides. The chairperson of the DB and the President of the Malaysian Bar (or his or her representative) must disqualify themselves from deliberating on any complaint if they consider it proper in the interest of justice.

13.4.1 Disciplinary Proceedings

Disciplinary proceedings are set out in Part VII of the LPA 1976.

Disciplinary proceedings have been simplified by the Legal Profession (Amendment) Act 2006.[19] Before the amendments, written complaints against advocates and solicitors were referred by the DB to an Investigating Tribunal (IT) which acted as a filter. A Disciplinary Committee (DC) would be appointed by the DB to conduct a formal investigation only if the IT so recommended. The amendments, among other things, abolished the IT. Now the DB itself filters the written complaints to determine whether a formal investigation is necessary, in which case it appoints a DC. In short, the deletion of the IT was intended to expedite disciplinary proceedings by introducing a single tier system in investigation into any complaint against an advocate and solicitor which is to be conducted only by the DC.

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[18] With the possibility of another two-year extension, they may, however, be reappointed.

[19] Act 1269 which came into force on 2 October 2006 [PU(B) 248/06].

Disciplinary proceedings against advocates and solicitors may be initiated in three ways:

1. where the DB receives a written complaint regarding the conduct of any advocate and solicitor;
2. where any court, judicial officer of the subordinate court or judge of one of the superior courts or Attorney General refers any complaint against the same to the DB; or
3. where the Bar Council or State Bar Committee makes a complaint of its own motion against the same to the DB.[20]

Misconduct, for the purposes of disciplinary proceedings, means conduct or omission to act in Malaysia or elsewhere by an advocate and solicitor in a professional capacity or otherwise which amounts to grave impropriety.[21] Examples include:

- conviction of a criminal offence;
- breach of duty to a court;
- dishonest or fraudulent conduct in the discharge of duties;
- breach of any rule of practice and etiquette made by the Bar Council under the LPA 1976;
- being adjudicated a bankrupt and being found guilty of any of the acts or omissions mentioned in the provisions of s 33(6) of the Bankruptcy Act 1967;
- accepting employment in any legal business through a tout;
- gross disregard of client's interests.

Upon receiving a complaint, the DB investigates whether there is any substance to the complaint.[22] A complaint without merit is dismissed.[23] Where the DB is satisfied there is merit in the complaint, it conveys a copy of the complaint and supporting documents to the advocate and solicitor concerned and invites him or her to provide a written explanation within fourteen days of the request or such longer time as the DB may allow.[24]

Whether or not the advocate and solicitor furnishes a written explanation, the DB has to decide whether a formal investigation is necessary, in which case it appoints a Disciplinary Committee (DC).

Where the advocate and solicitor admits to the misconduct or where no cause of sufficient gravity exists for a formal investigation but the advocate and solicitor should nevertheless be penalized or

[20] LPA 1976, s 99.
[21] LPA 1976, s 94.
[22] LPA 1976, s 100. Unfortunately, no time limit is imposed on the DB to commence its investigation, and to determine whether a formal investigation is necessary.
[23] LPA 1976, s 100(1)(a).
[24] LPA 1976, s 100(1)(b).

where the material facts establishing the misconduct are straight forward and do not warrant further investigation, the DB may deal with the complaint forthwith and impose an appropriate penalty.[25] However, the DB may not impose any penalty without first notifying the advocate and solicitor of its intention to do so and giving him or her a reasonable opportunity to be heard.[26]

The DB may impose any one of the following penalties:

- record a reprimand against the name of the advocate and solicitor;
- impose a fine for such sum as the DB deems just;
- suspend the advocate and solicitor from practice for such period not exceeding five years as the DB deems appropriate; or
- strike the advocate and solicitor off the Roll of Advocates and Solicitors.[27]

The imposition of a penalty does not preclude the DB from making an order of restitution of any sum owing to the complainant and stipulating the time within which such restitution ought to be made. Failure to pay the restitution ordered empowers the DB to impose on the defaulter a higher punishment than that previously imposed.[28] The restitution is recoverable by the complainant as a civil debt.[29]

Where the DB has imposed a fine, such fine must be paid within one month from the date of the order. In default, the DB may:

- order the suspension of the defaulter from practice or
- if the defaulter is currently not in possession of a practising certificate, order that no Sijil Annual be issued to him or her

until the fine is paid.[30] A fine so imposed is deemed a debt owing to the DB.[31]

Disciplinary Committee

A Disciplinary Committee (DC) is appointed to investigate and make recommendations to the DB where:

(a) the DB determines, at any stage of the proceedings, that a formal investigation is required;
(b) an advocate and solicitor has been convicted of criminal breach of trust under s 409 of the Penal Code (Act 574) or any other offence involving fraud or dishonesty; or

[25] LPA 1976, s 100(6).
[26] LPA 1976, s 100(7).
[27] LPA 1976, s 100(8).
[28] LPA 1976, s 100(9).
[29] LPA 1976, s 100(10).
[30] LPA 1976, s 103(1).
[31] LPA 1976, s 103(2).

(c) the advocate and solicitor has been suspended from practice under s 94(4) LPA 1976.[32]

A DC is appointed from the Disciplinary Committee Panel (Panel) established under s 96 LPA 1976. The Panel is set up from a list supplied by the Bar Council. The Panel comprises thirty members of whom:

- twenty are advocates and solicitors of not less than ten years standing and having valid practising certificates and
- ten are lay persons.

The number of members of the Panel may be varied by the DB after consulting the Bar Council. Any variation of the number of members must maintain the same proportion of advocates and solicitors and lay persons prescribed.

Every member of the Panel serves for two years. Such term may be extended for a period not exceeding two years. Members, however, may be reappointed.

A DC comprises three members:

- two advocates and solicitors, and
- one lay person.

The chairperson, appointed by the DB, must be one of the two advocates and solicitors appointed.[33]

The DC must commence its investigation within one month of its appointment.[34] Before commencing, the DC must convey to the advocate and solicitor concerned:

(a) a copy of any written complaint and of any statutory declaration or affidavit made in support of the complaint; and
(b) a notice inviting him or her within a period of not less than fourteen days:
    (i) to give to the DC any written explanation which may be additional to any previous explanation that might have been given to the DB; and
    (ii) to inform the DC if he or she wishes to be heard by the DC.[35]

For the purposes of the investigation, the DC may:

(a) require the production for inspection of any documentary material relating to the subject-matter of the investigation;
(b) require any person to give all information concerning such documentary material; and

[32] LPA 1976, s 103(A).
[33] LPA 1976, s 103(A)(2) and (3).
[34] LPA 1976, s 103B(1).
[35] LPA 1976, s 103B(4).

(c) require any person to appear before it to give oral evidence relating to the subject-matter of the investigation.[36]

After investigating the written complaint referred to it, the DC records its findings on the facts and according to those facts make any one of the following recommendations to the DB:

(a) that no cause for disciplinary action exists;
(b) that cause for disciplinary action exists but is not of sufficient gravity to warrant any punishment other than a reprimand; or
(c) that there is merit in the complaint and that the advocate and solicitor should be subject to one of the following disciplinary actions:
    (i) imposition of a fine for such sum as the DC deems just;
    (ii) suspension from practice for such period not exceeding five yeas as the DC deems appropriate; or
    (iii) striking the advocate and solicitor off the Roll of Advocates and Solicitors.[37]

In addition, the DC may in appropriate cases recommend that the DB make an order of restitution by the advocate and solicitor of any sum owing to the complainant.[38]

The DB, after considering the DC's report, may make an order affirming or rejecting the finding or recommendation of the DC.[39] Where the DB disagrees with the DC's finding or recommendation, it shall make such other order as it deems just.[40] In appropriate cases, the DB may impose a greater punishment than that recommended by the DC.[41] However, before it does so or makes an order likely to be adverse against the advocate and solicitor, it must notify the latter of its intention and give him or her a reasonable opportunity to be heard.[42] Where the DB orders the advocate and solicitor to make restitution of any sum owing to the complainant, it may stipulate the time within which such restitution ought to be made. On default, the DB may impose on the advocate and solicitor a higher punishment than that previously imposed.[43] Such sum is recoverable by the complainant as a civil debt.[44]

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[36] LPA 1976, s 103B(3).
[37] LPA 1976, s 103C(1).
[38] LPA 1976, s 103C(2).
[39] LPA 1976, s 103D(1).
[40] LPA 1976, s 103D(3).
[41] LPA 1976, s 103D(2).
[42] LPA 1976, s 103D(4).
[43] LPA 1976, s 103D(5).
[44] LPA 1976, s 103D(6).

Any party aggrieved by a decision or order made by the DB under the following provisions:

(1) s 100(5): dismissing a complaint deemed of no merit;
(2) s 100(8): imposing one of four penalties on an advocate and solicitor after a complaint, deemed as not warranting a formal investigation, is dealt with forthwith by the DB;
(3) s 100(9): ordering restitution of any sum owing to the complainant, in addition to imposing one of the four penalties under s 100(8); or
(4) s 103D : making an order after considering the report of the DC;

has the right to appeal to the High Court within one month of receiving the notification of the decision or order complained against.[45] A further right of appeal lies to the Court of Appeal, and thereafter to the Federal Court.[46]

No appeal lies against any other decision or order of the DB.[47] Even more drastic, no judicial review is allowed against any decision or order made by that board.[48]

Before concluding it may be commented that while the Legal Profession (Amendment) Act 2006 has streamlined the disciplinary proceedings against advocates-and solicitors the amendments it introduced were not flawless. Two other amendments that touch and concern disciplinary proceedings should be mentioned here. These are amendments to s 76 LPA 1976:

(1) A new subsection (2) replaces the old. The new subsection provides that unless necessary to give effect to any resolution passed or decision taken, secrecy should be maintained by the QB, the Bar Council, the State Bar Committee, the DB, the DC, and their staff in all proceedings or matters conducted by each of these organs.
(2) A newly added subsection (3) protects members of these same organs and their staff who are involved in any proceedings or matters conducted by them from being compelled to disclose to any court any information concerning such proceedings or matters.

[45] LPA 1976, s 103E(1).
[46] LPA 1976, s 103E(5).
[47] LPA 1976, s 103E(1).
[48] LPA 1976, s 103E(2).

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Questions

1. Discuss, critically, the avenues towards entry into the legal profession in Peninsular Malaysia.
2. Analyse and evaluate the current process of disciplinary proceedings against advocates and solicitors in Peninsular Malaysia.

Reading List

Ahmad Ibrahim, 'The Teacher in Malaysia', *JMCL*, 3 (1976): 250–63.

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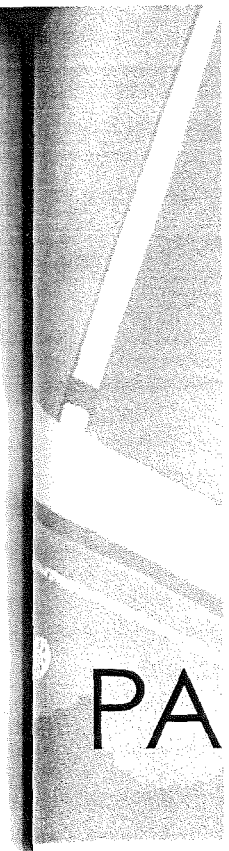
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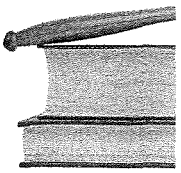
PART FOUR

TRIAL PROCESS AND LEGAL AID

The last part of the book covers the trial process and legal aid.

The civil process at the pre-trial, trial, and post-trial stages is summarized in Chapter 14. An outline of the criminal process, at the same three stages, follows in Chapter 15.

The final chapter discusses the two legal aid schemes that are available: one sponsored by the government and the other by the Bar Council of Malaysia. They are set up to offer to those who qualify, free legal advice and assistance in certain civil and criminal matters.



Chapter

Outline the
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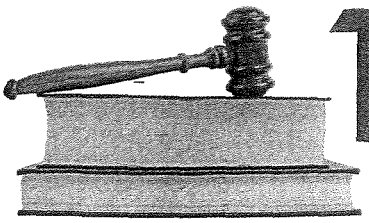

14 THE CIVIL PROCESS

Chapter Objectives

Outline the civil process at the:

- pre-trial
- trial and
- post-trial

stages.

14.1 INTRODUCTION

CIVIL litigation is regulated by rules of procedure. These rules are contained in statutes,[1] Rules of Court,[2] Practice Directions which are issued from time to time by the registrar or judges of the superior courts, and case law. Case law plays a significant role because it applies and explains the rules and sometimes develops new principles of procedure.

The Rules of Court provide the framework of the civil process. These rules are subsidiary legislation. They are drafted by the respective Rules Committee comprising primarily judges and legal practitioners.[3] These rules are based on the English Rules of the Supreme Court 1965. Reference to the English rules currently in force is not as helpful after the adoption of the Woolf reforms which came into effect on 26 April 1999.[4]

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[1] In particular, the Courts of Judicature Act 1964 (Act 91)(Revised 1972); Civil Law Act 1956 (Act 67)(Revised 1972), and the Subordinate Courts Rules Act 1955 (Act 55)(Revised 1971).

[2] Rules of the Federal Court 1995; Rules of the Court of Appeal 1994; Rules of the High Court 1980 and Subordinate Courts Rules 1980.

[3] Pursuant to s 17 Courts of Judicature Act 1964 and s 4 Subordinate Courts Rules Act 1955.

[4] The Woolf reforms by far the most important reforms of the civil justice system in England and Wales in the last century, resulted from proposals made by Lord Woolf in his Final Report, *Access to Justice—Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*. The reforms introduced a uniform procedure in all courts and a major change in the functions and powers of the judges. Central to the reforms is case management which allows the judges to organize and insist on a timetable in which proceedings are completed. This takes away from litigants much of their power to delay proceedings, thereby increasing costs.

Since civil procedure in the subordinate courts follows closely that in the High Court, the ensuing discussion focusses on the procedure in the High Court.

14.2 CIVIL PROCEDURE IN THE HIGH COURT

The litigation process may be divided into three phases: pre-trial, the trial proper, and post-trial.

14.2.1 Pre-Trial

Objectives of pre-trial procedure

Pre-trial procedure is designed to:

- enable the parties to prepare their cases for the trial as fully as possible;
- ensure that the issues in dispute between the parties to be determined at the trial are defined clearly and precisely;
- prevent either party from being taken by surprise at the trial as to the nature of the case and the documentary evidence in the possession of the other party; and
- eliminate those cases which may be properly disposed of without trial.

Before 21 September 2000, pre-trial procedure could be either very simple and speedy or very complex and lengthy. This was because throughout almost the duration of pre-trial procedure, the court was more or less a passive observer and left the initiative to be taken by the parties. On 21 September 2000, pre-trial case management was introduced into the Rules of the High Court 1980 under Order 34 (RHC O 34; see below, p 312). The significance of pre-trial case management was explained by Mohd Noor Ahmad FCJ in *Tan Geok Lan (P)* v *La Kuan* [2004] 2 CLJ 301 as follows:

> The significance of this procedure is that it marks a change from the traditional position under which the progress of cases was left largely in the hands of the parties. Now, under the procedure, the court controls the progress of cases by the exercise of its powers given to it to enable it, and not the parties, to dictate the progress of cases at the pre-trial stage, ensuring that the practices and procedures applicable during that stage are complied with promptly and not abused.[5]

14.2.1.1 Originating Processes

Ways of commencing High Court action

There are four ways of commencing an action in the High Court, ie by:

- writ of summons;
- originating summons;

[5] [2004] 2 CLJ 301, 312.

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[6] RHC O 34.
[7] RHC O 2 r
[8] RHC O 6 r
[9] RHC O 10
[10] RHC O 62
[11] RHC O 11;

- originating motion; or
- petition.[6]

It is important to use the appropriate mode because the court has a discretion to set aside, in part, the proceedings commenced by the wrong mode.[7]

The writ applies where there is a factual dispute. It is the most common way of commencing a High Court action.

The originating summons is used primarily for non-factual disputes, eg those involving construction of legislation or a written document (such as a deed, trust, or will).

The originating motion and petition are used only where expressly provided for by statute, eg a petition has to be used in an application to wind up a company.

The discussion below is based on an action commenced by writ of summons.

Writ of summons

The writ is in standard form. It is intended to inform the defendant of the plaintiff's claim and directs the defendant to either satisfy the claim or, if the defendant wants to challenge it, to enter appearance within eight days of the service of the writ. The writ must be endorsed either with a statement of claim or a concise statement of the nature of the claim (in which case, the remedy sought must be stated).[8]

14.2.1.2 Service

Service is the means by which the writ is served on the defendant. These are:

- personal service;[9]
- substituted service;[10] or
- service out of jurisdiction.[11]

Personal service

Personal service is effected by leaving a sealed copy of a writ with the defendant. There are qualifications to this rule because personal delivery to the defendant may be impractical in certain circumstances. Thus personal service may be effected by service on the defendant's lawyer (if the lawyer agrees to accept service on the defendant's behalf) or by acknowledgement returned (AR) registered post at the defendant's last known address.

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[6] RHC O 34.
[7] RHC O 2 r 1(3).
[8] RHC O 6 r 2(1).
[9] RHC O 10 r 1.
[10] RHC O 62 r 5.
[11] RHC O 11; also RHC O 6.

Where personal service is not possible (eg the whereabouts of the defendant cannot be traced or the defendant is deliberately avoiding service), the court has the discretion to make an order for substituted service. Substituted service is effected by such means as the court may direct to bring the writ to the notice of the defendant, eg service by post or advertisement in a newspaper. Such service is equivalent to actual service. Thus, the writ is regarded as having been properly served even though the defendant is unaware of the action against him.

Substituted service

Service out of jurisdiction is permissible only with the leave of the court in the situations set out in RHC O 11 and RHC O 6.

Service out of jurisdiction

14.2.1.3 Appearance

A defendant who wishes to defend the plaintiff's action must enter an appearance within the prescribed period (in Peninsular Malaysia, eight days where the defendant resides in the same state in which the action is filed but twelve days if the defendant resides outside that state but within the peninsula; in Sabah and Sarawak, the corresponding period is ten days unless the writ is served on a defendant whose place of residence or registered place of business is not within the Division or Residency in which the court is located, in which case the period is twenty days).[12] The defendant enters an appearance by completing a memorandum of appearance and filing a copy of it at the High Court registry. The copy is then posted to the plaintiff to notify the latter that the defendant will defend or challenge the action.

Appearance

Entering an appearance does not prevent the defendant from challenging the jurisdiction of the court, for example, because the court is not the appropriate forum for the adjudication of the dispute.

14.2.1.4 Pleadings

Exchange of pleadings takes place after the defendant enters an appearance. Such exchange applies only in actions commenced by writ of summons.

Pleadings are written documents containing concise statements of all material facts relied upon by the parties. Pleadings include the:

Types of pleadings

- Plaintiff's statement of claim—which must be served on the defendant within fourteen days after the defendant has entered

[12] RHC O 12 r 4.

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[13] RHC O 20.
[14] RHC O 18 r
[15] RHC O 13 r
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an appearance (unless the court gives leave to the contrary or a statement of claim is already indorsed on the writ).

- Defendant's statement of defence (and counterclaim, if any)—which unless the court gives leave to the contrary must be served on the plaintiff within fourteen days of the expiration of the period prescribed for entering appearance or after service of the statement of claim, whichever is the later.
- Plaintiff's reply (and defence to the counterclaim, if applicable)—which must be served on the defendant before the expiration of fourteen days after the service of the statement of defence (and counterclaim, if any).
- Subsequent responses which can only be served with the leave of the court.

Pleadings serve two primary purposes:

Purposes of pleadings

1. they define in advance the issues in dispute between the parties so that the court may resolve these expeditiously at the trial; and
2. they give the other party notice of the case to be answered so that he or she will not be taken by surprise at the trial.

For these reasons, parties are bound by their pleadings. At the trial, they may not raise issues which were not pleaded. Nor can the court decide a case on an issue that was not pleaded. Nevertheless, amendment of pleadings is allowed in appropriate circumstances.[13]

Further and better particulars

Elaboration of a pleading may be necessary when its content is inadequate or lacks clarity. In such event, 'further and better particulars' may be obtained on request; if such request is refused, by application to the court.[14]

14.2.1.5 Resolution of Action Before Trial

Proceedings may be terminated or disposed of before the trial for various reasons.

1. Default judgment

The defendant's failure to enter appearance, or to file a defence having entered appearance, within the prescribed period entitles the plaintiff to apply to the court for default judgment.[15]

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[13] RHC O 20.

[14] RHC O 18 r 12.

[15] RHC O 13 rules 1–5 (failure to enter appearance); RHC O 19 r 7 (failure to file a defence).

2. Summary judgment

Where the defendant has entered appearance and filed a defence but it is obvious from the statement of defence that the defendant has no real defence to the plaintiff's claim, the plaintiff may apply to the court for summary judgment.[16] Applications for summary judgment must be filed within twenty-eight days after pleadings are deemed to be closed. To avoid summary judgment being entered, the defendant must show there is a 'triable issue' (ie there is an issue which ought to be tried).

