

Common Law of Malaysia: A Practical Approach

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Abstract

Malaysia is a common law country with a distinct common law-based legal system. The Malaysian legal system comprises various sources such as: Federal and State Constitutions, Legislations, Judicial decisions, English law, Islamic law, and customary law. English law includes English common law, rules of equity and certain legislations. Although the English law, which is entrenched in Malaysian legislations and judicial decisions, is a predominant source of Malaysian law, other sources of law, such as, Islamic law and Customary laws, have also played a significant role in shaping the Malaysian legal system to be what it is today. There was a time when English and Islamic laws conflicted especially during the British occupation. The conflict of laws is less evident today due to active legislative interventions and strict judicial observance of jurisdictional boundaries.

Keywords: Malaysia, Common law, Legal systems, Shariah.

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Common Law of Malaysia: A Practical Approach

Introduction

Malaysia has a unique legal system, it is known as Common Law of Malaysia, it takes the name from the former Colony, where the British ruled the country through indirect means. This article seeks to examine the statutory basis for the reception of English law in Malaysia and the prospects of the development of the Malaysian common law within the existing legal framework. English law, which includes the common law, rules of equity and legislation, is the predominant source of the Malaysian law. It remains the source and one of the greatest contributors to Malaysian jurisprudence even today. The historical basis of the reception of English law in Malaysia is somewhat unclear and contentious.

The received wisdom on this point is that English law was first introduced in Malaysia in the island of Penang by way of the First Charter of Justice by the British Crown in 1807. It is said that Penang was then an uninhabited island. The claim that Penang¹ was a deserted island cleared the way for the introduction of English law through the application of the English doctrine of reception. However, a growing body of literature based on reliable historical documents proves that the allegedly uninhabited island was in fact inhabited by well-organized Malay communities. It follows then that the English doctrine of reception on the basis of which English law was originally introduced in Malaysia could be without a foundation.

In this article analyses the development of the administration of Courts in Malaysia from the post-independence periods. We will also look at the status of Islam as the official religion during the Malacca Sultanate² and the application of Islamic law throughout the administration during that period are agreed upon by most historians. In the modern structure Shariah courts consisting of subordinate and superior levels with the Sultan as the head of the judiciary shows the existence of an organized structure which

¹ Island of Penang is an Island in the northwest of Malaysia, the Ruler of Kedah gave it to the British.

² Wilkinson, R. J. (1912). The Malacca Sultanate. *Journal of the Straits Branch of the Royal Asiatic Society*, (61), 67-71.

recognized natural justice as one of the rules of law. After Merdeka (independence), the restructuring and restoring of Shariah Courts in Malaysia took more than 40 years. Subsequently, the current Shariah Court acts and state enactments have been amended and improved to bring them into line with the policy of the government, current situations, and legal pluralism in Malaysia. The process of reform of the Shariah Court was slow, but Muslims in Malaysia handled the matter with tolerance, perseverance, and patience, and, most importantly, without jeopardizing the peace and harmony which is the hallmark of Malaysia as a nation.

This article will discuss the historical point of the Malaysian Common Law, with special references to the history. This article begins by considering the statutory basis of the reception of English law³ in the Straits Settlements via the doctrine of reception. The Separation of power is an important of the rule of law; we will examine the Separation of power within the Malaysian system. As lawyers, we must look at the Judiciary as one of the vital organs of the state and discussing selection and appointment of judges. The last part will discuss the Shariah Courts. It's powers and rules of selecting judges and the procedures on how to become a lawyer in Shariah Courts.

1. History of Common Law

After the fall of Malacca, its ruling elite and their followers eventually established the sultanate of Johore, commanding the southern Peninsula and Riau Islands. Elsewhere, on the Peninsula other states flourished, usually claiming legitimacy through connection with the former Malacca and paying tribute to Johore. In spite of Portuguese attempts to subdue Johore it prospered in the late 16th and early 17th centuries, especially when the Dutch arrived on the scene⁴. Basing themselves in Java, the Dutch saw Johore as a useful counterweight to the Portuguese at Malacca and developed trading agreements with the

³ The Malaysian legal system draws on various sources such as: Federal and State Constitutions, federal and state legislation, judicial decisions, English law, Islamic law and customary law. English law includes English common law, rules of equity and certain imperial statutes.