3. Striking out

Just as the plaintiff may apply to the court for summary judgment where it is obvious the defendant has no real defence, the defendant may likewise apply to strike out the plaintiff's statement of claim where it:

- discloses no reasonable cause of action; or
- is scandalous, frivolous, or vexatious; or
- tends to prejudice, embarrass, or delay the fair trial of the action; or
- is otherwise an abuse of the process of the court.[17]

4. Withdrawal or discontinuance

A party may withdraw or discontinue his or her action or defence or counterclaim.[18]

14.2.1.6 Discovery

Pleadings are deemed to be closed fourteen days after the service of the last pleading.[19] Once pleadings are closed, discovery of documents begins.

Parties rely on evidence to prove their cases. Evidence can be oral or documentary. Oral evidence will be given by witnesses in court. Documentary evidence may consist of, eg agreements, correspondence, deeds, tape, or video recordings. It is important for a party to have prior knowledge of the documents intended to be relied upon by the other party at the trial. This facilitates proof of these documents by agreement between the parties, thus saving time and cost.

Discovery

Discovery is the process by which each party makes, and exchanges with the other party, a list of all relevant documents which are or have been in his or her possession, custody, or power

[16] RHC O 14.
[17] RHC O 18 r 19.
[18] RHC O 21.
[19] RHC O 18 r 20.

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[20] RHC O 24.
[21] RHC O 24 r
[22] RHC O 26.
[23] RHC O 25.

relating to matters disputed by them in the action.[20] The documents disclosed by one party may be inspected by the other party, and copies or extracts made. Such a process (known as general discovery) normally takes place voluntarily, ie without applying for a court order. It may also be possible to obtain a court order for the delivery up of specific documents where the general discovery does not yield all the relevant documents.[21]

Besides discovery of documents, the parties may also request for admission of facts, and discovery of facts through interrogatories.[22] Interrogatories are written questions posed by one party to the other party concerning matters in dispute between them, asking that other to answer such questions on oath before trial. The intention is to obtain evidence of material facts which the interrogating party is unable to prove and which is within the knowledge of the other party.

Interrogatories

The rationale underlying discovery of documents and interrogatories is to provide the parties with the opportunity to assess the strength and weakness of their respective cases, and to encourage them either to compromise or settle their dispute without a trial. Indeed, a large proportion of cases are settled out of court at the discovery stage.

14.2.1.7 Summons for Directions

If a settlement is not reached by the parties, the plaintiff has to take out a summons for directions within one month of the close of pleadings.[23] This is to:

Summons for directions

- enable all matters which must and can be dealt with by interlocutory (ie pre-trial) applications but have not already been dealt with, may so far as possible be dealt with; and
- allow the court to give directions as to the future course of action as appear best adapted to secure the just, expeditious, and economical disposal of the action.

The operation of summons for directions contained in RHC O 25 was suspended by Practice Direction No 1 of 2001 dated 19 June 2001 issued by the Chief Judge of Malaya. RHC O 25 was suspended because it was perceived to overlap with the new RHC O 34 which introduced pre-trial case management into the Rules of

[20] RHC O 24.
[21] RHC O 24 r 7.
[22] RHC O 26.
[23] RHC O 25.

the High Court 1980.[24] However, RHC O 25 may still be in operation in view of the High Court decisions in *Faridah Ariffin* v *Dr Lee Hock Bee & Anor* [2006] 1 CLJ 660 and *Yap Hong Choon* v *Dr Pritam Singh* [2006] 1 CLJ 842. The judge in both cases held that the Chief Judge does not have the power to suspend RHC O 25. The Rules of the High Court 1980 are subsidiary legislation made by the Rules Committee under s 17(1) of the Courts of Judicature Act 1964 (Act 91). Under s 22 of the Interpretation Acts of 1948 and 1967 (Act 388), the Rules of the High Court including O 25 may be added to, revoked, suspended, or revived only by the Rules Committee. Referring to the Federal Court decision in *Megat Najmuddin bin Dato Seri (Dr) Megat Khas* v *Bank Bumiputra (M) Bhd* [2002] 1 CLJ 645 (in which two Federal Court judges expressed the view that Practice Directions are only administrative directions with no statutory authority and, as such, cannot supersede or deviate substantially from the Rules of the Court which have statutory authority), the judge in both cases held that Practice Direction No 1 of 2001 is invalid and that RHC O 25 remains operative.

Until the uncertainty over RHC O 25 and RHC O 34 is clarified, the safer course for a plaintiff is to comply with both procedures.[25]

14.2.1.8 Pre-Trial Case Management

The final step before the trial is for the plaintiff to apply to the court for pre-trial case management not later than fourteen days after the close of pleadings under RHC O 34.

Pre-trial case management introduced on 21 September 2000

Pre-trial case management applies to all actions commenced by writ of summons. The introduction of pre-trial case management in Malaysia with effect from 21 September 2000 followed developments in the United Kingdom and Singapore (where the pre-trial conference procedure was introduced in the High Court in 1992). Case management brings about a greater involvement by the judge in the preparation of the case for trial.

The new RHC O 34 r 1(2) requires the plaintiff to cause the court registry to issue a notice requiring the parties to the action to attend before the judge in chambers. Failure on the part of the plaintiff to comply with RHC O 34 enables the judge to direct the court registry to issue a notice to the plaintiff to show cause why

[24] Effected by way of an amendment to the RHC 1980 on 21 September 2000 via the Rules of the High Court (Amendment) Rules 2000 [PU(A) 342/2000]. The new O 34 replaces the old O 34 on the setting down of an action for trial.

[25] *Halsbury's Laws of Malaysia*, Vol 7(1), 2007 Reissue, Singapore: LexisNexis, 2007, p 40 [190. 1–O36 note 7]; ibid, p 608 [190. 3–417 and note 1].

the action should not be struck out.[26] If the parties fail to appear before the judge on the date stated in the notice to attend pre-trial case management, the judge may make any order as meets the ends of justice, including striking out the action or any defence or counterclaim, or other pleading. The judge may also enter judgment against the defendant or, after recording his or her reasons for doing so, adjourn the proceedings to another date.[27]

When the parties appear on the date stated in the notice referred to above ('the first pre-trial conference'), the judge may under RHC O 34 r 4(1) make such orders and give such directions as to the future conduct of the action as will ensure its just, expeditious, and economical disposal. Without prejudice to that provision, the judge may give specific directions, eg:

- direct the parties to furnish further and better particulars of the statement of claim or statement of defence or any other pleading;
- order the parties to answer interrogatories;
- require the parties to formulate and settle, with the judge's concurrence, the principal issues requiring determination at the trial;
- order the parties to deliver their respective lists of documents that they may use at the trial;
- direct the parties to exchange their bundles of documents;
- order the parties to furnish the report of an expert;
- require the parties to provide a summary of their respective cases in advance of the trial date;
- limit the number of witnesses that each party may call at the trial;
- fix a date for the hearing of the action.

The judge may convene as many pre-trial conferences as he or she may deem necessary to give directions or further directions or for the amendment or variation of any direction already given.[28]

If any party fails to comply with any direction given by the judge at any pre-trial conference, the judge may make such order against the defaulting party as meets the ends of justice.[29]

14.2.2 Trial

There are three modes of trial in the High Court:

- by a judge sitting alone;

[26] RHC O 34 r 2(2).
[27] RHC O 34 r 3(1).
[28] RHC O 34 r 6.
[29] RHC O 34 r 7.

- by a judge sitting with assessors; or
- by a registrar.[30]

Trial by a judge sitting alone

The mode of trial in a particular case is determined by a court order at the hearing of the summons for directions or pre-trial conference. The predominant mode in the High Court is trial by a judge sitting alone. This is the mode of trial outlined below.

The order of speeches in the trial is determined in accordance with RHC O 35 r 4. The normal rule—applicable in civil as well as in criminal case—is that the party who bears the burden of proof begins the case. In a civil trial, that party must prove each and every element of the cause of action on a balance of probabilities. This standard of proof is lower than that in a criminal trial (which requires proof beyond reasonable doubt).

Unless the burden of proof of all issues in the action lies on the defendant, the normal rule in a civil trial is that the plaintiff begins the order of speeches. The plaintiff's counsel makes an opening speech which is of crucial importance. It informs the judge about the facts of the case, the issues in dispute between the parties which have to be determined by the judge, the evidence the counsel intends to adduce to prove his or her client's case, the strength in the client's case, and the weaknesses in the other party's case. Counsel may also touch on any point of law involved in the case.

After the opening speech, witnesses for the plaintiff are called. After taking the oath, each witness is examined-in-chief by the plaintiff's counsel, cross-examined by the defendant's counsel, and re-examined by the plaintiff's counsel. The object of examination-in-chief is to elicit facts favourable to the plaintiff's case. Cross-examination is designed to test, and if possible, cast doubt on the evidence given by the witness in examination-in-chief, or to impugn the credit of the witness. Re-examination, which may be conducted when a witness is cross-examined by the defendant's counsel, is to remedy any damage done during the cross-examination. Once the plaintiff's witnesses have given evidence, the plaintiff's counsel may close the plaintiff's case.

At the close of the plaintiff's case, the defendant may submit that there is 'no case to answer', ie the plaintiff has failed to adduce at least prima facie evidence against the defendant. In practice, such a submission is rarely made because the defendant must be prepared to stand or fall on that submission alone. If the court accepts the defendant's submission, judgment will be entered for the defendant. If the submission fails, judgment will be entered for the plaintiff.

[30] RHC O 33.

If the defendant makes no such submission at the close of the plaintiff's case, the defendant's counsel opens the case for the defence. The defendant's counsel then proceeds to call the defendant's witnesses, each of whom may be examined-in-chief, cross-examined and re-examined.

After the defendant's witnesses have testified, the defendant's counsel makes a closing speech, followed by a closing speech by the plaintiff's counsel. Closing speeches (referred to as submissions in Malaysia), like opening speeches, are of great importance. The facts are reviewed, submissions are made as to the weight to be attached to the evidence of witnesses, and reasons are given why their evidence should be accepted or rejected, and the points of law arising are fully argued, with citation of the relevant authorities.

The court then delivers its judgment. Judgment may be reserved if the court needs time to consider the case, in which event judgment will be delivered subsequently after the parties are notified.

14.2.3 Post-Trial

14.2.3.1 Costs

After judgment has been given in an action, the subject of costs will have to be dealt with:

- how costs are to be borne (eg whether a particular party must pay his or her own costs or may have them paid by the other party); and
- the basis on which costs are to be assessed and paid (because, usually, a party who is awarded costs will not obtain from the other party all the expenses which he or she has incurred, but only so much as is allowable on the particular basis on which they are 'taxed', ie assessed).

The subject of costs has two major aspects:

Two major aspects of costs

1. 'party and party costs', and
2. 'solicitor and client costs'.

'Party and party costs' (or costs as between the parties) are the costs of, and incidental to, the proceedings. These costs arise throughout the course of litigation. They include costs on interlocutory (or pre-trial) applications, costs of the preparation for trial (in particular, the research element in the preparation) and post-trial costs (eg costs incurred on appeal, in relation to taxation proceedings and for enforcement of a judgment).

'Solicitor and client costs' are the costs which each party has to pay his or her own advocate and solicitor for representing him or her.

The purpose of awarding costs to a party is to reimburse that party for the expenses incurred in relation to legal proceedings. Nevertheless, in the usual case, a party awarded costs will still be out of pocket to the extent that the costs payable to his or her solicitor exceed the costs recovered from the opponent. The difference arises from the different basis for assessing costs which apply to recovery between the parties and recovery by the solicitor from his or her client. The party who has to pay costs to the opponent may have to bear a hefty financial burden because he or she has to pay not only the opponent's costs but the costs of his or her solicitor as well.

The subject of costs is covered by RHC O 59 and O 48 of the Rules of the Subordinate Courts.

Among the primary rules governing entitlement to costs are the following:

Primary rules governing entitlement to costs

- Subject to the provisions of RHC O 59, a party is not entitled to recover costs unless he or she has obtained a court order.
- The court's power to award costs is discretionary. It has the full power to determine by whom and to what extent the costs are to be paid. Indeed, it is because costs are within the discretion of the court that under s 68(1)(c) of the Courts of Judicature Act 1964 (Act 91), no appeal shall be brought to the Court of Appeal where the judgment or order concerns costs only, except with the leave of the Court of Appeal. And, it has long been established in case law that an appellate court shall not interfere with a discretion exercised by a lower court unless it is clearly shown that such discretion has been exercised on wrong principles.[31]

This discretion of the court concerning costs must, however, be exercised judicially and in accordance with well-established principles.

In the exercise of its discretion the court may make no order as to costs, in which case, each party will bear his or her own costs. If the court does decide to make an order, the general principle applicable is 'costs follow the event', ie the losing party will be ordered to pay the winning party's costs and will be left to bear his or her own costs. This general principle is subject to qualifications:

1. where circumstances in the case require any other order as to the whole or any part of the costs to be made;[32]

[31] per Viscount Cave LC in *Donald Campbell & Co Ltd* v *Polak* [1927] AC 732, at pp 811–12; per Wee Chong Jin CJ in *Hilborne* v *Tan Tiang Quee* [1972] 2 MLJ 94, 99; *Petroliam Nasional Bhd (Petronas) & Anor* v *Cheah Kam Chiew* [1987] 1 MLJ 25 (SC).

[32] RHC O 59 r 3(2).

2. where the Rules of Court place restrictions on the discretion of the court.[33]

Under RHC O 59 r 7, the court in exercising its discretion may take into account the conduct of a party in determining costs. The court may refuse to allow a party to recover his or her costs if it considers that anything has been done, or any omission has been made, improperly or unnecessarily by or on behalf of that party. In addition, the court may order that party to pay the costs of any other party if his or her improper or unreasonable conduct had occasioned these costs.

An advocate and solicitor may be made personally liable for costs occasioned by the manner in which he or she has conducted at case. Under RHC O 59 r 8, where in any proceedings costs are incurred improperly or unreasonably or are wasted by undue delay or by any other misconduct or default, and the court considers that the solicitor is responsible, whether personally or through an agent, the court may:

1. disallow the solicitor the 'solicitor and client costs';
2. direct the solicitor to bear personally the 'party and party costs' which his or her client has been ordered to pay to the other parties; or
3. direct the solicitor personally to indemnify the other parties against costs payable by them.

However, before ordering the solicitor to pay costs, the court must give the solicitor a reasonable opportunity to show cause why such an order should not be made.[34]

The court may deal with the costs of interlocutory (or pre-trial) proceedings at once or may postpone the question of the incidence and amount of such costs to the end of the trial. If the court chooses the latter, the costs are referred to as 'reserved costs'. As a general rule, the court makes an order for costs of the interlocutory proceedings at the end of the trial when it becomes clear who should bear the costs of the action.

The Court of Appeal is expressly empowered to deal with the costs of the appeal and of the original hearing.[35] Unless some other order is appropriate in the circumstances, the general rule that costs follow the event will be applied. This means that if an appeal succeeds, the appellant will be awarded his or her costs of the appeal

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[33] For example, RHC O 59 r 6(1); RHC O 59 r 6(2); RHC O 59 r 3(3); RHC O 59 r 3(4).

[34] See, *Karpal Singh* v *Atip bin Ali* [1987] 1 MLJ 291; *Kemajuan Flora Sdn Bhd* v *Public Bank Berhad* [2006] 2 AMR 493.

[35] CJA 1964, s 70.

and the costs of the original hearing—an order often referred to as 'costs here and below'.

Costs awarded are taxed, ie assessed

Except where other methods to quantify costs (eg agreed costs, fixed costs[36]) apply, costs awarded are taxed, ie assessed and approved, usually in the first instance, by the senior assistant registrar or registrar of the court in his or her chambers. The quantum of costs recoverable by one party from another depends on the basis on which the taxation is made and upon the scale of costs applicable to the case.[37]

Costs are assessed on one of four bases mentioned in the rules of court and discussed below. However, the court has an inherent jurisdiction to award costs on an indemnity basis. This basis allows all costs reasonably incurred or of a reasonable amount, and any uncertainty as to whether costs are reasonably incurred or reasonable in amount is resolved in favour of the receiving party.[38]

Bases for assessing costs

1. Party and party basis[39]

This is the basis on which costs are most commonly allowed. This basis allows all costs as were necessary or proper for the attainment of justice, or for enforcing or defending the rights of the party whose costs are being taxed.

2. The common fund basis[40]

This is a more generous basis than the party and party basis. It allows all costs reasonably incurred whereas the party and party basis only allows essential costs. The common fund basis is usually ordered when there is a common fund arising out of a case involving a will or a trust the executors are paid on the trustee basis (see below) and the beneficiaries on the common fund basis.

3. The trustee basis[41]

Costs may be awarded on this basis where a person is or has been a party to any proceedings in the capacity of a trustee or personal representative. Such a person is entitled to the costs of those proceedings out of the trust fund. The court may order otherwise (ie order that the costs be borne by the trustee personally) only on the grounds that the trustee has acted contrary to his or her duty as trustee, or has in substance, committed a breach of trust.

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[36] RHC O 59 Appendix 2 sets out the circumstances in which costs are fixed.
[37] RHC O 59 Appendix 1 set out the items chargeable and the scale of the charges.
[38] Paraphrasing Sir Robert Megarry VC in *EMI Records Ltd* v *Ian Cameron Wallace Ltd* [1982] 3 WLR at p 259.
[39] RHC O 59 r 27(2).
[40] RHC O 59 r 27(3) and r 27(4).
[41] RHC O 59 r 30(1).

4. The solicitor and own client basis[42]

Although this basis is usually applied in a taxation of the solicitor's bill of costs, the court has the discretion to order that the costs recoverable by one party against the other be taxed on a solicitor and own client basis. However, such discretion is exercised only in exceptional circumstances.[43]

The rules applicable in taxation on the solicitor and own client basis may be summarized as follows:

1. All costs shall be allowed unless they are of an unreasonable amount or have been unreasonably incurred.
2. Subject to rule (3) below, costs must be presumed to be reasonable in amount or to have been reasonably incurred if their amount or if they were incurred with the express or implied approval of the client.
3. Costs must be presumed to have been unreasonably incurred if, in the circumstances of the case, they are of an unusual nature unless the solicitor is able to prove that before such costs were incurred he or she informed the client that they might not be allowed in a taxation on a common fund basis.

Procedure on taxation of costs

The procedure on taxation, set out in RHC O 59 rr 20–26, may be outlined as follows:

1. The party awarded costs draws up a bill of costs, the items drawn from Appendix 1 to RHC O 59.
2. Sufficient copies of the bill are filed in the court registry and two copies served on the other party at least seven days before the date fixed for taxation.
3. The other party indicates in the bill his or her objections, if any, to the items or to the quantum claimed.
4. On the date fixed for taxation, the registrar hears arguments on the disputed items or quantum, and either allows—in full or in part—the items or disallows them altogether. Where the registrar allows only partly an item, the sum so reduced is referred to as the sum taxed off.
5. At the end of the taxation, the registrar deducts the sums taxed off from the gross amount claimed in the bill.
6. The registrar issues the allocatur, ie the certificate of approval for the net balance as the amount properly payable.

A party dissatisfied with the taxation may apply, within fourteen days, for review by the registrar under RHC O 59 r 34; and from

[42] RHC O 59 r 28(1).

[43] For example, pursuant to an agreement that costs be paid on this basis.

such review by the registrar, to a judge of the High Court in chambers under RHC O 59 r 36. The application for review by the judge must be made within fourteen days from the date of the review by the registrar.

14.2.3.2 Appeals

A party aggrieved by the decision of a court may either:

- file an appeal to a higher court or
- proceed by way of revision provided the matter originates in a subordinate court (see below, Chapter 15).

After 24 June 1994 an aggrieved party has two rights of appeal

Before 24 June 1994 an aggrieved party who wishes to appeal had only a single right of appeal to a higher court. After that date the three-tier hierarchy of courts gave an aggrieved party a second right of appeal.

1. Appeals to the High Court

Outlined below is the general procedure concerning appeals from the subordinate courts to the High Court. The procedure is set out in the Subordinate Courts Rules O 49 and in the RHC O 55.

An appellant may appeal from the whole or any part of a decision of a subordinate court. No appeal lies from civil matters heard in the subordinate courts to the High Court where the amount in dispute or the value of the subject-matter is below RM10 000 but this does not apply to an appeal concerning maintenance of wives or children. Further, no monetary limit applies where the appeal is on a question of law.

Initiation of appeal

An appeal to the High Court is brought by giving notice of appeal specifying the decision or the part of the decision complained of. Such notice must be filed within fourteen days from the day on which the decision was pronounced and served on all parties directly affected by the appeal. A copy of the notice, endorsed with the date it was filed, must be sent by the registrar of the subordinate court to the registrar of the High Court.

The court appealed from must supply to the appellant, upon payment of the required fee, a certified copy of the notes of evidence and the judgment (or where there is no written judgment, the grounds of decision). As soon as the certified copies are ready for collection, the court notifies the appellant.

Within fourteen days of receipt of such notification, the appellant must (unless the court otherwise orders) deposit in the court appealed from:

1. a sum to cover the costs of preparing copies of the appeal record; and
2. a sum as security for the costs of the appeal.

Filing of memorandum of appeal and preparation of appeal record

Also within the same period, the appellant must file in the High Court in duplicate a memorandum of appeal, and serve each respondent with a copy of the memorandum and a copy of the appeal record. The memorandum of appeal, in prescribed form, does not form part of the appeal record and should be filed separately. The appeal record is prepared by the appellant where represented; otherwise, by the registry of the court appealed from. It must contain copies of the:

- relevant pleadings;
- notes of evidence;
- grounds of judgment;
- decision;
- notice of appeal; and
- documentary exhibits and other documents relevant for the purposes of the appeal.

When the registrar of the High Court receives the appeal record from the court appealed from, the registrar enters the appeal in the list of appeals from the subordinate courts.

An appeal is by way of a rehearing

All appeals from a subordinate court are by way of a rehearing. On the hearing of appeals, the High Court has the same powers as the Court of Appeal has when hearing appeals from the High Court.

An appeal does not operate as a stay of execution of the decision appealed against except where the court appealed from or the High Court so orders.

2. Appeals to the Court of Appeal

The procedure for lodging an appeal to the Court of Appeal is set out in the Rules of the Court of Appeal (RCA) 1994. Where the RCA do not provide for the procedure in a given situation, the Rules of the High Court 1980 apply with necessary changes.

The civil jurisdiction of the Court of Appeal comprises hearing appeals from any judgment or order of the High Court whether made in the exercise of its original or appellate jurisdiction. That jurisdiction is discussed in Chapter 9 (pp 209–10).

An appellant may appeal from the whole or any part of the judgment or order of the High Court. No appeal, except with the leave of court, can be brought after the expiration of one month:

1. in the case of an appeal from an order in chambers, from the date such order was pronounced;
2. in the case of an appeal from the refusal of an application, from the date of such refusal;
3. in all other cases, from the date the judgment or order appealed against was pronounced.

Initiation of appeal

An appeal to the Court of Appeal is brought by:

1. giving notice of appeal;
2. filing in the registry of the High Court within the time limited for bringing the appeal four copies of the notice of appeal;
3. paying the prescribed fee and the security for costs; and
4. serving a copy of the notice on the respondent within the prescribed time.

On the day of filing the notice of appeal in the High Court, the appellant must send one copy of the notice to the registry of the Court of Appeal by registered post. Once the four copies of the notice of appeal, the prescribed fee, and the security for costs are lodged, the registrar of the High Court must enter the appeal in the list of appeals, stating there:

1. the title of the case;
2. the appellant's name and his or her counsel (if any); and
3. the date of such entry.

The registrar of the High Court must inform the registrar of the Court of Appeal of such entry. The latter, upon receipt of such information, must enter the appeal and its particulars in the consolidated list of appeals kept in the registry of the Court of Appeal, and allocate a number to the appeal. That number must be conveyed to the registrar of the High Court and the appellant.

A respondent who has been served with a notice of appeal and who wishes on the appeal to contend that the decision of the court below should be varied must give notice of a cross-appeal. Such notice must specify the grounds of that contention. That notice must be filed any time after the entry of appeal but not more than ten days after the records of appeal has been served on him or her. The respondent's notice of cross-appeal must be served on the appellant and on all parties to the proceedings in the court below within the same period of time.

After filing the notice of appeal, the appellant must prepare a memorandum of appeal setting forth concisely, without argument or narrative, consecutively numbered grounds of objection to the decision or part of the decision appealed against, specifying the points of law or fact that are alleged to have been wrongly decided.

The memorandum should have attached to it:

1. a copy of the notice of appeal;
2. copies of the documents in the nature of pleadings, so far as is necessary to show the matter decided and the nature of the appeal;

3. a copy of the judge's notes of the hearing of the case in which the decision appealed against was given;
4. a copy of the judgment, decree, or order of the court appealed against;
5. copies of such documents, affidavits, exhibits, or parts of exhibits as were read or put in evidence in the court below, relevant to any issue in the appeal;
6. a copy of the written judgment or grounds of decision of the judge, or a copy of the agreed notes of judgment as prepared by the parties and approved by the judge.

Filing of record of appeal

The memorandum together with these documents (collectively called the record of appeal) must be filed at the registry of the Court of Appeal within eight weeks of the entry of the appeal, or such further time as the Court of Appeal may allow.

Sufficient copies of the record of appeal for the use of the judges must be sent to the registrar of the Court of Appeal when the record of appeal is filed. A copy of the record of appeal must also be served on every party who has been served with the notice of appeal within eight weeks after the entry of the appeal or such extension of time allowed by the Court of Appeal.

When filing the record of appeal the appellant must submit seven copies of a chronology of the case from the date of filing of the claim in the court of first instance to the date of the filing of the record of appeal in the registry of the Court of Appeal. The parties must also file in the Court of Appeal at least seven days before the hearing of the appeal an outline of the submissions of the case. Such an outline must summarize the main points to be argued in the appeal. The outline, which should not be more than three pages in length, should contain in numbered paragraphs:

1. the agreed facts of the case;
2. the facts of the case not agreed;
3. the grounds of appeal and submissions following the sequence set out in the memorandum of appeal; and
4. authorities to support such grounds of appeal and submissions.

The object of providing the court with an outline of submissions is twofold:

1. to assist the appellate court in preparing itself for the appeal; and
2. to facilitate the hearing of the appeal by specifying clearly and concisely the arguments to be adduced.

An appeal may be withdrawn by mutual consent at any time before it is due to be heard.

The Court of Appeal may exercise the powers of the High Court in an appeal

In hearing the appeal, the Court of Appeal has the same powers as the High Court, including receiving further evidence. However, no further evidence, other than evidence concerning matters which have occurred after the trial at first instance, may be admitted except with the leave of the court and on special grounds:

- that at the hearing before the court of first instance the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it available;
- that the new evidence, if true, would have had, or would have been likely to have had, a determining influence upon the decision of the court of first instance.

An appeal is by way of rehearing

The hearing of an appeal by the Court of Appeal is by way of a rehearing. This means that the court rehears the case on the documents, including the judge's notes of evidence. The Court of Appeal considers the materials which were before the judge below, and additional materials (if any) before the court itself before deciding, after considering the judgment appealed against, whether that judgment was plainly wrong.

Unless the court of first instance or the Court of Appeal otherwise directs, an appeal to the Court of Appeal generally does not have the effect of staying execution of the judgment appealed against.

3. Appeals to the Federal Court

Appeal proceedings commenced on or after 24 June 1994 are governed by the Rules of the Federal Court 1995.

The jurisdiction of the Federal Court concerning civil appeals is discussed in Chapter 9 (p 206). An appeal can only be brought in the Federal Court with leave from that court. The application for leave to appeal must be made within one month (or such further time as may be allowed by the court) from the date on which the decision appealed against was given. On an application for leave the Federal Court may fix the time within which an appeal must be brought once leave is granted.

Initiation of appeal

An appeal is brought when the notice of appeal is given within the time prescribed. The notice must state whether the whole or part only of judgment or order is complained against.

Notice of appeal is given by:

1. filing six copies of the notice in the registry of the Court of Appeal and one copy in the registry of the Federal Court;
2. paying the prescribed fee; and

3. lodging in the Federal Court the security for costs of bringing the appeal.

The notice of appeal must be served on all parties directly affected by the appeal within the time prescribed for the filing of the appeal.

Once the notice of appeal is filed, the registrar of the Court of Appeal enters the appeal in the list of appeals. The registrar of the Federal Court, on receipt of the information of an entry of an appeal, enters the particulars in the list of appeals kept in the Federal Court registry, and allocates a number to the appeal. The number is communicated to the registrar of the Court of Appeal and the appellant.

The appellant then prepares the memorandum of appeal setting forth concisely and systematically, without argument or narrative, the grounds of objection to the decision, or part of the decision, appealed against. It must also specify the points of law or fact which are alleged to have been wrongly decided.

Filing of record of appeal

The record of appeal must next be filed at the registry of the Federal Court within six weeks after the entry of the appeal (or extended period as allowed by the Court). The record of appeal comprises the memorandum of appeal to which are attached a copy of each of the following:

1. the order granting leave to appeal;
2. the notice of appeal;
3. the order made by the Court of Appeal;
4. the record of appeal filed in the Court of Appeal; and
5. the grounds of judgment of the Court of Appeal.

Sufficient copies of the record of appeal must be sent to the registrar of the Federal Court when the record is filed. At the same time, a chronology of the case, from the date the action was filed in the High Court to the date the record of appeal was filed in the Federal Court, must be submitted.

A copy of the record of appeal must be served on every party served with the notice of appeal within six weeks of the entry of appeal or such extended time allowed by the Federal Court. A respondent who wishes to cross-appeal must file a notice of cross-appeal within the time prescribed by the court.

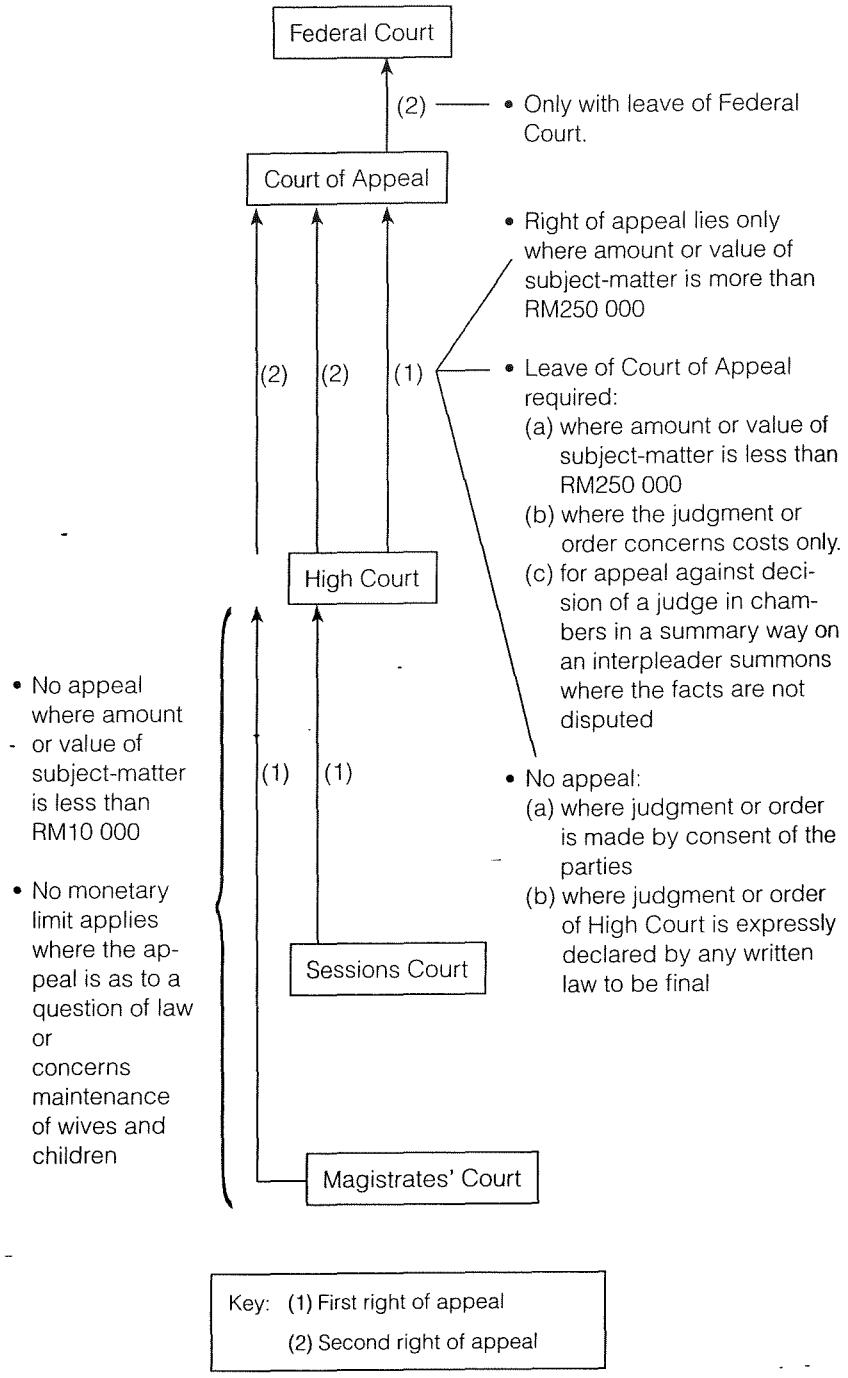
An appeal may be withdrawn at any time before the appeal is due to be heard by serving on the parties to the appeal a notice that the appellant does not intend to proceed with the appeal.

The Federal Court may exercise the powers of the High Court in an appeal

For the purposes of the appeal, the Federal Court may exercise any of the powers of the court from which the appeal lies (including the power to order a retrial). It may confirm, reverse, set aside, or vary the decision of the court of first instance, or it may remit the

matter with its opinion thereon to that court or make such other order in the matter as it thinks fit.

Figure 14.1 Avenues of Appeal



An appeal to the Federal Court does not operate as a stay of execution or of the proceedings under the decision appealed from unless the court of first instance or the Federal Court so orders.

14.2.3.3 Enforcement of Judgment

No problem arises where the judgment debtor (the losing party in a legal action) complies with the judgment by paying the damages, interest, and costs to the judgment creditor (the winning party). However, if the judgment debtor refuses or is unable to do so, the judgment creditor will have to take steps to enforce the judgment.

A judgment or order (depending on its nature and that of the property to be attached) may be enforced by one of several writs of execution, eg:

- writ of seizure and sale (which involves seizing and selling the judgment debtor's property to satisfy the judgment debt);
- writ of delivery (to recover any movable property or its assessed value);
- the garnishee order (requiring a third party, ie the garnishee who owes a sum of money to the judgment debtor to pay the debt directly to the judgment creditor).

Where a judgment or order requires a person:

- to do an act within a time specified in the judgment or order and that person refuses or omits to do it within that time (or within that time as extended), or
- to abstain from doing an act and that person disobeys

then the judgment or order may be enforced by applying for a committal order. Non-compliance constitutes contempt of court, punishable by imprisonment or fine.

Questions

1. Outline the procedure in a civil action in the High Court at the pre-trial stage.
2. Has the introduction of pre-trial case management in the Rules of the High Court bought about the reforms desired in the civil process in Malaysia?
3. If the answer to question 2 is in the negative, what other or further reforms should be proposed and implemented?

Reading List

Halsbury's Laws of Malaysia, Vols 7(1) and 7(2), 2007 Reissue, Singapore: LexisNexis, 2007.

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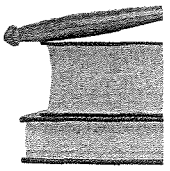

Chapte

Outline the
- pre-trial
- trial and
- post-trio

stages.

15.1 IN

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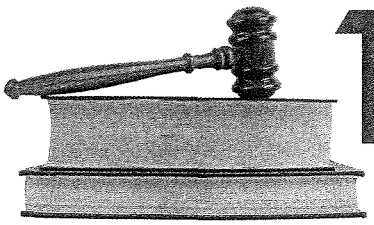

15 THE CRIMINAL PROCESS

Chapter Objectives

Outline the criminal process at the:

- **pre-trial**
- **trial and**
- **post-trial**

stages.

15.1 INTRODUCTION

Rules of general criminal procedure are contained primarily in the Criminal Procedure Code (CPC)

THE rules of general criminal procedure in Malaysia are found primarily in the Criminal Procedure Code (Act 593)(CPC). The CPC has applied throughout Malaysia since 10 January 1976. It was first introduced in 1927 to govern criminal procedure in the then Federated Malay States. It was revised in 1999 and has been amended several times, most recently in 2006 via the Criminal Procedure Code (Amendment) Act 2006 (Act A1274) following the publication in 2005 of the Report of the Royal Commission to Enhance the Operation and Management of the Royal Malaysia Police (The Royal Commission),[1] and subsequently of the Report of the Independent Inquiry Commission concerning the *ketuk-ketampi* ('nude squat') incident. Although not all the Royal Commission's key recommendations for reform have been implemented, those that have been included in the amendments to the CPC by Act A1274 should contribute towards improving the criminal process (in particular, at the pre-trial stage) and the battered image of the *Polis DiRaja Malaysia* (Royal Malaysia Police)(PDRM).[2]

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[1] The Commission, comprising sixteen members and headed by retired Chief Justice Tun Mohamed Dzaiddin Abdullah, was given the task to rectify weaknesses, improve work procedures, and enhance public confidence in the police.

[2] See, Salim Ali Farrar, *The Criminal Process in Malaysia: Cases & Materials,* Vol 1, Petaling Jaya: Pearson Malaysia Sdn Bhd, 2007, pp iv, 255–61; Wu Min Aun, *The Malaysian Legal System*, 3rd edn, Petaling Jaya: Pearson Malaysia Sdn Bhd, 2005.

The CPC provides rules of general criminal procedure. There are additional rules of criminal procedure governing specific situations, eg:

- Dangerous Drugs Act 1952 (Act 234)
- Internal Security Act 1960 (Act 82)
- Anti-Corruption Act 1997 (Act 575)
- Child Act 2001 (Act 611)

Provisions in statutes governing criminal procedure in specific situations supersede the general provisions of the CPC.

The CPC is designed to be an exhaustive statement of the law concerning criminal procedure

The CPC is intended to be an exhaustive statement of the law concerning criminal procedure in Malaysia.[3] Should a lacuna or gap in the law concerning criminal procedure exists in the CPC or any other statute for the time being in force, the 'law relating to criminal procedure for the time being in force in England' shall be applied so far as that law is not inconsistent with the CPC.[4]

Criminal process, like the civil process, may be looked at in three stages:

1. pre-trial
2. trial
3. post-trial

15.2 PRE-TRIAL

15.2.1 Investigation of Offences

Criminal investigations in Malaysia are conducted by a number of enforcement agencies. The largest and the most important is the PDRM. Others include the Anti-Corruption Agency (ACA), Royal Customs and Excise Department, and the Immigration Department.

Police powers of investigation are contained in Chapter XIII, CPC and the Police Act 1967

The powers of the police to investigate are found in Chapter XIII (ss 107–120) of the CPC and in the Police Act 1967 (Act 344).

The investigation powers of the police vary depending on whether the offence complained of is:

- seizable or
- non-seizable.

Seizable (ie arrestable) offences and non-seizable offences are defined in s 2 of the CPC.[5] A seizable offence is an offence for which a police officer may ordinarily investigate without an order from

[3] CPC s 3.
[4] CPC s 5.
[5] Unless otherwise stated, all sections subsequently mentioned refer to sections of the CPC.

the public prosecutor, and arrest without a warrant from a magistrate. Seizable offences are the more serious offences, eg housebreaking, kidnapping, murder, and rape. Conversely, the requisite order from the public prosecutor to investigate or warrant from a magistrate to arrest must first be obtained in the case of a non-seizable offence. The third column of the First Schedule to the CPC designates offences under the Penal Code (Act 574) as seizable or non-seizable. For offences other than those under the Penal Code, the last part of the First Schedule designates them as seizable if they are punishable with imprisonment exceeding three years, and non-seizable if punishable with imprisonment not exceeding three years or with fine only.

The general powers of the police to investigate any offence include investigation at the scene of the crime, to find, locate, and preserve any relevant evidence, and to interview any person who may be able to assist the investigation. The police may also compel the attendance of any person who appears to be acquainted with the circumstances of the case under investigation, interview such persons, and record written statements from them.

Additional powers to investigate terrorism offences

Chapter XIIA in Part IV of the CPC provides the police with additional powers of investigation to deal with terrorism offences.[6] Such offences defined as either terrorist acts or terrorism financing offences (neither is described) are seizable offences. The public prosecutor is empowered to:

- direct any police officer to intercept, detain, and open any article or form of communication received or transmitted by post or telecommunication;
- direct a communications service provider to intercept and retain specified communications received or transmitted by that service provider; or
- direct a police officer to enter any premises to install on, and remove from, such premises any device to intercept specified communications;

if the public prosecutor considers such communications likely to contain information concerning the commission of a terrorism offence.

Police investigations begin once a 'first information report' is made

Investigations by the police generally commence upon the receipt of information concerning the commission of an offence. Such information may be given orally or by making a 'first information report' (FIR) or police report under s 107.

[6] Added by s 9 of Act A1274 which came into force with effect from 6 March 2007 vide PU(B)68/07.

Under amendments to s 107,[7] any member of the public has the right to lodge a police report at any police station, mobile or patrol unit, or police officer on the street. Information given by a person concerning the commission of an offence to a police officer who is not in a police station when receiving such information is deemed to be received at a police station. A police officer is duty bound to receive any information concerning any offence committed in Malaysia. If any police officer obstructs a member of the public from lodging a report, such officer can be reported to the public prosecutor who can initiate charges.