⁴ Wilkinson, R. J. (1912). The Malacca Sultanate. *Journal of the Straits Branch of the Royal Asiatic Society*, (61), 67-71.

Common Law of Malaysia: A Practical Approach

Sultanate⁵. In 1641 Johore helped the Dutch oust the Portuguese from Malacca, which then became a minor, outlying base in a growing Dutch Empire.

The Dutch had considerably greater resources than the Portuguese had been able to deploy and also, by the 17th century, greater resources than another Western power, the Spanish, who had established themselves in the Philippine archipelago in the previous century. But Dutch resources were not enough to full-fill their intended goal of trade dominance over the region. The Malay-Muslims trading world of the Peninsula and Archipelago thus persisted with considerable vigor after the advent of the Dutch⁶. Dutch has remained the local laws as called *adat*. The Dutch could not resist the British pressure on Malaya Archipelago and it has to postpone itself more into south of archipelago where it occupied Indonesia for a long time.

The British were the one, who ruled Malaya for a long time but with indirect rule. ***“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”.***

Malay adat is applied to the Malays. The non-Malays were governed by their personal laws or if they were British subjects, English Law. These Laws continued to apply, subject to modifications made by specific legislation, until the formal reception of the English Law. The formation of the Federated Malay States showed that the Ruler of the states started to accept the British intervention in Malaysia. Section 2(1) of the Civil Law Enactment 1937, give the permission to accept of the English law provided that the inhabitants permit and subject to such qualifications as local circumstances render necessary. The Unfederated Malay States started to accept the English Law when the English Law formally received and applied by the virtue of Civil Law (Extension) Ordinance 1951 but indirectly the Unfederated Malay States had accepted the English Law before those dates as mentioned by *Edmonds J.C. in Shaik Abdul Latif Bux v Shaik Alias Bux*;

⁵ Aun, W. M. (1975). *An introduction to the Malaysian legal system*. Heinemann Educational Books (Asia).

⁶ Hamzah, A., & Bulan, R. (2003). *An introduction to the Malaysian legal system*. Fajar Bakti.

“The British treaties with the Ruler 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..”.

Common law and the rulers of equity were applied in the Straits Settlement by virtue of the three Charters of Justice. The Charters, however, did not not apply to the Malay States. With the introduction of the Residential System in Perak by virtue of the terms stated under Pangkor treaty 1874, the Malay Sultans were forced to establish the English-style courts and the English judges were appointed. With such a judicial “apparatus” in place, it was therefore only a matter of time that the common law and equity are applied. The Civil Law Enactment No.3 of 1937 had been enacted, and this was the first step towards the enforcement of the English Legal System in the Malay States. The application of the said ordinance was only for the Federated Malay States, but on 31 December 1951, it was extended to Penang and Malacca.

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 the English Law.
- The decision of the courts established by the British administrators. The higher rank 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 influences⁷.

1.1. Malaysian Experience

⁷ Andaya, B. W., & Andaya, L. Y. (2001). *A history of Malaysia*. University of Hawaii Press.

Common Law of Malaysia: A Practical Approach

When the British came to Malaysia in 1786, they brought with them their own English legal system. They argued that the first occupied land, i.e. Penang Island, was a virgin territory with no proper legal and administrative systems in place.⁷ They used that as an argument to introduce English law to Penang through the introduction of the First Charter of Justice in 1807. The First Charter of Justice is considered to be the first statutory introduction of English law to Malaysia even though the Charter itself does not explicitly say so⁸.

In 1963 Malaysia was formed and, at that time, there were altogether three different statutes which recognized the application of English law in Malaysia, i.e. the Civil Law Ordinance 1956 in West Malaysia, the Application of Law Ordinance 1949 in Sarawak and the Application of Law Ordinance 1951 in North Borneo. Soon after the formation of Malaysia, the Civil Law Ordinance 1956 was extended to Sarawak and Sabah through the Civil Law Ordinance (Extension) Order 1971⁹. Hence, all three statutes were amalgamated into one single statute called the Civil Law Act 1956 (Act 67), which has since applied to the whole of Malaysia¹⁰.