New s 107A,[8] when it comes into force, allows any informant who has given information under s 107 to request for a report on the status of the investigation of the offence complained of from the officer in charge of the police station where the information was given. The police officer concerned has to provide the status report requested not later than two weeks from the receipt of the request where:

- the offence complained of is a seizable offence;
- four weeks have lapsed from the date the information was given; and
- the report requested does not contain any matter likely to adversely affect the investigation or the prosecution of the offence.

Failure on the part of the police officer to furnish a status report within the prescribed period renders such an officer liable to be reported to the public prosecutor. The latter, after receiving such a status report, shall direct the police officer in charge of the Police District to furnish him or her with a detailed status report containing such information as the public prosecutor may direct. A police officer who disobeys such directive commits an offence, punishable with imprisonment not exceeding one month or with a fine not exceeding RM1000, or with both.

The Royal Commission had recommended a systematic monitoring system involving close supervision by senior police officers of, and earlier involvement of the public prosecutor in, ongoing police investigations. Its recommendations have not been fully implemented. Nevertheless, new ss 107A and 120 do inject greater supervision of police investigations by the public prosecutor. Section 120 is aimed at preventing delay in the conduct of police investigations.[9] At any time during the investigation, the public prosecutor

[7] Introduced by s 10 of Act A1274 which came into force with effect from 7 September 2007 vide PU(B)322/07.

[8] Added by s 11 of Act A1274.

[9] Introduced by s 19 of Act A1274 which came into force with effect from 7 September 2007 vide PU(B)322/07.

can direct the investigating officer to submit to him or her a report as specified in Form 26 in the Second Schedule to the CPC. Further, the investigating officer is obliged to submit to the public prosecutor an investigation report complete with the investigation papers not later than one week after the expiration of three months from the date the information was given under s 107.

Not all complaints made to the police will be investigated. In minor matters which the police may not wish to entertain, the complainant who insists on pursuing the matter may be referred to a magistrate to file a private complaint and initiate a private prosecution. In more serious matters, the police will conduct investigations and work closely with the Attorney General's Chambers. Under s 376 the Attorney General is the public prosecutor and is empowered by Article 145(3) of the Federal Constitution to institute, conduct, or discontinue any criminal proceedings other than those before a *Syariah* Court, a native court, or a court martial. Thus, it is the Attorney General's Chambers which ultimately decides whether a prosecution should be initiated.

Decision whether or not to prosecute lies with the Attorney General's Chambers

15.2.2 Arrest

An arrest is the deprivation of a person's liberty by lawful authority to compel that person's appearance to answer a criminal charge or to comply with a judgment of a court.

Under s 15, arrest may be effected by:

- actually touching the body of the person to be arrested; or
- actually confining the body of such person; or
- submission to the custody, by word or action, on the part of such person.

Modes of arrest

An arrest may be made with or without a warrant of arrest depending on whether the offence committed is seizable or non-seizable. No warrant is required to arrest a person who commits, or is reasonably suspected of having committed, a seizable offence. In contrast, a warrant is ordinarily required in the case of a non-seizable offence.

No warrant of arrest needed to arrest persons who commit a seizable offence

A warrant of arrest is an order issued by a magistrate. It is ordinarily directed to a police officer directing such officer to arrest the person named in the warrant and produce such person before the court. Such a warrant may be executed in any part of Malaysia. A warrant issued by a magistrate in Peninsular Malaysia for execution in East Malaysia must first be indorsed by a local magistrate before it can be executed, and vice versa.

A police officer who executes a warrant must bring along the original sealed warrant, notify the person to be arrested the substance

of the warrant, and, if required, show the person the warrant or a copy. After effecting the arrest, the police officer must, without unnecessary delay, bring the person arrested before the required court. However, where the issuing magistrate by an indorsement on the warrant authorized the police officer to release on bail the person arrested, such person, if he or she accepts bail, will appear in court on the date specified in the bailment.

Under the CPC there are five categories of persons who may arrest without a warrant:

Five categories of persons who may arrest without a warrant

1. any police officer;
2. any *penghulu*;
3. any private person;
4. a magistrate; or
5. a Justice of the Peace.

A police officer or a *penghulu* may arrest without a warrant a person in any of the circumstances listed in s 23. Other than persons who have committed, or are reasonably suspected of having committed, seizable offences, persons who may be arrested under that provision include a person:

- who has in his or her possession, without lawful excuse, any housebreaking implement;
- who has been proclaimed under s 44 as absconding or hiding to avoid a warrant of arrest from being executed;
- in whose possession is found anything which may reasonably be suspected to be stolen or fraudulently obtained property;
- who obstructs a police officer in the course of duty or who has escaped or attempts to escape from lawful custody;
- who is reasonably suspected of being a deserter from the Armed Forces of Malaysia.

Section 23 does not limit the power of the police officer or *penghulu* to arrest without warrant under any other written law.

Although, generally, a police officer or a *penghulu* may arrest without a warrant only in seizable cases, such officer or *penghulu* may arrest without a warrant a person who commits a non-seizable offence in the presence of the officer or *penghulu* and when requested to give his or her name and address, either:

- refuses or
- gives a name and address reasonably believed to be false or
- gives an address not within Malaysia.[10]

Under s 27, any private person may arrest a person who commits a non-bailable and seizable offence or who has been proclaimed

[10] CPC s 24.

under s 44 as absconding or hiding to avoid a warrant of arrest from being executed. The person arrested must be handed without unnecessary delay to the nearest police officer or police station.

Section 30 empowers a magistrate or a Justice of the Peace to arrest—or authorizes the arrest of—a person who has committed an offence in his or her presence. Section 31 further empowers a magistrate (but not a Justice of the Peace) to arrest—or authorizes the arrest of—in his or her presence a person for whose arrest he is competent to issue a warrant.

An arrest, to be lawful, must comply with the requirements, and be justified by the circumstances, set out in the CPC. A wrongful or illegal arrest may be resisted by the person intended to be arrested. Any irregularity or illegality in the process of effecting arrest while giving rise to civil consequences will not, however, vitiate any criminal prosecution. In other words, a court is not concerned with how an accused came to be brought before it.[11]

15.2.2.1 Rights and Remedies of an Arrested Person

While the law confers upon the police considerable powers to protect society by bringing offenders to justice it also provides procedural safeguards to ensure that 'no person shall be deprived of his life or personal liberty save in accordance with law'. This fundamental right is contained in Article 5(1) of the Federal Constitution. Several other rights stem from this basic constitutional right:

Rights of an arrested person

1. Right not to be subjected to more force than is necessary on being arrested.[12]
2. Right not to be subjected to unnecessary restraint.

   Under s 19, the person arrested shall not be subjected to more restraint than is necessary to prevent his or her escape. Restraint, such as the use of handcuffs on the accused when appearing in court, is justified only if the accused is violent or has committed a crime of violence.[13]
3. Right to be informed of the grounds of arrest, to communicate with family or friend, and to consult with a legal practitioner.

   Article 5(3) of the Federal Constitution states that 'where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice'.

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[11] *Saminathan* v *Public Prosecutor* [1937] MLJ 39; *Saw Kim Hai & Anor* v *Reg* (1956) 22 MLJ 21.

[12] SS 14(2) and 15(3) CPC.

[13] Per Callow J in *Public Prosecutor* v *Wee Swee Siang* [1948] MLJ 114, at p 115; per Gill CJ (Malaya) in *Yaakub bin Ahmad* v *Public Prosecutor* [1975] 2 MLJ 223, at p 224.

New s 28A supplements and amplifies Article 5(3).[14] Under the provisions of this section:

(a) The person arrested without a warrant shall be informed as soon as may be of the grounds of his or her arrest by the police officer making the arrest.

(b) Before questioning or recording any statement from the person arrested, the police officer must inform that person that he or she may:

  (i) communicate with a relative or friend to inform of his or her whereabouts; and

  (ii) communicate with a legal practitioner of his or her choice.

(c) Where the person arrested wishes to communicate with any of these persons, the police officer must allow him or her to do so as soon as may be.

(d) Where the person arrested has requested to consult a legal practitioner, the police officer must allow a reasonable time:

  (i) for the legal practitioner to be present to meet the person arrested at his or her place of detention; and

  (ii) for consultation to take place.

(e) The consultation must be within sight of the police officer and in circumstances, in so far as practicable, where their communication may not be overheard.

(f) The police officer must defer any questioning or recording of any statement from the person arrested for a reasonable time until the communication or consultation has taken place.

(g) The police officer must provide reasonable facilities for the communication and consultation and all such facilities must be free of charge.

However, these requirements do not apply where the police officer reasonably believes that:

(a) compliance with any of these requirements is likely to result in:

  (i) an accomplice of the person arrested taking steps to avoid arrest; or

  (ii) the concealment, fabrication or destruction of evidence or the intimidation of a witness; or

[14] New s 28A was added to the CPC by s 7 of Act A1274 which came into force with effect from 7 September 2007 vide PU(B)322/07.

(b) having regard to the safety of other persons, the questioning or recording of a statement is so urgent that it should not be delayed.

4. Right to be produced before a magistrate without unnecessary delay.

The person arrested has a right to be produced before a magistrate without unnecessary delay, and in any event, within twenty-four hours (such period to be exclusive of the time necessary for the journey from the place of arrest to the magistrate). Such a person may not be detained beyond twenty-four hours without a remand order issued by a magistrate under s 117.[15]

Remand order by magistrate needed to detain person beyond 24 hours for police investigation

Where police investigations cannot be completed within twenty-four hours, under s 117, the magistrate before whom the accused is produced may, on the application of the police officer, authorize the detention of the accused in custody up to a maximum of fifteen days to enable such investigation to be completed. The police officer making the application must support it by forwarding to the magistrate a copy of the entries in the police investigation diary, and the magistrate authorizing the detention must record his or her reasons for so doing.

Section 117 is susceptible to abuse. There have been public complaints that after an accused is released from custody, another police officer from another police station, at the request of a colleague who has not completed his or her investigation, would obtain another remand order, usually on a separate charge, for another fifteen days. To eliminate this practice of serial remand (referred to by lawyers as 'chain smoking'), s 17 of Act A1274 (not yet in force) replaces the existing s 117 with a new s 117.

Under the new s 117, upon the application of a police officer, a magistrate may authorize the detention of the accused in two stages:

(a) if the offence which is being investigated is punishable with imprisonment of less than fourteen years, the detention must not exceed:

(i) four days on the first application, and
(ii) three days on the second application;

(b) if the offence which is being investigated is punishable with death or imprisonment of fourteen years or more, the detention must not exceed:

[15] Article 5(4) of the Federal Constitution; ss 28 and 117 CPC.

(i) seven days on the first application, and
(ii) seven days on the second application.

Upon the application of a remand order:

- the police officer must state in the copy of the entries of the investigation diary any period of detention of the accused immediately before such application; and
- the magistrate, in deciding the period of detention of the accused, must take into account the earlier period of detention,

whether or not such earlier detention relates to the application being made.

In determining the period of detention of the accused, the magistrate has the discretion whether to allow the accused access to a legal practitioner of his or her choice.

The new s 117 is clearly intended to reduce the total period an accused person has to spend in detention while under police investigation.

Remedies for unlawful detention

A person who is unlawfully detained may apply to the courts for a writ of habeas corpus. Such a person may also seek damages by filing a civil action, eg for wrongful arrest, trespass, and false imprisonment.

15.2.3 Search and Seizure

Provisions for search and seizure can be found in the CPC and specific penal statutes.

The CPC provides for three types of search:

Three types of search

- of a person's body ('body search');
- for person in premises;
- of place or premises.

15.2.3.1 'Body Search'

'Body search' is covered by ss 17, 19, 20, 20A, 21, and 22.

Section 17 deals with body search before arrest. Persons found in a place searched under a warrant of arrest may be subjected to body search if the thing sought is in its nature capable of being concealed upon the person.

In contrast, s 20 relates to body search after arrest. A person arrested:

- under a warrant of arrest which does not provide for the taking of bail, or
- under a warrant of arrest which provides for the taking of bail but the person arrested cannot furnish bail, or
- without a warrant of arrest,

may be searched and all articles other than necessary wearing apparel found on them will be placed in safe custody. Any offensive weapon found on the person upon his or her arrest may be taken away.

Section 19(2) requires a body search on a woman to be conducted by another woman, a requirement rendered redundant by the procedure on body search set out in the Fourth Schedule to the CPC.[16]

New s 20A requires any search of a person by any officer of any enforcement agency under any written law to comply with the procedure prescribed in the Fourth Schedule.[17]

The Fourth Schedule sets out the procedure to be followed in a body search of a 'person arrested', which term is defined as 'a person who is arrested or a person in lawful custody after his [or her] arrest'. The procedure laid down in that schedule must be strictly complied with.

Four types of body search are allowed. In escalating order, they are the:

Four types of 'body search'

1. pat down search;
2. strip search;
3. intimate search; and
4. intrusive search.

The pat down search is the standard airport security 'frisking' of the person arrested, fully clothed. No authorization is required for an officer to conduct such search. It may be carried out by any enforcement officer conferred with the power of arrest or search of a person.

The strip search allows the person arrested to retain part of his or her clothing at all times while being examined. No strip search can be conducted without the prior approval of a police officer not below the rank of inspector or an officer of any other enforcement agency of equivalent rank.

The intimate search entails the physical examination of the arrested person's body orifices other than the mouth, nose, and ears. If necessary, the person arrested may have to squat over a mirror placed on the floor. Such a search requires the prior approval of a police officer not below the rank of Assistant Superintendent of Police, or an officer of any other enforcement agency of equivalent rank.

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[16] Added by s 34 of Act A1274 which came into force with effect from 7 September 2007 vide PU(B)322/07.

[17] Added by s 5 of Act A1274 which came into force with effect from 7 September 2007 vide PU(B)322/07.

The intrusive search involves the examination of the person arrested to determine the existence of any object or evidence inside the body or body orifices, and includes the removal of such object or evidence. It has to be conducted by medical personnel with the prior authorization of an officer in charge of a Police District or in the case of any other enforcement agency, an officer with equivalent authority.

The four types of body search are neither mutually exclusive nor do they have to be conducted in any particular order.

The Fourth Schedule specifies that a body search may be conducted on the person arrested only to:

- obtain incriminating evidence of the commission of the offence for which the person has been arrested;
- seize contraband, the proceeds of crime or other things criminally possessed or used in the commission of the offence for which he or she has been arrested;
- discover evidence related to the reason for the arrest or to prevent the disposal of such evidence by the person arrested.

Also set out are the guidelines governing the general conduct of the officer during a body search. Among the most salient are:

- The search must be conducted in a professional manner and with the highest regard for the dignity of the person arrested (thus any body search must be conducted out of the public view and with minimal embarrassment to the person arrested).
- Before conducting any search, the officer must introduce himself or herself to the person arrested.
- The search must not be more extensive than is necessary to ascertain the existence of the objects believed to be concealed on the person arrested.
- The officer must be of the same sex as the person arrested.
- For strip, intimate, and intrusive search, a second officer who is of the same sex as the person arrested must be present during the search.
- In the course of a search, the religious and cultural sensitivities, as well as the physical, psychological, and medical characteristics of the person arrested must be respected.
- Where the person arrested is pregnant, elderly, or disabled, the search must take into consideration the arrested person's medical and physical condition.

Search for person

15.2.3.2 Search for Person in Premises

Under s 16, a person:

- acting under a warrant of arrest, or
- who is properly authorized to arrest,

and has reason to believe that any person to be arrested has entered into any place can demand entry into such premises to search for the person to be arrested. Where free entry cannot be obtained and delay may enable the person to be arrested to escape, it is lawful for the person authorized to arrest to effect forced entry by breaking open any door or window of the premises concerned.

Section 57 empowers a magistrate to issue a search warrant authorizing search to be conducted for a person believed to be wrongfully confined.

15.2.3.3 Search of Place or Premises

Search of premises

Search of place or premises can be conducted with or without a search warrant.

Sections 54 and 56 deal with the issue of a search warrant. Under s 54, a court may issue a search warrant where:

(a) it has reason to believe that a summons under s 51 or a request under s 52 for the production of a document or property requested would not yield the desired result; or
(b) that the document or property is not known to the court to be in the possession of any person; or
(c) the court considers that the purposes of justice or any proceedings under the CPC will be served by a general search.

Section 56 authorizes a magistrate to issue a search warrant to enter and search any place which the magistrate has reason to believe may be found:

- anything upon which, by which, or concerning which, an offence has been committed; or
- any evidence which is necessary to the conduct of an investigation into any offence.

Search without the authority of a search warrant may be effected only in the circumstances set out in ss 62, 62A, 62B, 63, and 116.

Section 62 allows search for stolen property; s 62A, search for, and forfeiture of, counterfeit coin or any equipment or material used for counterfeiting coin; and s 62B, search for, and forfeiture of, forged or counterfeit currency note or bank note or any equipment or material used for forging or counterfeiting any currency note or bank note. In any of these three circumstances, the search may be effected by a police officer not below the rank of inspector.

Section 63 also allows search for stolen property. It authorizes, in addition, seizure of such property. Such search and seizure may

be effected by any police officer. However, written authorization by the Chief Police Officer is required. The latter may give such authorization when:

1. the place to be searched is, or within the preceding twelve months has been, in the occupation of, or used by, any person who has been convicted of receiving stolen property or of harbouring thieves; or
2. the place to be searched is in the occupation of, or used by, any person who has been convicted of an offence involving fraud or dishonesty and punishable by imprisonment.

Section 116 authorizes a police officer to search, or cause a search to be made, for any document or thing in any place provided:

1. the production of the document or thing is necessary to the conduct of an investigation into any offence; and there is reason to believe that the person to whom a summons under s 51 has been or might be issued would or will not produce the document or thing as directed; or
2. the document or thing is not known to be in the possession of any person.

Seizure of things during search

Seizure of things during a search is authorized either under a specific provision or under s 435. If the specific provision under which the search is made provides also for seizure, then seizure is effected under that provision. Otherwise, reference has to be made to s 435 which is the general provision for seizure of any property either:

- suspected to have been stolen or
- found under circumstances which create suspicion that an offence has been committed.

Section 64 requires any person who effects a search under Chapter VI of the CPC to prepare and sign, a list of all things seized in the course of the search and the places in which they are respectively found.

Any illegality arising from entry, search, seizure, and disposal of seized items will not necessarily vitiate any criminal proceedings. Neither will such illegality, by itself, result in the inadmissibility as evidence of such items seized or information thus gathered.[18]

15.2.4 Statements

All statements from anyone who is acquainted with the facts and circumstances of the case under investigation (whether police personnel, witnesses, or suspects) are generally made, and recorded, under

[18] *Kuruma* v *R* [1955] AC 197; 1 All ER 236 (PC); *Ramli bin Kechik* v *Public Prosecutor* [1986] 2 MLJ 33; *Ng Yiu Kwok* v *Public Prosecutor* [1989] 3 MLJ 166 (SC).

s 112. The recording must be made by a police officer of the rank of sergeant or above ('the recording officer' or RO).

All statements concerning a case under investigation are made and recorded under s 112 CPC

Before recording a statement, the RO has to determine the language used and understood by the person being questioned, and inform such person that:

- he or she must answer all questions concerning the case put to him or her except any question the answer to which would have a tendency to expose him or her to a criminal charge or penalty or forfeiture; and
- he or she is legally bound to state the truth.

After recording, the RO must read back the contents of the recording to the person in the language in which he or she made it. That person must be given the opportunity to make corrections, if any, before being required to affix his or her signature or thumbprint on the recording.

In contrast to s 112, s 113 is an admissibility provision of statements made by accused persons.

Any statement made by an accused person is admissible as evidence at that person's trial subject to the conditions stated in s 113 CPC

Any statement made by an accused person (whether amounting to a confession or not), at any time (whether in the course of police investigation or not, and whether made before or after the person is charged), to or in the hearing of any police officer of or above the rank of inspector, is admissible as evidence at the person's trial subject to the conditions specified in s 113, in particular:

1. the statement must have been made voluntarily in the sense that it was obtained from the accused without any inducement, threat, or promise; and
2. where the statement is made by an accused person after his or her arrest, a caution such as that specified in s 113 or words to the same effect must have been administered to the accused before he or she made the statement or as soon as possible afterwards.

The recording of the accused person's statement under s 113 must also comply with the mandatory requirements set out in s 112; thus, ss 112 and 113 must be read together.

An accused person is not bound to answer any questions concerning the case under investigation after being administered the statutory caution by the police officer:

> It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence.

That is, the accused has a right to remain silent in the face of questioning by the police (except where such right is displaced by specific statutory provisions).

The right to silence which has traditionally been regarded as a procedural safeguard for the accused was curbed in the United Kingdom under the Criminal Justice and Public Order Act 1994.[19] Sections 34–39 of that Act allow the judge at the trial to draw inferences from the refusal of the accused to answer questions during police investigation. The judge may comment on the accused's failure to mention a crucial fact when questioned, and this failure can be part of the evidence against the accused.