1.2. Development of Malaysian Common Law

In fact, the Malaysian courts have been developing Malaysian common law in the past and are continuing to do so. Any English law that has been accepted by the Malaysian court in toto or in part crystallizes into Malaysian common law. There is nothing wrong with accepting the English law in toto, but that has to be done in compliance with section 3(1) of the Civil Law Act 1956. If there is lacuna in the Malaysian law, then the court may apply English law in toto provided all the hurdles in section 3(1) are satisfied. In this way, the English law crystallizes into a Malaysian

⁸ In *In the Goods of Abdullah*, above n. 2 at 9, the judge, Sir Benjamin Malkin, suggested that the Charter had the effect of introducing English law into the Penang island. However, in *Regina v Willans Esquire* [1808–84] 3 Ky 16, Sir Peter Benson Maxwell reiterated that the Charter did not have any explicit provision indicating that it introduced English law to Penang.

⁹ Ibrahim A (1971) *The Civil Law Ordinance in Malaysia*. Malayan Law Journal 2: lviii.

¹⁰ Ibrahim A and Joned A (1987) *The Malaysian Legal System*. Kuala Lumpur: Dewan Bahasa dan Pustaka.

common law through the statutory doors of section 3(1). This was done by judges in many cases in the past.

It can surely be said that the Malaysian courts are empowered by section 3(1) to develop the Malaysian common law. In fact, it has been argued that the Federal Court, as the highest court in the country, has the responsibility to develop the Malaysian common law by taking into consideration local circumstances and inhabitants (Alsagoff, 2010: 26)¹¹. Thus the development of the Malaysian common law must be done in the manner prescribed by section 3. Section 3 is a complex section, which provides the concrete methodology that ought to be followed by the courts when faced with a lacuna in the law.

2. Separation of Powers

The doctrine of Separation of powers is an western doctrine but this has also been implemented before the west reintroduced it. Separation of Powers are also pillars of rule of law, where government by the law not based in single power Monarchy alone could bring tyranny, aristocracy alone could bring oligarchy, and Democracy could bring anarchy. Liberty exist not only from personal freedom and rights but with limitations in accordance to law so there would not be abuse of powers on other individual liberty as Lord Acton says; *'All powers corrupts and absolute power corrupts absolutely'*¹². A government may be so constituted, as no man shall be compelled to do things to which the law does not oblige him, nor forced to abstain from things which the law permits. This is the importance of check and balance. In this part we will look at the separation of Power under Malaysian constitution. The separations of power in Malaysia system are similar with English legal system in United Kingdom.

2.1. Head of State

The king of Malaysia or Yang Di-Pertuan Agong. Yang Di-Pertuan Agong (here on to be called as YDPA) is the ceremonial executive and is an integral part of the Parliament. The Parliament in Malaysia shall consist of the YDPA and the two Majlis

¹¹ Alsagoff SA (2010) Principles of the Law of Contract in Malaysia. Kuala Lumpur: LexisNexis.

¹² Acton, L., & Himmelfarb, G. (1950). Essays on freedom and power.

Common Law of Malaysia: A Practical Approach

(Meclis, house of representative can be appointed and elected). The Yang Di-Pertuan Agong is the part of the Parliament, but that is merely a **formality** and he actually does not play main role in Parliament. Besides that, the Prime Minister and the Minister are from the Dewan Rakyat (elected House of Representatives) and Dewan Negara. Minister comes from Parliament is a lapsed of Separation of Power as well, these two organs should be separated in membership and function. The governing system of Malaysia is based on the Westminster parliamentary system with the features of a federation.

Another important point in Malaysia is the State Rulers, as Malaysia is divided into states. Nine of the states of Malaysia are constitutionally headed by traditional Malay rulers. The nine states are collectively referred to as the Malay States. State constitutions limit eligibility for the thrones to male Malay Muslim of royal descent. Seven are hereditary monarchies based on agnatic primogeniture; they are Kedah, Kelantan, Johor, Perlis, Pahang, Selangor and Terengganu¹³.

Every five years or when a vacancy occurs, the rulers convene in the Conference of Rulers (In local Malay language: Majlis Raja-Raja) to elect among themselves the Yang di-Pertuan Agong, the federal constitutional monarch and head of state of Malaysia¹⁴. As the Yang di-Pertuan Agong is elected among the rulers, Malaysia as a whole is also an elective monarchy. The process has been practiced in the region for centuries. Even the *intervention of former colonial powers did not change the structure of governing when it comes to the rulers*, however the powers of rulers decreased by time.