Singapore virtually abolished the right to silence much earlier. Under the Criminal Procedure Code (Amendment) Act 1976 (No 10 of 1976), the court has a discretion to draw adverse inferences against the accused at the trial if at the time the accused was charged, he or she chose to remain silent or failed to mention a fact which he or she subsequently relied on in his or her defence in court.

Malaysia is moving towards abolishing the right to silence and cautioned statements

Malaysia is moving towards removal of the right to silence and cautioned statements. There are several reasons for the move:

- Cautioned statements delay trials. Cautioned statements are routinely challenged in court by the accused persons who allege that the statements made during police investigation or in custody had been extracted through intimidation or oppression. Such challenges lead to 'trials-within-trials' to enable the judge to determine the voluntariness or otherwise of the statements concerned.
- Admissions obtained in custody in the absence of defence counsel create a negative image of the police in the eyes of the public.
- Over-reliance on admissions or confessions to prove the guilt of the accused encourages slipshod police investigations.

Consequently, a new s 113 replaces its antecedent.[20] The new section when it comes into force, makes all statements to a police officer in the course of police investigation inadmissible in evidence except in the circumstances specified:

- any statement made by a witness (whether called for the prosecution or defence) may be used, after the accused is given a copy of it, to impeach the credit of the witness;
- a statement made by the accused may be admitted in evidence to support his or her defence;

[19] The Royal Commission on Criminal Justice chaired by Lord Runciman was set up following some notable cases of miscarriage of justice in the 1970s and 1980s. The Runciman Commission was given the task of examining the effectiveness of the criminal justice system in England and Wales in securing the conviction of those guilty of criminal offences and the acquittal of the innocent. The Commission whose report was published in July 1993 had recommended the retention, in essence, of the right to silence. However, the government decided to curb the right on the grounds that the right enabled the guilty to be acquitted.

[20] The new s 113 is introduced by s 14 of Act A1274 which is not yet in force.

- where a person is charged with any offence concerning the making, or the contents, of any statement made by him or her during police investigation, that statement may be used as evidence in the prosecution's case.

The proposed removal of cautioned statements carries the consequence that whatever admissions or confessions the accused wishes to make must be made at the trial in open court. This is underscored by the deletion of the existing s 115 which empowers magistrates to record statements and confessions at any time before the commencement of the trial.[21]

Once the police has completed all the preliminary investigations into an alleged offence, the relevant investigation papers are sent to the Attorney General's Chambers. The Deputy Public Prosecutors study these papers and if satisfied that sufficient evidence exists to prosecute a person for a particular offence, grant the authority to prosecute. A charge or charges will be drafted.

15.2.5 The Charge

The general rule is that each charge must disclose only one offence, and every charge must be tried separately.[22] However, joinder of charges and trials may be permitted.[23]

The charge is a notice to the accused of the offence which he or she is accused of. For this reason, the charge must convey to the accused with clarity and certainty the case which the prosecution intends to prove against him or her, and which he or she will have to answer. The charge also serves as an information to the court which is to try the accused, of the matters that need to be proven.

A charge must state the offence with which the accused is charged, the precise provision of law under which the person is being prosecuted, and the provision providing for the punishment, if the punishment is provided in a separate or different provision. The offence may be referred to by its specific name in law, eg 'murder' or 'theft'. If the offence is not known by a specific name, it suffices for the prosecution to state in the charge so much of the definition of the offence as will give the accused notice of the offence with which he or she is charged.[24] The charge must also state the time, date, and place of the alleged offence.[25] If the particulars described still do not give sufficient notice of the offence with which the accused is

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[21] The deletion of s 115 is made by s 16 of Act A1274 which is not yet in force.
[22] CPC s 163.
[23] CPC ss 164, 165, 166 and 170.
[24] CPC s 152.
[25] CPC s 153.

charged, then the prosecution is required to set out the particulars of the manner in which the alleged offence was committed.[26]

The charge or charges may be amended by the prosecution, and the court at any time before judgment. The prosecution may also, at any stage of a trial before verdict, if it thinks fit, withdraw the charge or charges—in which case, all proceedings will be stayed and the accused given a discharge not amounting to an acquittal unless the court orders otherwise.

15.2.6 Bail

Stages of the criminal process at which bail applies

The accused is presumed innocent until proven guilty at the trial. Therefore, as a general rule, the accused, after being charged and before trial, may apply to the court for bail. Although bail is normally applied at this stage, it may take place at other stages of the criminal process:

- Before the expiry of twenty-four hours immediately after arrest;
- After the expiry of twenty-four hours following the arrest but before being charged;
- After being charged but before the accused's final court appearance; and
- Following conviction (or acquittal) pending appeal against the verdict or sentence.

The ensuing discussion focusses on bail at the first three stages mentioned.

Bail may be described as a process in which a person arrested by the police is set free either by a police officer (in charge of a police station or not below the rank of corporal) or a court on condition he or she makes an undertaking ('bond'), or finds another person ('bailor' or 'surety'), to provide sufficient security to guarantee his or her appearance at the police station or the court at the date and time stated.

Whether a suspect or an accused person may be released on bail depends on whether the offence with which he or she is suspected of committing is 'bailable', 'non-bailable', or 'unbailable'. The general law governing bail is set out in Chapter XXXVIII (ss 387–394) of the CPC. There are also bail provisions in specific penal statutes such as the Dangerous Drugs Act 1952 (Act 234) and the Firearms (Increased Penalties) Act 1971 (Act 37).

Section 387 relates to bailable offences; s 388, to non-bailable offences. The fifth column of the First Schedule to the CPC

[26] CPC s 154.

designates offences in the Penal Code (Act 574) as either bailable or non-bailable. For offences other than those in the Penal Code, the last part of the First Schedule designates them as non-bailable if they are punishable with imprisonment for three years upwards, including death; and as bailable if they are punishable with imprisonment for less than three years or with fine only.

Unbailable offences are offences in statutes other than the CPC. In these statutes, there is a provision stating that bail shall not be granted to a person charged with the specified offence despite any written law or any rule of law to the contrary. In other words, unbailable offences are offences in relation to which the accused person will not be given bail in any circumstances.

If an offence is bailable, then according to s 387(1), a person charged with such an offence is entitled to bail as of right. This general proposition is, however, subject to three qualifications:

- the person concerned must be prepared to post bail or furnish the required sureties or securities, as the case may be;
- bail may not be granted where the police applies for an extension of detention under s 117 pending completion of police investigations;
- the bail originally granted may be revoked or cancelled where there has been a breach of the terms of the bail bond.

A person charged with a non-bailable offence has no right to bail. The granting of bail in non-bailable cases is at the discretion of the court (whether Magistrates', Sessions, or High Court).

Under s 388, there are two broad categories of non-bailable offences:

1. offences punishable with death or imprisonment for life and
2. other non-bailable offences.

For offences in category (1), and subject to the proviso in s 388(1), the court has no discretion to grant bail if there are reasonable grounds to believe the accused committed the offence.[27] Under the proviso, the court retains the discretion to grant bail if the accused is:

- under sixteen, or
- a woman, or
- sick or infirm.[28]

An accused who does not fall within the proviso may resort to s 389 which gives a High Court judge discretion to grant bail in any

[27] *R* v *Ooi Ah Kow* [1952] MLJ 95.
[28] *Public Prosecutor* v *Dato' Balwant Singh* (No 1) [2002] 4 MLJ 427.

case. Whether the case falls under the proviso or s 389, case law shows that the court will not grant bail unless there are 'exceptional and very special reasons'.[29]

Where there are no reasonable grounds to believe that the accused committed an offence punishable with death or imprisonment for life, but there are grounds to believe he or she committed another non-bailable offence, any court before which the accused appears has a discretion to grant bail.

For offences in category (2), the court has an absolute discretion to grant bail.

Factors guiding the court in deciding whether or not to grant bail

There are factors guiding the court in exercising its discretion whether or not to grant bail. These are stated in *Mallal's Criminal Procedure*, 6th edn, Singapore: Butterworths Asia, 2001, at p 6148, para [12528], and in case law.[30] Some of these factors are:

- the nature and gravity of the offence;
- the likelihood of the accused absconding or obstructing the prosecution in any way;
- the likehood of the accused continuing or repeating the offence if released on bail;
- the danger of witnesses being intimidated;
- the danger of prosecution evidence being tampered with;
- the age, gender, and state of health of the accused.

The court, in addition to stating the amount of bail to be deposited and the number of sureties, if any, may also impose conditions for bail, such as asking the accused to surrender his or her passport or to report at regular intervals to the police station.

15.2.7 Submission of Prosecution Documents to the Defence Before Bail

In line with greater pre-trial disclosure of documents in civil proceedings to expedite the trial process, a new provision has been introduced into the CPC with the same objective. Section 51A obliges the prosecution to deliver ahead of trial certain prosecution documents, except those which are classified, to counsel for the accused.[31] The documents specified are:

(a) a copy of the first information report (FIR) made under s 107, if any;

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[29] R v *Ooi Ah Kow* [1952] MLJ 95; *Public Prosecutor* v *Latchemy* [1967] 2 MLJ 79; *Leow Nyok Chin* v *Public Prosecutor* [1999] 1 MLJ 437.

[30] For example, *Public Prosecutor* v *Wee Swee Siang* [1948] MLJ 114; *Sek Kon Kim* v *Attorney General* [1984] 1 MLJ 60.

[31] Added by s 8 of Act A1274 which came into force with effect from 7 September 2007 vide PU(B)322/07.

(b) a copy of any document which would be tendered as part of the evidence for the prosecution; and
(c) a written statement of facts favourable to the defence of the accused signed by the public prosecutor or any person conducting the prosecution.

The disclosure process will:

- shorten trials because disclosure facilitates agreement on the facts of the case, thus eliminating the need to call witnesses to prove every single fact whether contested or otherwise; and
- put the counsel for the accused in a better position to advise him or her whether to plead guilty or claim trial.

15.3 TRIAL

15.3.1 Processes for Compelling Attendance

A person suspected of committing an offence may be brought before the court in one of three ways:

1. by summons;
2. by a warrant of arrest; or
3. by arrest without warrant for seizable offences.

Summons

A summons and a warrant of arrest are essentially processes to compel the attendance of the accused or a witness in court. Summons is governed by ss 34–37, and warrant of arrest by ss 38–46.

A summons is a document requiring the person on whom it is served to appear in court at a specified time and place either to answer a specific charge or to give evidence concerning a complaint made to the court. Every summons must be in writing, signed by the magistrate, and bear the seal of the court. A summons is ordinarily served by a police officer. Wherever practicable, it should be served personally on the person summoned by showing him or her the original summons and delivering to him or her a copy under the seal of the court. Where the person summoned cannot be found after due diligence, the summons may be served by leaving a copy for him or her with some adult member of his or her family or with a servant residing with him or her.

Warrant of arrest

A warrant of arrest is an order issued by a court addressed ordinarily to the police directing the police officer concerned to arrest the person named in the warrant and produce such person before the court at a specified time and place. It must be in writing, signed by the magistrate, and bear the seal of the court. When issuing a warrant, the court may, at its discretion, indorse it with a direction that

the person named in the warrant, on arrest, be released on bail on such terms as may be specified.

Basically, the warrant for arrest is used to compel attendance in court in the more serious cases. Although the High Court in *Karpal Singh* v *Public Prosecutor* [1986] 2 MLJ 319 determined whether a summons or warrant should be issued in the first instance on the basis of the definition of a 'warrant' case in s 2(1) (ie a case relating to an offence punishable with death or with imprisonment for a term exceeding six months), it has been suggested that the better approach would for the court to be guided by the First Schedule to the CPC.[32] The fourth column in that schedule designates offences under the Penal Code (Act 574) as either a summons or warrant case. As for non-Penal Code offences, the last part of that schedule designates offences punishable with imprisonment for three years or upwards, including the death penalty, as 'warrant' cases and offences punishable with imprisonment for less than three years as 'summons' cases.

Depending on the gravity of the offence, the accused may be tried, in the first instance, in a Magistrates' Court, a Sessions Court, or the High Court.

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Trials before subordinate courts are referred to as 'summary trials'. They are traditionally called so because such trials are conducted without a jury. The term has outlived its purpose because all criminal trials in Malaysia, including High Court trials, are now conducted without a jury.

The procedure in summary trials is set out in Chapter XIX of the CPC. Although headed 'Summary Trials by Magistrates', the procedure therein outlined applies equally to trials by Judges of the Sessions Courts.[33] The procedure for High Court trials is set out in Chapter XX of the CPC. As the procedure for High Court trials is substantially similar to that in the subordinate courts (the differences are minor and these will be indicated), the discussion below outlines the former.

15.3.2 High Court Trial

All High Court trials in criminal cases are now before a judge sitting alone. Jury trial and trial with assessors were abolished by the Criminal Procedure Code (Amendment) Act 1995 (Act A908). That Act also abolished the preliminary inquiry procedure. Before that Act came into force on 17 February 1995, all criminal cases

[32] Francis Ng Aik Guan, *Criminal Procedure*, 2nd edn, Petaling Jaya: LexisNexis, 2006, p 52.

[33] *Tengku Abdul Aziz* v *Public Prosecutor* [1951] MLJ 185.

triable in the High Court, unless they came within any of the then existing exceptions, were preceded by a preliminary inquiry before a magistrate. Such cases could be committed to the High Court for trial only if at such inquiry a case against the accused (a 'prima facie case') could be made out. With the abolition of trials with jury and assessors, and the preliminary inquiry procedure, a new s 177A was added to the CPC. It requires all cases to be tried by the High Court to be instituted by, or with the consent of, the public prosecutor.

Under s177A, the accused shall be produced, in the first instance, before the Magistrates' Court where the charge will be read out and explained to him or her. However, no plea will be taken. The magistrate will have to wait for issuance of the public prosecutor's consent before transmitting the case to the High Court for trial. In ordering the transmission, the magistrate will also cause the accused to appear or be brought before the High Court as soon as may be practicable. While waiting for the public prosecutor's consent, the accused may be remanded in custody or be released on bail (if applicable). When the accused appears or is brought before the High Court after the consent of the public prosecutor is obtained, the High Court fixes a date for trial.

Main steps in trial before the High Court

The procedure for High Court trials is set out in ss 178–183. The main steps may be summarized as follows:

1. The accused is brought before the court.
2. The charge is read and explained to the accused and he or she is asked whether he or she pleads guilty or claims trial. If necessary, an interpreter will be engaged.
3. The accused makes his or her plea. If the accused refuses to, or does not, plead, such silence has the same effect as a plea of not guilty.
4. If the accused pleads guilty:
   (a) the court must ensure that it is the accused himself or herself who wishes to plead guilty;
   (b) the court must, before it records that plea, ascertain that the accused understands the nature and consequences of the plea and intends to admit, without qualification, the charge against him or her;
   (c) the prosecution reads out the statement of facts;
   (d) the accused admits the facts as stated (including the identification of any exhibits mentioned, and produced, in the court);
   (e) the court accepts the accused's guilty plea and convicts him or her;

(f) a plea of mitigation may be made on behalf of the accused, which if made, is followed by a reply from the prosecution;
(g) sentence is passed, and the trial is concluded.

5. If the accused refuses to, or does not, plead or claims trial, a full-length trial commences.
6. The prosecution makes an opening statement, under s 179(1), stating shortly the nature of the offence charged and the evidence by which the prosecution proposes to prove the guilt of the accused.
7. The prosecution calls the prosecution witnesses, each of whom is subjected to three stages of examination:
   (i) examination-in-chief by the prosecution;
   (ii) cross-examination by the defence; and
   (iii) re-examination by the prosecution.

   Under s 272B, a person, other than the accused, may with the leave of the court give evidence through a live video or live television link in any trial, if it is expedient in the interest of justice to do so.[34] Where a witness gives evidence under this section, he or she shall, for the purposes of the CPC and the Evidence Act 1950 (Act 56), be deemed to be giving evidence in the presence of the court, the accused or his or her counsel, as the case may be.
8. At the close of the prosecution case, the accused may submit that there is no case to answer, ie that the prosecution has failed to make out some or all of the ingredients of the charge.
9. Where the accused makes such a submission, arguments by both sides are presented.
10. At this point, the court must decide whether the prosecution has made out a case against the accused 'which if unrebutted or unexplained would warrant a conviction'.[35]

The question arising at this stage, ie at the close of the prosecution case, is the standard of proof required of the prosecution to warrant the court calling upon the accused to enter his or her defence.

If the prosecution has not made out a case, according to the standard of proof required depending on the date of the commission of the

[34] Added by s 24 Act A1274 which came into force with effect from 7 September 2007 vide PU(B)322/07.
[35] S 180(4) CPC which was added by s 22 of Act A1274 and came into force with effect from 7 September 2007 vide PU(B)322/07.

offence, the court will acquit the accused. If it has, the court will call upon the accused to enter his or her defence.

15.3.2.1 Standard of Proof Required of the Prosecution

Standard of proof required of the prosecution at the end of its case

There is a long-standing controversy on the standard of proof required of the prosecution at the close of its case.

Before the CPC was amended in 1997, ss 173(f) and 180 read:

> If upon taking all the evidence herein before referred to, the court finds that no case against the accused has been made out which *if unrebutted would warrant his conviction* the court shall record an order of acquittal. (Emphasis added.)

Before the decision of the Privy Council in an appeal from Singapore in *Haw Tua Tau* v *Public Prosecutor* [1981] CLJ 123, the words emphasized had by a long line of authorities in Malaysia been taken to mean a 'prima facie case'. This term, as indicating the standard of proof at the close of the prosecution case, required the judge at that stage of the trial to weigh the prosecution evidence and be satisfied that, if unrebutted (ie if not overthrown by evidence to the contrary) would warrant the accused's conviction. Accordingly, if the accused chose to remain silent and offered no evidence to contradict the prosecution evidence, the judge would have to convict the accused. On the other hand, if after weighing the prosecution evidence the judge was satisfied that it would be wholly unsafe to convict the accused on such evidence standing alone, then no prima facie case had been made out and the accused would be acquitted.

The Privy Council decision in *Haw Tua Tau* radically changed the position. While the prosecution at the close of its case had to establish a prima facie case that expression meant merely that the prosecution had to adduce credible evidence to establish all the essential elements of the charge. Unlike previously, the prosecution was not required to establish the guilt of the accused; that could only be determined by the judge after weighing all the evidence (adduced by the prosecution and the defence) at the end of the trial.

The *Haw Tua Tau* decision raised no problem where the accused adduced evidence. At the end of the whole trial, the judge would determine whether the prosecution had established the guilt of the accused beyond reasonable doubt. The problem arose where the accused remained silent after the prosecution rested its case. Should the judge convict the accused on the strength of the prima facie case or should the judge reassess the evidence adduced by the prosecution by a higher standard of proof, ie beyond reasonable doubt?

To compound the problems post-*Haw Tua Tau*, the terms minimum evaluation of evidence and maximum evaluation of evidence were introduced. Minimum evaluation of evidence came to be associated with prima facie standard of proof; maximum evaluation of evidence with proof beyond reasonable doubt.

The Federal Court, to resolve the controversy whether the prosecution needs to establish only a prima facie case or comply with the usual criminal standard of proof beyond reasonable doubt at the close of its case, convened a bench of seven judges in *Arulpragasan a/l Sandaraju* v *Public Prosecutor* [1977] 1 MLJ 1. The Federal Court, by a majority of 4 : 3, decided in favour of proof beyond reasonable doubt.

Parliament intervened. It overruled *Arulpragasan* by amending the CPC. Via the Criminal Procedure Code (Amendment) Act 1997 (Act A979), the phrase 'prima facie case' was explicitly introduced into ss 173(f) and 180. The result was the application of two different standards of proof at two different stages of trial:

1. Under ss 173(f) and 180, the prosecution is required to make out a prima facie case against the accused at the close of its case;
2. Under ss 173(m) and 182A, the prosecution has to prove the guilt of the accused beyond reasonable doubt at the end of the trial.

However, problems remained. A 'prima facie case' is not defined. No provision is made for the 'no defence' case, ie where the accused offers no evidence after the prosecution rests its case. And, the degree of evaluation to which the prosecution evidence should be subjected at that stage is not specified.

The amendments introduced into the CPC by Act A979 were not retrospective. Sections 173 (f) and 180, as amended, apply only to offences committed after 31 January 1997. Offences committed before that date continue to be governed by *Arulpragasan*.

The gaps, or problems not addressed, in the 1997 amendments to the CPC led to differing interpretations of 'prima facie case'. In *Public Prosecutor* v *Dato Seri Anwar Ibrahim* (No 3) [1999] 2 CLJ 215, Augustine Paul J, while maintaining that at the close of its case, the prosecution is required to establish only a prima facie case and not one beyond reasonable doubt, virtually assimilates the former to the latter. This is underscored when he ruled that a maximum evaluation of the prosecution evidence (ie applying the rigorous test of credibility to each strand of evidence adduced) must be undertaken at the close of the prosecution case before the court can rule that a prima facie case has been made out to warrant calling for the defence.

The above decision was confirmed on appeal.[36] The views expressed by Augustine Paul J, were subsequently indorsed by Gopal Sri Ram JCA in delivering the judgment of the Court of Appeal in *Looi Kow Chai* v *Public Prosecutor* [2003] 2 MLJ 65. *Looi Kow Chai* was, in turn, indorsed in *Public Prosecutor* v *Hanif Basree Abdul Rahim* [2004] 3 CLJ 700, and by the Federal Court in *Balachandran* v *Public Prosecutor* [2005] 2 MLJ 301, and in *Public Prosecutor* v *Mohd Radzi Abu Bakar* [2006] 1 CLJ 457.

New subsection (h)(iii) has been added to s 173, and subsection (4) to s 180 by Act A1274.[37] They fill a gap in the amendments introduced by Act A979 in 1997 by defining a 'prima facie case' as one 'where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction'.

It is clear from that definition and from the explicit use of the expression 'prima facie case' in the 1997 amendments that Parliament, by amending the CPC, intended to overrule *Arulpragasan* and reinstate the principles laid down in *Haw Tua Tau*. Whether the judiciary will give effect to Parliament's intention remains to the seen.

11. Before the court calls upon the accused to present his or her defence, the court must inform and explain to the accused the three electives and their attendant consequences:
    (a) to give sworn evidence in the witness box;
    (b) to give unsworn evidence from the dock; or
    (c) not to give evidence, ie to remain silent.

    The first elective renders the accused liable to cross-examination by the prosecution. Otherwise, the accused can opt for the second or third elective.
12. After the accused makes his or her election, the accused or his or her counsel may make an opening address by stating the facts or law on which the accused intends to rely, and making such comments on the prosecution evidence as deemed necessary. Each defence witness, including the accused (if the accused elects to give evidence, he or she will precede all other defence witnesses) is examined-in-chief, cross-examined by the prosecution, and re-examined by defence counsel. Any accused who elects to give evidence may be cross-examined on behalf of any other accused jointly tried.

[36] [2002] 3 CLJ 457.

[37] See, ss 21 and 22 of Act A1274 which came into force on 7 September 2007 vide PU(B)322/07.

13. At the conclusion of the defence case, the defence makes its closing submissions.
14. The prosecution then exercises the right to reply on the whole case, whether the accused adduces evidence or not.
15. The court must then decide whether on the evidence adduced, the prosecution has proved the guilt of accused beyond reasonable doubt. If the court finds the accused not guilty, it will record an order of acquittal.
16. If the court finds the accused guilty, the accused or his or her counsel will be given the opportunity to make a mitigation plea before the court pronounces the sentence.
17. The court records a conviction and passes sentence on the accused.

15.3.3 Difference in Procedure Between Summary Trial and High Court Trial

There are only two differences and these are minor:

- Where the accused refuses to, or does not, plead or claims trial, the court, in a summary trial, proceeds to try the case by calling on the prosecution to produce its witnesses under s 173(c). In contrast, in a High Court trial, it is mandatory for the prosecution to make an 'opening statement' under s 179(1) before calling its witnesses.
- After the defence makes its closing submissions, the court, in a summary trial, proceeds to consider all the evidence adduced before it, and decides whether the prosecution has proved its case beyond reasonable doubt under s 173(m)(i). In a High Court trial, before the court considers all the evidence adduced before it, the prosecution has the right to reply on the whole case, whether the accused adduces evidence or not, under s 182.

15.4 POST-TRIAL

15.4.1 Appeals and Revision

A party aggrieved by a decision of a court may either appeal or request for a revision

A party aggrieved by the decision of a court in a criminal case may either:

- file an appeal to a higher court or
- proceed by way of revision provided the matter originated in a subordinate court.

Before 24 June 1994 an aggrieved party who wishes to appeal would have only a single right of appeal to a higher court. After

An aggrieved party has two rights of appeal

that date, ie after the coming into force of the Constitution (Amendment) Act 1994 (Act A885) and the Courts of Judicature (Amendment) Act 1994 (Act A886), the two-tier superior court hierarchy was replaced with a three-tier hierarchy. The latter Act also gave an aggrieved person in a criminal case a second right of appeal. This right of second appeal extends to situations which proceed by way of revision before the High Court.[38]

15.4.2 Appeals

There are three levels of appeals:

1. appeals against decisions of subordinate courts to the High Court;
2. appeals against decisions of the High Court to the Court of Appeal; and
3. appeals against decisions of the Court of Appeal to the Federal Court.

Appeals from subordinate courts to the High Court are governed by s 26 of the Courts of Judicature Act 1964 (Act 91)(CJA 1964) and Chapter XXX (ss 303A–322) of the CPC; appeals from the High Court to the Court of Appeal by ss 50–63 CJA 1964 and the Rules of the Court of Appeal 1994 (RCA 1994); and appeals from the Court of Appeal to the Federal Court by Part IV (ss 86–95) CJA 1964 and Rules of the Federal Court 1995 (RFC 1995).

In the hierarchy of subordinate courts, appeals against decisions of the Penghulu's Courts lie to the First Class Magistrates' Courts. Only appeals to the superior courts are discussed below.

15.4.2.1 Appeals to the High Court

Appeals against the judgment, sentence, or order of the Magistrates' and Sessions Courts may be made to the High Court.[39] 'Judgment' refers to the final order in a trial terminating in the conviction or acquittal of the accused, while 'order' must be a final order in the sense that it is final in effect as in the case of a judgment or sentence. The test for determining the finality of an order is to see whether the judgment or order finally disposes of the rights of the parties.[40]

Appeals may be made on the grounds of error of fact, law, or mixed fact and law, or excessive severity or inadequacy of sentence.

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[38] Via the retrospective operation of the Courts of Judicature (Amendment) Act 1995 (Act A909) deemed to have come into force on 24 June 1994.

[39] CJA 1964, s 26.

[40] *Maleb bin Su* v *Public Prosecutor and Cheak Yoke Thong* v *Public Prosecutor* [1984] 1 MLJ 311 (HC); *Ang Gin Lee* v *Public Prosecutor* [1991] 1 MLJ 498 (SC).

Qualified right to appeal against decisions of subordinate courts to the High Court

The statutory right to appeal from the judgment, sentence, or order of the magistrates or judges of the Sessions Courts is qualified:[41]

1. There is no appeal in the case of an offence punishable with a fine only not exceeding RM25.
2. A person convicted after pleading guilty cannot appeal against his or her conviction; he or she can appeal only as to the extent or legality of the sentence.
3. Where a person has been acquitted by a magistrate or a Sessions Courts judge, there shall be no appeal except by, or with the written sanction of, the public prosecutor.

1. Procedure

A person who wishes to appeal must:

- file, within ten days from the date the judgment, sentence, or order was passed or made, with the clerk of the relevant subordinate court, a notice of appeal in triplicate addressed to the High Court and a request to be supplied with the notes of evidence recorded by the magistrate or Sessions Court judge;
- pay, at the same time, the prescribed appeal fee.

On receipt of the notice of appeal, the court appealed from, with all convenient speed,

- makes a signed copy of the grounds of decision and the notes of evidence in the case, and
- causes such copy to be served upon the appellant or his or her counsel.

Within ten days after the copy of the grounds of decision has been served, the appellant must file a petition of appeal in triplicate addressed to the High Court. The petition must state shortly the substance of the judgment, sentence, or order appealed against and contain particulars of the points of law or fact concerning which the court appealed from is alleged to have erred. If the appellant fails to file the petition of appeal within the prescribed time, the appeal will be deemed to have been withdrawn, although the appellate court has the power to allow out-of-time petitions.

After the appellant has filed the petition of appeal, the court appealed from bundles up the notice of appeal, grounds of decision and petition of appeal in the form of an appeal record and transmits such appeal record to the High Court. A copy of the same will be served on the public prosecutor and the appellant.

[41] CPC ss 304–306.

Upon receipt of the appeal record, the High Court proceeds to enter it on the list of appeals. The parties will then be notified of the date fixed for the hearing of the appeal.

An appeal does not automatically operate as a stay of execution. The trial or appellate court has the discretion to stay execution on any judgment, sentence, or order pending appeal on such terms as to security for the payment of any money, or the performance or non-performance of any act, or the suffering of any punishment ordered, as to the court may seem reasonable.

Apart from applying for a stay of execution, a convicted appellant may also apply for bail pending appeal. However, the considerations in such an application are different from the application for bail pending trial because the presumption of innocence no longer applies, and because of the increased risk of the accused absconding because of the sentence imposed.

At the hearing of the appeal, where all the parties are present, the submissions will be made by the parties in the following order:

1. the appellant;
2. the public prosecutor or respondent, and
3. a reply by the appellant.

Where the appellant is not present, the court may consider his or her appeal and may make such order as it thinks fit. If the public prosecutor or respondent is absent, and it is clear to the court that the notice of appeal was not served upon him or her, the court may not make any order adverse to, or to the prejudice of, the respondent but must adjourn the hearing of the appeal to a later date, and must issue to the respondent the requisite notice which shall be served by the court registrar. If service of the notice cannot be effected on the respondent, the court must proceed to hear the appeal in his or her absence.

Admission of additional evidence on appeal

Pursuant to s 317 CPC, additional evidence may be taken either by the High Court judge or a magistrate acting under order. Before such evidence is allowed, certain conditions laid down in the English case of *R* v *Parks* [1961] 3 All ER 634 and cited with approval by the Federal Court in *Mohamed bin Jamal* v *Public Prosecutor* [1964] MLJ 254 must be satisfied, namely, such evidence:

1. was not available at the trial;
2. must be relevant to the issue;
3. must be credible (ie well capable of belief); and
4. which, if it had been given with the other evidence at the trial, might have raised a reasonable doubt in the minds of the jury as to the guilt of the accused.

Powers of the High Court when exercising appellate jurisdiction

The powers of the High Court when exercising its appellate jurisdiction are set out in s 316 CPC. The judge may, if he or she considers there is no sufficient ground for interfering, dismiss the appeal, or may:

1. where the appeal is against an order of acquittal, reverse the order by setting aside the acquittal and either:
   (a) direct a further inquiry (where the accused was acquitted at the close of the prosecution case without his or her defence being called), or
   (b) order a retrial (where the accused was acquitted at the end of a full trial), or
   (c) substitute the order of acquittal with a conviction and proceed to sentence the accused according to law.
2. where the appeal is against an order of conviction or against sentence:
   (a) quash the conviction, set aside the sentence, and either:
      (i) acquit or discharge the accused, or
      (ii) order a retrial; or
   (b) substitute the conviction recorded by the trial court with a conviction under a different provision while maintaining the sentence; or
      (i) reduce,
      (ii) enhance, or
      (iii) alter the nature of, the sentence.
3. where the appeal is against any other order, alter or reverse the order made by the trial court.

15.4.2.2 Appeals to the Court of Appeal

Appeals to the Court of Appeal against decisions of the High Court

Appeals to the Court of Appeal may be made against decisions of the High Court:

1. in the exercise of its original jurisdiction,[42]
2. in the exercise of its appellate or revisionary jurisdiction concerning matters originating in the Sessions Court,[43] and
3. in the exercise of its appellate or revisionary jurisdiction concerning matters originating in the Magistrates' Court.[44]

There are differences, however, between appeals falling under categories (1) and (2) on the one hand and under category (3) on the other hand. Whereas in categories (1) and (2), the appeal may lie on questions of fact or law or mixed fact and law, appeals falling under category (3):

[42] CJA 1964, s 50(1)(a).
[43] CJA 1964, s 50(1)(b).
[44] CJA 1964, s 50(2).

- are confined to only questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the outcome of the appeal or revision, and
- can be pursued only with the leave of the Court of Appeal .

1. Procedure

Other than in the case of appeals falling under category (3) described above, the appellant must file a notice of appeal with the registry of the High Court within fourteen days after the date of the High Court decision.[45] In the case of appeals falling under category (3), the appellant must first apply to the Court of Appeal for the requisite leave within fourteen days after the date of the High Court decision. It is only after the Court Appeal has granted leave that the appellant files the notice of appeal within fourteen days of such leave being granted.[46]

After the appellant has filed the notice of appeal, the High Court judge must, with all reasonable speed, prepare in writing his or her grounds of decision. When the grounds are ready, the appellant will be notified. Within ten days after service of that notice, the appellant must file a petition of appeal, in five copies, with the registrar of the Court of Appeal who then extends a copy to the High Court. If the petition is not filed within the prescribed period, the appeal will be deemed to have been withdrawn, although the Court of Appeal has the power to grant an extension of time.

When all the requisite documents have been filed, the High Court registrar compiles them into an appeal record and transmits the same to the Court of Appeal. Copies will also be served on the parties.

Upon receipt of the record of appeal, the Court of Appeal may either summarily reject the appeal under s 58 CJA 1964 or set the appeal down for hearing under s 59 CJA 1964.

An appeal does not automatically operate as a stay of execution. The only exceptions are where the appellant has been sentenced to whipping or death by the High Court. In these two cases, the sentence will not be carried out until the deadline for filing a notice of appeal has expired or, where a notice of appeal has been filed, until the appeal has been determined. In all other cases, the High Court or Court of Appeal has the discretion to stay execution on any judgment, order, conviction, or sentence pending appeal on such terms as may seem reasonable to the Court.[47]

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[45] CJA 1964, s 51.
[46] Proviso to CJA 1964, s 51(2).
[47] CJA 1964, s 57.

Where an appeal is against an acquittal, the Court of Appeal may direct that the accused be arrested and brought before it. In such a case, the Court of Appeal may remand the accused to prison pending the disposal of the appeal or grant the accused bail, if applicable.[48]

At the hearing of the appeal, the parties will make their submissions in the following order:

1. the appellant;
2. the respondent; and
3. a reply by the appellant.[49]

The Court of Appeal may admit additional evidence under s 61 CJA 1964 subject to the same conditions applicable to the admission of additional evidence by the High Court in an appeal.

The powers of the Court of Appeal are set out in s 60 CJA 1964. It may, among other things, confirm, reverse, or vary the decision of the High Court, or even order a retrial. The proviso to subsection (1) of s 60 is important. It allows the Court of Appeal to dismiss the appeal if the court considers that no substantial miscarriage of justice has occurred even though it is of the opinion that the point raised in the appeal might be decided in favour of the appellant.

15.4.2.3 Appeals to the Federal Court

Appeals to the Federal Court confined to cases heard by the High Court in the first instance

Pursuant to s 87(1) CJA 1964, the appellate jurisdiction of the Federal Court in criminal cases is confined to hearing and determining 'any appeal from any decision of the Court of Appeal in its appellate jurisdiction in respect of any criminal matter decided by the High Court in its original jurisdiction'. This, in essence, means that the Federal Court can only hear and determine appeals in criminal cases which are heard by the High Court in the first instance. It does not have jurisdiction over appeals in criminal cases which originate in the subordinate courts; appeals in such cases terminate at the Court of Appeal.

Appeals against decisions of the Court of Appeal in cases which originate in the High Court may be on questions of fact or law or mixed fact and law.

The procedure for appeals to the Federal Court is substantially the same as that for appeals to the Court of Appeal. Likewise, the powers of the Federal Court, in the exercise of its appellate jurisdiction in criminal matters, are the same as those conferred upon the Court of Appeal and the High Court.[50]

[48] CJA 1964, s 56A.
[49] CJA 1964, s 60(1); RCA 1994, r 74.
[50] CJA 1964, s 86.

Figure 15.1

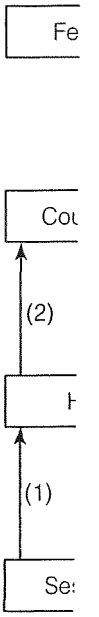

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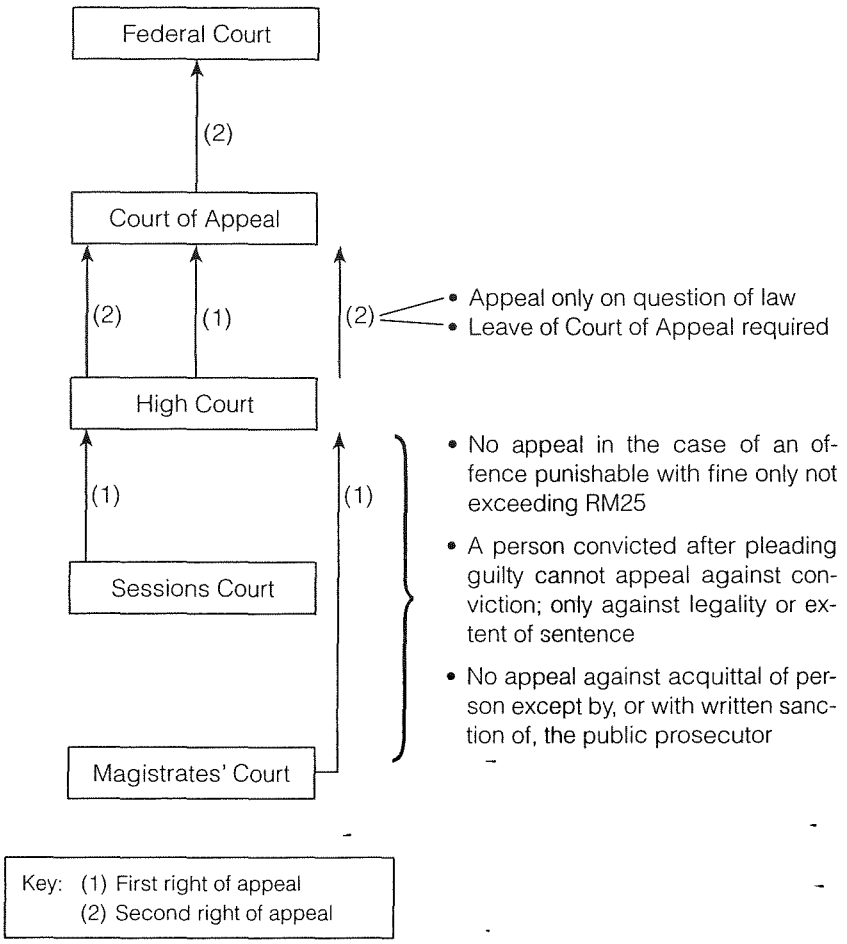
Figure 15.1 Appeals to the Federal Court



Unless otherwise stated above, all appeals are as of right and can be made on questions of fact, law, or mixed fact and law.

15.4.3 Revision

The powers of revision of the High Court have their source in ss 31 and 35 CJA 1964. Section 31 empowers the High Court to revise criminal proceedings which originate in the subordinate courts in accordance with any law relating to criminal procedure for the time being in force. That law is contained in Chapter XXXI (ss 323–327) of the CPC.

Sections 31 and 35 CJA 1964 overlap. Closer examination shows that whereas s 31 provides for revision, s 35 provides for supervision (although revision is also mentioned). Supervisory jurisdiction has its origins in the ancient jurisdiction of the Court of King's Bench

in England to issue prerogative writs (such as prohibition and certiorari) to control the exercise of jurisdiction of the inferior courts—either to keep them within the limits of their jurisdiction or compel them to observe the principles of natural justice. The High Court in its supervisory role does not re-examine the merits of the case. Instead, it examines, for example, whether the subordinate court had jurisdiction in the case or whether the presiding officer had exceeded his or her jurisdiction by acting in breach of the principles of natural justice.

There is no difference between revision in civil proceedings (s 32 CJA 1964) and in criminal proceedings (s 31 CJA 1964). Both s 32 CJA 1964 and s 323 CPC (applicable to criminal proceedings) confer substantially the same powers upon the High Court, ie to call for, and examine, the record of any proceedings in the subordinate courts for the purpose of satisfying itself as to the correctness, legality, or propriety of any decision recorded or passed, and as to the regularity of any proceedings before the subordinate courts. 'Correctness ... of any decision' allows revision in all matters of fact or law although, generally, the revisional court will decline to go into questions of fact, which should be dealt with by way of appeal. 'Legality ... of any decision' refers to the assumption (or appropriation) of jurisdiction,[51] while 'regularity of any proceedings' refers to the exercise of jurisdiction.[52] 'Propriety of any decision' refers to sentencing and other orders that lie within the discretion of the subordinate court.

Revisionary and supervisory powers of the High Court amount to paternal jurisdiction

The object of ss 31 and 35 CJA 1964 and s 323 CPC is to give the High Court a kind of paternal or supervisory jurisdiction to correct or prevent a miscarriage of justice arising from misconception of law or irregularity of procedure, neglect of proper precautions, or apparent harshness of treatment which has resulted on the one hand in some injury to the due maintenance of law and order, or on the other hand, in some undeserved hardship to individuals.[53] The powers of the High Court in revision are discretionary. They are very wide in scope to ensure the High Court is able to do justice in cases where the fault is that of the magistrate or judge of the Sessions Court.

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[51] For example, a subordinate court illegally assumes a jurisdiction it does not posses if it exercises a jurisdiction not conferred upon it.

[52] For example, a subordinate court will have acted irregularly if it fails to exercise its jurisdiction, or in the exercise of it, contravenes the principles of natural justice.

[53] Per Abdul Hamid CJ (Malaya) when delivering the judgment of the Supreme Court in *Liaw Kwai Wah & Anor* v *Public Prosecutor* [1987] 2 MLJ 69 at p 70, quoted the Indian case of *Emperor* v *Nasrullah & Ors* AIR 1928 All 287.

Strictly speaking, there is no fixed mode by which a case may be laid before the High Court for revision. Revision may be initiated in many ways including the following:

- where the magistrate or judge of the Sessions Court who entertain doubts about any decision made requests the High Court to revise such decision;
- applications made by either party to the case;
- in certain cases, where the matter is brought before the High Court as an appeal but the judge chooses to act in revision.

The procedure in a revision, once the record of proceedings in the subordinate court is before the High Court, is governed by s 36 CJA 1964 and ss 325(2) and 326 CPC. According to these provisions the parties do not have a right to be heard. However, in practice, an opportunity to be heard will be given. Section 325(2) specifically requires the judge to give the accused such an opportunity if the judge intends to make an order to the prejudice of the accused.

The powers of the High Court in revision are set out in ss 324 and 325(1) CPC. These powers are substantially the same as those which the High Court may exercise in its appellate capacity, with one exception: under s 325(3) CPC, the High Court in its revisionary capacity cannot convert an order of acquittal into one of conviction.

Questions

1. Have the amendments to the Criminal Procedure Code (Act 593) introduced by the Criminal Procedure Code (Amendment) Act 2006 (Act A1274) brought about such reforms to the criminal process as to conform to the principles proclaimed in the Universal Declaration of Human Rights 1948?
2. (a) Rogo is charged with rape. Outline the procedure at the trial.
   (b) Rogo is found guilty of rape, convicted and sentenced to imprisonment for fifteen years and five strokes of the rotan. He wishes to appeal against the conviction and sentence. Outline the procedure for appeal.
3. Explain the differences between appeal and revision in terms of:
   (a) concept and
   (b) procedure

Reading List

Farah Nini Dusuki, 'The Standard of Proof at the Close of the Prosecution's Case: Is the Question Finally Resolved?', *CLJ*, 3 (2006): lxxxv–cxvi.

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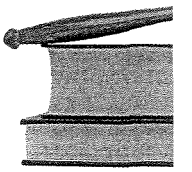

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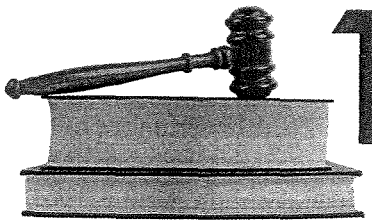

16 LEGAL AID

Chapter Objectives

Discuss the:

- **rationale for providing legal aid**
- **government-funded legal aid schemes, and**
- **Bar Council-funded legal aid scheme**

16.1 INTRODUCTION

ARTICLE 7 of the Universal Declaration of Human Rights declares: All are equal before the law and are entitled without discrimination to equal protection of the law. That principle, in essence, is enshrined in Article 8(1) of the Federal Constitution.

For all persons to be equal before the law and be granted equal protection by the law, there must be unrestricted access to justice or access to the courts. Access to the courts is thus a fundamental human right. Excluding individuals from access to the courts, for whatever reason, amounts to a violation of this basic right.

Access to the courts is a basic right and is the rationale for provision of legal aid

In practice,

- lack of knowledge of the law (and, consequently, inability to identify one's problem as a legal problem and unawareness of one's rights) and
- the problem of costs

operate against the less privileged in society.

The law, a complex set of rules expressed in technical jargon, is largely incomprehensible to the ordinary person. Such a person, a faced with a legal problem, may have no option but to seek legal advice and assistance.

The cost of engaging a legal practitioner—unless the latter is altruistic enough to waive his or her fees for the less privileged—can be prohibitive. Further, a person who contemplates taking or defending a lawsuit will have to bear in mind not only the fees payable to his or her counsel but also:

- court fees, and
- the other party's costs, ie costs which he or she, if unsuccessful, will have to pay to counsel representing the opposing party.

The less privileged members of society who desire to stand equal before the law and obtain equal protection of the law cannot possibly rely on the generosity of public spirited legal practitioners. The state must step in to introduce a national legal aid programme.

A national legal aid programme should be holistic. Ideally, it should cover:

- legal aid in criminal proceedings;
- legal aid in civil proceedings;
- legal counselling and assistance in all matters which touch and concern the law and affect a person whether directly or indirectly; and
- legal literacy and awareness.[1]

Such a programme which involves massive financial and human resources requires the participation of both the government and the legal profession.

16.2 INTRODUCTION OF THE GOVERNMENT-FUNDED LEGAL AID SCHEME

The less privileged worldwide had little or no access to the courts, and were not able to obtain proper legal redress or protect their rights, until comparatively recent times. Even the United Kingdom which can pride itself as having one of the most advanced and organized legal aid schemes started the state-funded system only in 1949. This was the era in which the welfare state was developed and access to legal service was regarded as important as access to medical services.

Malaysia is the third country in South-East Asia to implement the legal aid scheme. That scheme was introduced in 1970. Before the introduction of that scheme, legal aid was made available only to:

Provision of legal aid before 1970

(i) government servants in legal proceedings related to their official duties under the Public Officers (Conduct and Discipline)(General Orders Chapter D) Regulations 1969;
(ii) poor persons in *forma pauperis* under the Rules of the Supreme Court 1957; and
(iii) persons charged with criminal offences involving capital

[1] Cecil Rajendra, 'Legal Aid and The Protection Rights: How Effective are Domestic Legal Aid Programmes? Are There New Dimensions?', a paper presented at the 12th Commonwealth Law Conference, Kuala Lumpur, 13–16 September 1999, pp 1–2.

punishment under the Penal Code (Act 574).

The creation of a legal aid scheme in Malaysia had been contemplated way back in 1954 but the first positive step was taken only in 1960. The initiative was triggered by a letter written by a lady almoner attached to the General Hospital Kuala Lumpur who suggested that free legal representation be given to victims of accidents to enable them to claim compensation for serious residual disabilities.[2] That suggestion was supported by requests to the government from women's organizations to provide assistance to women and children in their claims for maintenance from defaulting spouses and guardians. Unfortunately, lack of funds prevented further progress being made despite the formation in 1963 of a committee comprising members of the government and the Bar Council, Malaysia to investigate, report, and make recommendations on the introduction of a legal aid scheme.

Two years later, in December 1965, the Minister of Justice announced in Parliament that the government would consider the possibility of setting up a Legal Aid Bureau (the term 'bureau' was considered more appropriate than 'department'; while the latter denotes a branch of the government managed wholly by government employees, the former was intended to mean an agency funded by the government, coordinating the functions of giving legal counselling and assistance by not only government officers but legal practitioners who volunteer to serve on panels at a reduced fee as counsel for the bureau).[3] The committee formed in 1963 was reconvened. It recommended the setting up of a Legal Aid Bureau in four regions. Pursuant to the emergency powers proclaimed on 15 May 1969, the Yang di-Pertuan Agong promulgated the Emergency (Essential Powers) Ordinance 1970 (No 39), for this purpose. That ordinance came into force on 15 July 1970 but applied only in Selangor. One month later, on 15 August 1970, the *Biro Bantuan Guaman* (Legal Aid Bureau) (BBG) was declared open by Tan Sri Abdul Kadir bin Yusof, then Minister of Law and Attorney General, the prime mover for its establishment.

Launch of BBG in 1970

Lack of funds and personnel enabled the BBG to start only a pilot project in Kuala Lumpur in September 1970. It provided only legal counselling. A sum of RM100 000 was allocated for this purpose. Its limited resources forced the BBG to prioritize. Family and

Restricted scope of legal aid initially because of limited funds and personnel

[2] Legal Aid Bureau, *The Legal Aid Scheme in Malaysia*, Kuala Lumpur, 1997, p 13; Interview with Dato' Wira Wan Yahya bin Pawan Teh, the first Director of the Legal Aid Bureau, in *Biro Bantuan Guaman, BBG 30 Tahun*, Kuala Lumpur, 2001, p 16.

[3] Interview with Dato' Wira Wan Yahya bin Pawan Teh, ibid.

matrimonial matters were given top priority because these not only formed the bulk of the cases but required urgent attention.

When the emergency was lifted, Parliament passed the Legal Aid Act 1971 (Act 26). The Act came into force on 30 April 1971. It applied throughout Malaysia.

BBG comes under the Prime Minister's Department

At its inception the BBG was placed under the Attorney General's Chambers. Following the establishment of the Ministry of Law in 1985, it was placed under that ministry. When that ministry was downsized to the Legal Affairs Division in the Prime Minister's Department in 1995, the BBG was put under that division where it has remained ever since.

16.2.1 The Laws Governing the BBG

The government-funded legal aid scheme is governed by the Legal Aid Act 1971 (Act 26)(the Act) and the Legal Aid and Advice Regulations 1970 (the Regulations) made under s 32 of the Act.[4] All sections and schedules referred to below, unless stated to the contrary, refer to sections and schedules of the Act.

Malaysia's legal aid legislation is modelled on that of Singapore

The Act is based on its equivalent in Singapore, the Legal Aid and Advice Ordinance No 19 of 1956 [since renamed the Legal Aid and Advice Act (Cap 160)]. When the creation of the legal aid scheme was contemplated, Malaysia looked at the Australian and Hong Kong legislation as well but eventually decided that the Singapore legislation was the most appropriate model for Malaysia.

16.2.2 The Objective of the BBG

The objective of the BBG is to implement Article 8(1) of the Federal Constitution which proclaims that all persons are equal before the law and entitled to the equal protection of the law by providing legal advice and representation to those who cannot afford to pay legal fees.[5]

16.2.3 Organizational Structure of the BBG

The BBG falls under the Legal Affairs Division of the Prime Minister's Department. That division is responsible for policy, financial, and service management, and for providing the infrastructure of the BBG.

The BBG is headed by the Director General of Legal Aid. The Director General is appointed by (and responsible to) the minister

[4] PU (A)299/70.

[5] Debate during the Second Reading of the Legal Aid Bill 1971, Official Reports, Parliamentary Debates, Dewan Rakyat, February–July 1971, cols 1367–92.

in charge of legal affairs from among members of the Judicial and Legal Service. He or she is assisted by two deputies:

- Deputy Director General for civil law matters and
- Deputy Director General for *Syariah* law matters.

The headquarters of the BBG is located in the Federal Government Administration Centre in Putrajaya. It has branches in major towns in all the states of Malaysia. At branch level, the BBG is headed by an Assistant Director General who is a legal officer from the Judicial and Legal Service. He or she is assisted by *Syariah* officers, qualified in *Syariah* law, from the Department of *Syariah* Judiciary of the Prime Minister's Department. All Assistant Directors General at branch level operate independently under the supervision of the Director General.

The BBG is assisted in carrying out its functions by:

- panels of solicitors (see below); and
- a team of welfare officers.

The welfare officers assist the BBG in investigating the means of the applicant for legal aid, and the desirability of assisting them.

16.3 THE ROLE OF LEGAL PRACTITIONERS

Under the legal aid scheme set out in the Act, legal aid, assistance, and representation are provided primarily by salaried officers from the Judicial and Legal Service. These officers handle the bulk of applications for legal aid. However, in exceptional cases (usually involving complex matters), applicants can be assigned to legal practitioners at the discretion of the Director General. Also, in cases where both parties to a dispute apply for legal aid, each of the parties will be assigned to different legal practitioners to avoid the possibility of a conflict of interest arising should the Director General act for either or both of the parties concerned.

Under s 5, the Director General is authorized to prepare and maintain panels of solicitors who are willing to:

- investigate, report, and give an opinion on applications for legal aid;
- act on behalf of, or represent, recipients of legal aid; or
- give general legal advice;

under the provisions of the Act. To these ends, the Director General may maintain separate panels for different purposes and different courts.

Legal practitioners thus supplement the work done by officers of the BBG. Although these legal practitioners volunteer to serve on

Legal practitioners supplement the work of BBG officers. They volunteer to serve on panels of solicitors for a nominal fee

the panels, they are paid token fees. However, some are known to waive the fees they are entitled to.

All legal practitioners may offer their services to the BBG. A legal practitioner who is excluded from the panels or any of them by the Director General may appeal to the High Court whose decision is final.

The response from legal practitioners to calls for service on the BBG panels can hardly be described as overwhelming. Nevertheless, to be fair to the public spirited practitioners, their numbers have increased over the years. When the BBG commenced its operation in 1970 only thirty-eight legal practitioners volunteered. Thirty years later, in 2000, there were approximately five hundred legal practitioners serving on the BBG panels.[6]

Legal practitioners formerly also took turns to serve on the Legal Aid Board

From the inception of the BBG until 1984, legal practitioners also served on the Legal Aid Board (the Board) established under s 6. The Board comprised the Director (now renamed the Director General) of the BBG as Chairperson and not less than two legal practitioners who were elected from the panels of solicitors on rotation. The Board made the final decisions on the merits of each application for legal aid and indorsed applications for legal representation in civil proceedings. The rationale for establishing the Board was that authorization for the expenditure of public funds based on legal merit should not be left in the hands of only one government officer but should be supported by at least two members of the public with the necessary expertise and experience.[7] The Board was unfortunately abolished when s 6 was deleted with effect from 20 January 1984 via the Legal Aid (Amendment) Act 1984 (Act A578).

There was also provision in the Act for the establishment of a Legal Aid Council (the Council). This was s 7. The Council was intended to advise the Attorney General (now to be read as the minister in charge of legal affairs) generally on the administration of the Act or on any matter referred to it by the minister. Such council was to comprise 'not less than three but not more than five members to be appointed by the [minister] from amongst persons with experience or special knowledge with regard to the workings of the courts or the social conditions in Malaysia'. This phraseology was wide enough to include legal practitioners. However, some thirty years after the BBG commenced operations, the Council had yet to be set up.[8] Whether its then imminent establishment (as announced in

[6] *New Straits Times*, 23 August 2000.
[7] Interview with Dato' Wira Wan Yahya bin Pawan Teh, above note 2, p 20.
[8] *New Straits Times*, 23 August 2000.

the press by the then de facto law minister, Datuk Dr Rais Yatim)[9] became a reality has become academic. Section 7 and Part II of the First Schedule (governing the membership and procedure of the Council) were deleted by the Legal Aid (Amendment) Act 2003 (Act A1188).

16.4 SCOPE OF LEGAL AID PROVIDED UNDER THE ACT

Services provided by the BBG

The BBG is empowered under the Act to provide the following services:

(i) To provide legal advice on all matters;
(ii) To provide legal aid and representation in criminal and civil proceedings (in the court of first instance and appellate courts) of the description specified in the Second and Third Schedules, respectively;
(iii) To educate members of the public on their rights under the law; and
(iv) To provide mediation services.

16.4.1 Legal Advice

Legal advice on all matters concerning Malaysian law

Under s 29 read together with the Fourth Schedule, the Director General or a legal practitioner on the appropriate panel of solicitors may give oral advice on all matters. This includes advice concerning any criminal cases of the description specified in the Second Schedule, and any civil cases of the description enumerated in the Third Schedule. The scope of legal advice which the BBG may provide is, therefore, very wide. The only restriction expressly imposed is that such advice must relate to Malaysian law.

The BBG officers periodically travel to rural areas to provide legal counselling

In addition to giving oral advice on all matters to persons who approach the BBG and any of its branches, the BBG runs the Legal Aid Rural Counselling Service. Under this service, the staff from all BBG branches periodically travel to rural areas giving legal counselling to those in the lower income group who do not have the means to travel to the major towns where the BBG branches are located. The creation of this service was seen as an alternative to the setting up of smaller branches in rural areas which would involve high overhead costs.[10]

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[9] *New Straits Times*, 23 August 2000.
[10] Legal Aid Bureau, *The Legal Aid Scheme in Malaysia*, Kuala Lumpur, 1997, p 27.

16.4.2 Legal Aid in Criminal Proceedings

Restricted scope of legal aid in criminal matters

Under s 10, the BBG may provide legal aid and representation in such criminal proceedings of the description specified in the Second Schedule. These are:

(i) All criminal proceedings in which the accused, being unrepresented, pleads guilty to the charge or charges and wishes to make a plea in mitigation;
(ii) Criminal proceedings under the Child Act 2001 (Act 611) [which superseded the Child and Young Persons Act 1947 (Act 232)]; and
(iii) Criminal proceedings under the Minor Offences Act 1955 (Act 336).

Despite the provisions of s 10, legal aid may be given in any criminal proceedings, whether or not specified in the Second Schedule. This is because s 10(2A), clearly meant as a parallel to s 12(3) and added to the Act in 2003,[11] confers upon the minister responsible for legal affairs the discretion to authorize in writing, the Director General to grant legal aid in any particular case of hardship if satisfied that it is in the interests of justice to do so. The minister may authorize such aid even though the applicant does not meet the eligibility requirements set out in ss 15 and 16 discussed below.

Legal aid in criminal proceedings was introduced only in 1993. Lack of financial and human resources restricted the services which the BBG could provide at its inception. As indicated above (see p 370), priority was given to civil proceedings, ie family and matrimonial matters. When legal aid in criminal proceedings was introduced in 1973 via the Legal Aid (Amendment) Order 1973,[12] it was confined only to cases designated under (i) above. Cases designated under (ii) and (iii) were added to the Second Schedule in 1982.

Narrow scope of legal aid in criminal matters given by BBG prompted the Bar Council to introduce its own legal aid scheme

It was precisely because the scope of legal aid granted by the BBG in criminal proceedings was so restricted that the Bar Council, Malaysia launched its own Legal Aid Centre (LAC) in Kuala Lumpur on 2 August 1982 (see below). The legal aid scheme devised by the Bar Council was specifically designed to supplement that funded and run by the government.

[11] Via the Legal Aid (Amendment) Act 2003 (Act A1188).
[12] PU(A)104/73.

16.4.3 Legal Aid in Civil Cases

Wide scope of legal aid in civil matters

Pursuant to s 12(1), the BBG may grant legal aid and representation in civil proceedings of a description enumerated in the Third Schedule. The list far outstrips the list of criminal matters contained in the Second Schedule. It covers mostly proceedings related to family and matrimonial matters under both the civil law and Islamic law. However, the list does extend beyond such matters to include proceedings for damages arising out of motor vehicle accidents, and proceedings concerning moneylending, tenancy, hire-purchase, as well as consumer claims.

Despite the provisions of s 12(1), the minister responsible for legal affairs is empowered under s 12(3) to authorize the Director General to give legal aid in any civil proceedings, whether or not enumerated in the Third Schedule, if satisfied that in any particular case of hardship it is in the interests of justice to do so. The minister may authorize the grant of legal aid even though the applicant does not meet the eligibility requirements set out in ss 15 and 16 (see below).

16.4.4 Legal Literacy and Education Programme

The BBG has a legal literacy and education programme to create legal awareness nationwide. The programme includes talks to grassroot leaders, and question and answer sessions on the law relating to common problems on the radio. The programme is implemented in collaboration with social organizations, government departments, and the Legal Aid Centre of the Bar Council, Malaysia.

The BBG has published twenty-three pamphlets which explain in simple Bahasa Malaysia the law concerning common problems, such as, family and matrimonial matters, the rights of an arrested person, the rights and responsibilities of a guarantor, and claims for damages arising out of motor vehicle accidents.

16.4.5 Mediation Services

Using the courts to resolve disputes can be costly in terms of money and time. Also, court proceedings, unless ordered to be held in camera, are open to the public and the media; consequently, details of the case (unless involving children and young persons) can be published in the local and national newspapers. The disadvantages of judicial settlement have led to alternative methods of dispute resolution or ADR. One of these methods is mediation.

Mediation is an informal process which involves a neutral third party—a mediator—who acts as a go-between (while maintaining confidentiality) to facilitate a mutually acceptable solution to a

dispute. The mediator may move between the parties, communicating their opinions without their having to meet. Alternatively, the mediator may operate in the presence of the parties. In either situation, it is the parties who are in control and who work out an agreement to resolve the dispute.

Mediation is a voluntary process. Should it fail, the parties would have preserved their positions and may, as a last resort, settle their dispute by referring it to the court.

Mediation has an important role to play in family and matrimonial matters, where the adversarial mode of trial has tended to emphasize, even exacerbate, existing differences between the parties; thus, not conducive to amicable settlements. In divorce cases, mediation has traditionally been used to enable the disputing spouses to work out an agreed settlement instead of having one imposed upon them by the court.

Mediation was introduced by the BBG in 2003

Mediation, which was added to the services provided by the BBG in 2003, is covered in Part V_A of the Act.[13]

Under s 29A, the minister responsible for legal affairs may authorize the Director General to provide mediation services to aided persons. Each mediation session is conducted by one or more mediators.

Any person (no qualifications or experience are specified) may be appointed as a mediator by the minister under s 29F. Persons so appointed are subjected to the general directions and supervision of the Director General. They have no right to appear or plead in any court.

Communications with a mediator are confidential. Under s 29E, if a mediation process fails, no person shall be compelled to disclose any such communications to the court unless that person offers himself or herself as a witness. In such event, that person may be compelled to disclose only such communications as may appear to the court to be necessary to be known to explain any evidence which he or she has given.

Mediation is available to any person who is or may become a party to any civil proceedings listed in the Third Schedule

Mediation is available to any person who is a party to a dispute which is or may become the subject of any civil proceedings specified in the Third Schedule. Under s 29B, mediation may be initiated either by such a person or by the Director General. Mediation may commence or continue whether or not the dispute is already the subject of civil proceedings before the court or can become one.

Mediation is voluntary

Attendance and participation in a mediation sessions is voluntary under s 29C. A party to mediation may withdraw at any time.

[13] Via the Legal Aid (Amendment) Act 2003 (Act A1188).

Recourse to mediation under the Act shall not prejudice the rights or remedies of any party to a dispute.

Section 29D requires an agreed settlement reached through mediation under the Act to be reduced into writing and signed by the parties concerned. Otherwise, it is not binding.

An agreed settlement reached through mediation must be in writing

Aided persons have availed themselves of the mediation services provided by the BBG. Almost two years after mediation was introduced it was reported the BBG had successfully resolved between 30–40% of the cases through mediation.[14] Statistics for February 2007 show that in that month the BBG resolved 191 family and matrimonial cases under Islamic Law and 22 of the same under the civil law through mediation nationwide.[15]

16.5 ELIGIBILITY FOR LEGAL AID

Not all persons qualify for legal aid under the Act. This is quite clear from the long title of the Act which reads: 'An Act to make provisions for the grant of legal aid to *certain* persons and for matters connected therewith.' (Emphasis added.)

Not all persons qualify for legal aid

The first point to note is that the word 'person' or 'persons' is not defined in the Act, although the term 'aided person' is. In the absence of a definition in the Act itself, it is proper to fall back on the definition of 'person' in the Interpretation Acts 1948 and 1967 (Act 388) to determine whether 'person' means a natural person only or includes an artificial person, such as a corporation. Since the Interpretation Acts 1948 and 1967 define a 'person' as including 'corporation', one is justified in deducing that artificial persons can, technically, apply for legal aid. If such a deduction contradicts the *raison d'etre* of the Act, an amendment to clarify this point would be in order.

16.5.1 Eligibility Criteria for Legal Advice

The eligibility criteria for legal advice only under s 29 are straightforward compared with the eligibility criteria set out in ss 15 and 16 for legal aid and representation in legal proceedings. Section 29 simply states that 'legal advice ... shall be available to persons resident and present in Malaysia'. Besides resident citizens and permanent residents, it would appear that foreign nationals legally residing and employed in Malaysia qualify for legal advice from the BBG, provided they meet the additional requirements set out in s 29(4):

Straightforward eligibility criteria for legal advice only

[14] *New Straits Times*, 22 April 2005.
[15] http:/www.bheuu.gov.my/bbg/perkhidmatan.shtml, 24 March 2008.

- satisfy the Director General that he or she cannot afford to obtain it in the ordinary way; and
- ability to pay to the Director General the nominal fee prescribed.

16.5.2 Eligibility Criteria for Legal Aid and Representation in Legal Proceedings

Persons applying for legal aid and representation in criminal and civil proceedings must satisfy the means test and the merits test

The eligibility criteria for legal aid and representation in criminal and civil proceedings are contained in ss 15 and 16. These provisions set out two tests:

(i) Means tests; and
(ii) Merits test.

16.5.2.1 Means Test

The means test places upper limits on the financial resources which an applicant possesses, above which he or she is no longer eligible for legal aid.

Two limits are laid down in ss 15(2)(b) and 16(1)(b):

(i) The applicant is entitled to full legal aid if his or her financial resources do not exceed RM25 000 per year.
(ii) The applicant is entitled to partial legal aid (ie he or she is required to make a contribution, in a lump sum or by instalment, to the sums payable on his or her account) if his or her financial resources exceed RM25 000 but do not exceed RM30 000 per year.

The Director General may refer an application to the Director of Social Welfare for a report on the means of the applicant.

16.5.2.2 Merits Test

This test is laid down in ss 15(2)(a) and 16(1)(a). This test requires the applicant to satisfy the Director General that he or she has reasonable grounds for taking, defending, continuing, or being a party to the legal proceedings (ie that the applicant is reasonably likely to succeed in the proceedings concerned).

As mentioned earlier (see p 372), before 1984 the merits test was administered by the Legal Aid Board comprising the Director General and not less than two legal practitioners. Since the abolition of the Board in 1984, the responsibility for administering the merits test falls upon the Director General.

An aided person who wishes to initiate an appeal against the decision of the first instance court is required by s 27 to satisfy a separate merits test. Such a person must:

- in the case where aid for the proceedings at first instance was granted by the authority of the minister responsible for legal affairs under ss 10(2A) and 12(3), satisfy the minister that he or she has good grounds of appeal; and
- in all other cases, satisfy the Director General likewise.

16.6 PROCEDURE FOR APPLICATION OF LEGAL AID OR ADVICE

16.6.1 Legal Advice

A person seeking legal advice must apply to the Director General

A person desiring only legal advice under s 29 must apply to the Director General, and pay the registration fee prescribed if he or she qualifies for legal advice.

16.6.2 Legal Aid in Criminal Proceedings

An accused or convicted person desiring legal aid may apply either to the magistrate or judge presiding over the court or to the Director General

Any person who is charged or convicted before or by any court, may at any time within fourteen days after being charged or convicted, apply in writing in the prescribed form to either:

- the magistrate or judge before whom he or she was charged or by whom the order was made, or
- the Director General,

for legal aid for his or her defence or for the preparation and conduct of his or her appeal, as the case may be.[16]

Where the public prosecutor has lodged a notice of appeal against any judgment, sentence, or order pronounced by any court, the respondent may apply to either:

- the magistrate or judge by whom the judgment, sentence or order was made, or
- the Director General,

for legal aid resisting the appeal.[17]

Under normal circumstances, a person desiring to be granted legal aid and representation in criminal proceedings would apply to the magistrate or judge before whom he or she is appearing. The magistrate or judge would then refer the application to the Director General.

Every application for legal aid must be accompanied by a statutory declaration verifying the facts stated in the application.[18] The

[16] S 10(3).
[17] S 10(4).
[18] S 10(5).

judge or Director General may refer the application to the Director of Social Welfare for a report on the means of the applicant.[19]

If the judge or Director General is satisfied, on the facts brought before him or her including any report by the Director of Social Welfare, that the person applying for legal aid is without adequate means to obtain legal aid and that it is desirable in the interest of justice that such legal aid should be given, he or she must certify to that effect. Upon such certification being made, the Director General may arrange for the defence of that person and for payment of the expenses of all witnesses or for the preparation and conduct of the appeal or for resisting the appeal, as the case may be.[20]

Any doubt whether an applicant's means are sufficient to enable him or her to obtain legal aid or whether it is desirable in the interests of justice that he or she should have free legal aid must be resolved in favour of the applicant.[21]

An applicant who has qualified for legal aid has to pay to the BBG the prescribed registration fee.[22]

16.6.3 Legal Aid in Civil Proceedings

Persons, who whether in their own right or in a representative capacity, desire to be granted legal aid must apply to the Director General

In contrast to criminal proceedings, in civil proceedings, any person who, whether in his or her own right or in a representative capacity,[23] wishes to be granted legal aid must apply to the Director General.[24] An application must be in the prescribed form and accompanied by a statutory declaration verifying the facts stated in the application.[25]

When an application is made, the Director General may:

(i) make inquiries concerning the means of the applicant (or refer the applicant to the Director of Social Welfare for a report on the means of the applicant) and the merits of the case;[26]

(ii) require the applicant to provide such information and documents as the Director General may require to consider the application;[27]

(iii) require the applicant to attend personally (to enable the Director General to identify the issues, needs of the applicant and appropriate remedies;[28]

[19] S 11(1).
[20] S 11(2).
[21] S 11(3).
[22] S 16B.
[23] Where the person desiring legal aid is an infant, the application must be made on the infant's behalf by his or her guardian: s 13(2).
[24] S 13(1)(a).
[25] S 13(1)(b).
[26] S 14(a).
[27] S 14(b).
[28] S 14(c).

(iv) refer the application or any matter arising out of the application to any solicitor serving on the appropriate panel to investigate the facts and make a report on those facts, or to give any opinion on the same or on any question of law arising out of the application;[29]

(v) take or cause to be taken such steps as may be necessary to safeguard the interests of the applicant pending a decision on his or her application,[30]

(vi) pay the expenses incidental to any of the abovementioned matters out of funds provided for the purpose.[31]

When satisfied that the applicant meets both the means and the merits tests, the Director General may issue a legal aid certificate. It is this certificate that signifies the applicant is entitled to be granted legal aid.

The applicant who meets both the means and the merits tests may be issued a legal aid certificate by the Director General

A legal certificate relates to only one action, cause, or matter.[32] Thus, an aided person who desires to either initiate or resist an appeal has to make a fresh application for legal aid.

Any decision made by the Director General whether or not to grant legal aid in civil (or criminal) proceedings or whether or not to certify that an aided person has good grounds of appeal is final and shall not be subject to appeal or review in any court.[33] However, applicants are not prevented from resubmitting—up to a maximum of four times—their applications on the same matter.[34]

After the Director General has approved an application for a legal aid certificate, he or she shall notify the applicant of:

(i) the amount, if any, which the applicant has to contribute, and

(ii) the terms upon which a certificate will be issued to the applicant.[35]

An applicant who agrees to the terms set out by the Director General for the issue of the certificate shall, within fourteen days of being notified, signify acceptance of those terms in the prescribed form and lodge it with the Director General. When the applicant has complied with the terms stipulated, the Director General shall issue the legal certificate.[36]

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[29] S 14(d).
[30] S 14(e).
[31] S 14(f).
[32] Reg 5(2).
[33] S 31A.
[34] Reg 11(1).
[35] Reg 5(6).
[36] Reg 5(9).

Before any other step can be taken in the proceedings, the legal aid certificate must be filed in the registry of the court in which the proceedings are pending either by the Director General or the solicitor on the appropriate panel assigned to act for the applicant.[37]

Privileges of a person granted a legal aid certificate once it is filed at the registry of the court before which the proceedings are pending

Once the legal aid certificate has been filed at the court registry, the aided person is entitled under s 21(3) to the following privileges:

- exemption from payment of court fees or any other fees for service and execution of process,
- entitlement to a copy of the judge's notes of evidence free of charge, and
- unless the contrary is expressly provided in the Act, exemption from payment of costs to any other party in the proceedings to which the certificate relates.

16.7 REVOCATION OF LEGAL AID CERTIFICATE

The Director General or any person appointed under the Act to assist him or her may revoke a legal aid certificate under s 19. The grounds justifying cancellation of the certificate are spelt out in Regulation 8 of the Regulations.

Under s 19, the Director General or any assistant may cancel any legal aid certificate issued at any time, whether or not an application has been made for the purpose, and the person to whom the certificate had been issued shall cease to be an aided person:

The date on which cancellation of the legal aid certificate takes effect

- from the date of such cancellation; or
- from the date the Director General or any assistant filed in court a notice of cancellation of the legal aid certificate where the certificate so cancelled had already been filed in the registry of any court.

The Director General or assistant concerned shall inform the person to whom the certificate had been issued of the cancellation of such certificate.

The grounds justifying cancellation

The grounds justifying cancellation of the certificate listed in Regulation 8 are the following:

(a) a request by the person to whom the certificate had been issued that it be cancelled;
(b) any payment towards the contribution to which the aided person had been required to make is more than thirty days in arrears;

[37] S 21(2).

(c) the Director General is satisfied that the proceedings to which the certificate relates have been disposed of;
(d) the aided person has died;
(e) the Director General is satisfied, upon further determination, that the financial resources of the aided person exceed the upper limits prescribed;
(f) the Director General is satisfied that the aided person has wilfully failed to comply with any regulations;
(g) the Director General is satisfied that the aided person has required the proceedings to be conducted unreasonably so as to incur an unjustifiable expense to the BBG;
(h) the Director General considers, upon receipt of information, that the aided person no longer satisfies the merits test.

Provided that in cases (g) and (h) above, before the certificate is cancelled, the aided person has been given an opportunity to show cause why the certificate should not be cancelled.

16.8 THE LEGAL AID SCHEME FUNDED BY THE BAR COUNCIL

16.8.1 Introduction

As is clear from the above discussion, the legal aid scheme funded by the government is tilted heavily in favour of civil matters and proceedings. Under the Act, legal aid in criminal proceedings is restricted to three descriptions as listed in the Second Schedule:

(i) Proceedings in which the accused, unrepresented by counsel, pleads guilty to the charge or charges and wishes to make a plea in mitigation;
(ii) Proceedings under the Child Act 2001 (Act 611);
(iii) Proceedings under the Minor Offences Act 1955 (Act 336).

16.8.2 Introduction to the Bar Council-funded Legal Aid Scheme

One of the objectives of the Malaysian Bar is 'to make provision for or assist in the promotion of a scheme whereby impecunious persons may be represented by advocates and solicitors'.[38] It was partly because of the Bar Council's commitment towards making this objective a reality and partly because of the restricted scope of legal aid in criminal proceedings under the Act that the Bar Council set up a subcommittee on legal aid to study the feasibility of running a legal

Desire to assist the poor and the narrow scope of legal aid in criminal proceedings in the government-funded scheme are the reasons for the setting up of the Bar Council-funded scheme

[38] S 42(1)(h) of the Legal Profession Act 1976 (Act 166).

aid scheme for the less privileged. The subcommittee co-opted representatives from the BBG and the Faculty of Law, University of Malaya to devise a scheme which would:

- supplement the government-funded legal aid scheme;
- provide assistance to the less privileged; and
- provide some clinical legal education to chambering students.

Bar Council legal aid scheme launched on 2 August 1982

Finance was a problem initially. The Bar Council intended its legal aid scheme to be funded by the legal profession; but the Bar Council was not then in a position to provide the initial outlay. The Asia Foundation came to its rescue and the expenses for the pilot project of the Legal Aid Centre in Kuala Lumpur were taken care of for the first few months. The Bar Council thereafter launched its legal aid scheme on 2 August 1982.

Bar Council legal aid scheme is fully financed by the legal profession

Today, the Bar Council Legal Aid Centres are wholly financed by the legal profession. Members of the Malaysian Bar contribute RM100 each annually to the Legal Aid Fund administered by the Bar Council. In addition, they are obliged to take on at least one legal aid case a year if called upon to do so.

16.8.3 The Legal Aid Centres

Location of Legal Aid Centres (LACs)

Under the Bar Council legal aid scheme, Legal Aid Centres are established in the capital of each of the states in Peninsular Malaysia. None exists in Sabah and Sarawak as the Legal Profession Act 1976 (Act 166) has not been extended to East Malaysia.

Each LAC is serviced by volunteer legal practitioners who provide their services, gratis

Each Legal Aid Centre (LAC) is run and serviced by legal practitioners who volunteer their services, free of charge. These practitioners are assisted by a full-time administrative staff and chambering students. The legal practitioners serve either as panel lawyers or panel consultants. The former serve, at least once a month, for half a day or full day at the centre, giving legal counselling, assistance, talks, etc. The latter undertake to provide, each year, legal representation in two cases. A practitioner willing to serve as a panel consultant indicates to the centre his or her area of specialty. Chambering students serve two weeks of their chambering period at the centres. They gain practical experience by assisting the panel lawyers to draft pleas in mitigation.

16.8.4 Scope of Legal Aid under the Bar Council Scheme

The range of programmes and services provided under the Bar Council legal aid scheme can be seen from the survey below of those carried out by the LAC in Kuala Lumpur.

The LAC in Kuala Lumpur provides:

- free legal advice;
- legal aid and representation in legal proceedings; and
- a legal awareness and education programme.

Services provided by the LAC in Kuala Lumpur

A preliminary observation may be made: the services encompass criminal and civil matters (under the civil law and Islamic law).

16.8.4.1 Legal Advice

Free legal advice on a spectrum of subjects

Legal advice is dispensed free of charge. The provision of legal advice spans a spectrum of subjects including criminal and civil matters in relation to which legal representation in court proceedings is offered to those eligible. The range of common problems on which advice is solicited, and given, include bail applications in criminal cases, family and matrimonial matters under both the civil law and Islamic law, matters pertaining to consumer law, housing and tenancy, employment and labour law, constitutional and immigration law (eg problems concerning citizenship, passport and identity card).

16.8.4.2 Assistance and Representation in Criminal Proceedings

Comprehensive scope of legal aid in criminal proceedings

The scope of legal assistance and representation in criminal proceedings is clearly more extensive than that offered by the BBG. The scope is virtually comprehensive. It excludes only criminal offences that carry the death penalty or life sentence (for which legal aid is given by the government, even before 1970, to the unrepresented accused who qualify: see above, p 369).

16.8.4.3 Assistance and Representation in Civil Proceedings

Varied scope of legal aid in civil proceedings

The civil matters concerning which legal assistance and representation are given are of the description already mentioned above in connection with legal advice. In addition, the list includes public interest litigation.[39] Excluded from the list are matters relating to claims for damages arising from motor vehicle accidents, conveyancing, debt collection, defamation, probate, and administration of estate.

16.8.4.4 Legal Awareness and Education Programme

A limited legal education programme

Sometime in the second half of the 1990s, a nationwide legal awareness and education campaign was launched. Thousands of legal literacy leaflets were distributed in markets and shopping complexes.[40]

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[39] It may be of interest to note that the LAC and the Bar Council's Human Rights committee filed the historic public interest case affecting land rights of six Orang Asli of the Temuan tribe in Kampong Bukit Tampoi, Dengkil in the *Sagong bin Tasi Case* [2002] 2 MLJ 591.

[40] http://www.legalaidkl.org 15 July 2008.

16.8.4.5 Other Programmes

Other programmes

Apart from the services outlined above, the LAC in Kuala Lumpur conducts the following programmes:

- Dock Brief Programme: to provide free legal advice, legal assistance, and representation to unrepresented persons in the Magistrates' Courts in Jalan Duta in criminal cases, in particular, in mitigation pleas, bail applications, and remand proceedings.
- Prisons/Juvenile Homes Programme: to provide free legal advice and assistance to remand detainees in the Sungai Buloh and Kajang prisons and juveniles in juvenile homes.

Joint programmes with several NGOs

In addition, the LAC conducts legal aid clinics in collaboration with a number of non-governmental organizations to provide free legal aid and assistance:

- LAC/AWAM (All Women Action Society)
- LAC/WAO (Women's Aid Organization)
- LAC/SIS (Sisters In Islam)
- LAC/PTF (Pink Triangle Foundation)
- LAC/TMWC (Tenaganita Migrant Workers Clinic) and
- LAC/UNHCR (United Nations High Commissioner for Refugees)

16.8.5 Eligibility for Legal Aid and Representation in Legal Proceedings

As the Bar Council-funded legal aid scheme is designed to provide legal aid and representation to impecunious persons, a means test is applied to determine whether or not an applicant qualifies.

To be eligible for legal aid and representation, an applicant must satisfy a means test comprising two components

The means test comprises two components:

(i) Disposable monthly income test, and
(ii) Disposable capital test.

Applicants must satisfy both components to qualify for legal aid and representation in legal proceedings.

Under the first component of the means test, monthly income (after deduction of monthly expenses) must not exceed:

- RM650 (for a single person)
- RM900 (for a married couple)

Under the second component, a person or persons must not own property worth more than the upper limit specified:

- House : RM45 000
- Car : RM10 000
- Motorcycle : RM4500
- Savings : RM5000

16.8.6 Procedure for Application of Legal Aid and Representation

Applications determined within one month from date of application

The applicant must bring all relevant documents to the LAC where he or she will be interviewed. The LAC will determine whether or not the applicant qualifies within one month of the date of application. Applicants who qualify for legal aid and representation will have to pay:

- an administrative fee of RM20 for a file to be opened; and
- the actual expenses of the lawyer assigned to their case (eg for travelling, photocopying, etc.)

Aided persons will not be charged the professional fees payable to counsel.

Questions

1. Examine and evaluate the legal aid scheme funded by the government.
2. Study the existence of two separate legal aid schemes in Malaysia, one funded by the government and the other by the Bar Council, Malaysia.
   (a) Is the continuance of the two separate schemes the best solution to the problem of making justice accessible to all, regardless of financial resources?
   (b) Investigate the wastage, if any, in terms of time, financial and human resources, likely to arise from the co-existence of the two schemes.
3. Khadija is a Muslim convert. She arrived from Kampuchea more than ten years ago and has worked in various capacities, legally, until she became the third wife of a Malaysian senior government officer four years after her arrival. She has borne him two children, aged four and two. One year ago her husband abandoned her and her children. She is unemployed and her savings are fast running out. She contemplates getting a divorce but does not know where to get advice and legal assistance. Advise Khadija.

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