2.2. Judiciary

¹³ Shah, N. (2004). The monarchy in contemporary Malaysia. Institute of Southeast Asian Studies.

¹⁴ Federal Constitution of Malaysia: Article 38-2(b);

(2) The Conference of Rulers shall exercise its functions of -

(a) electing, in accordance with the provisions of the Third Schedule, the Yang di-Pertuan Agong and Timbalan Yang di-Pertuan Agong;

(b) agreeing or disagreeing to the extension of any religious acts, observances or ceremonies to the Federation as a whole;.

The dual system of law is provided in Article 121(1A) of the Constitution of Malaysia¹⁵. Article 3 also provides that Islamic law is a state law matter with the exception for the Federal Territories of Malaysia¹⁶. Islamic law refers to sharia law, and in Malaysia it is known and spelled as Shariah. The court is known as the Shariah Court. Looking at the Malaysian legal system as a whole, sharia law plays a relatively small role in defining the laws on the country. It only applies to Muslims. With regards to civil law, the Shariah courts has jurisdiction in personal law matters, for example marriage, inheritance, and apostasy. In some states there are sharia criminal laws, for example there is the Kelantan Shariah Criminal Code Enactment 1993. Their jurisdiction is however limited to imposing fines for an amount not more than RM 5000, and imprisonment to not more than 3 years. In August 2007, the then Chief Justice of Malaysia proposed to replace the current common law application in Malaysia with sharia law¹⁷.

It is important to note that in 1988 the newly inserted clause of Article 121 (1A). Article 121(1A) was inserted into the Malaysian Constitution.

Article 121(1A) reads:

“The courts referred to in Clause 1 (i.e. the two High Courts of Malaya and Sabah and Sarawak and the inferior courts provided by the federal law) shall have no jurisdiction in respect of any matter within the jurisdiction of the Shariah Courts”.

Muslims in this country are governed by Islamic Family Law. Article 121(1A) sought to grant exclusive jurisdiction in the administration of Shariah law to Shariah courts. Before the enactment of Article 121(1A), the decisions of the Shariah courts could be reviewed by the Civil High Courts. Parliament’s intention was plain or so it seemed so. The legitimate expectation was that the amendment would reduce jurisdictional conflicts and friction between the Shariah courts and the Civil courts.

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¹⁶ Mutalib, H. (1993). *Islam in Malaysia: from revivalism to Islamic state?*. NUS Press.

¹⁷ Muzaffar, C. (1987). *Islamic resurgence in Malaysia*.

Common Law of Malaysia: A Practical Approach

3. Sources of Law

Malaysia practices the mixed legal system which includes the Common Law, Customary Law and Islamic law. Malaysia's legal system contain laws which have taken place from three momentous periods in Malaysian history from the Malacca Sultanate, to the raise of Islam in to Asia, then the indigenous culture of British colonial rule which introduced a constitutional government and the common law. The law of Malaysia is primarily come from the common law legal system. The sources of Malaysian Law can be classified into two different laws which are written and unwritten.

3.1. Federal Constitution and Constitution of State

The Federal Constitution is said to be the highest legal authority of land. The constitution was drafted by the Reid Commission in 1956 with 5 representatives from India, British, Pakistan and Australia¹⁸. The constitution came into force following the independence on August 31, 1957. It consists of 15 parts, 183 articles and 13 Schedules. Article 4(1)¹⁹ state that the constitution is the supreme law of federation and any law passed after Merdeka Day which is inconsistent with this constitution shall, to the maximum extent of inconsistency, be void. Article 159 and 161E provides provisions to allow the constitution to be amended with the condition of 2/3rds majority in both houses of Parliament agreeing to the amendment²⁰.

The Second leg of the written law is the State constitution, State Constitution is the same as Federal Constitution, except it is set by the states in Malaysia. The 8th schedule of the Federal Constitution mentions certain provisions that are to be included in the State Constitutions such as state executive members, finance, the state legislative assembly,

¹⁸ Trindade, F. A., & Lee, H. P. (1986). *The constitution of Malaysia: further perspectives and developments: essays in honour of Tun Mohamed Suffian*. Oxford University Press.

¹⁹ Federation Constitution Article number: 4

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

²⁰ Sheridan, L. A., Groves, H. E., & Malesia. (1967). *The Constitution of Malaysia*. Oceana Publications.

roles of the Sultan or Yang di-Pertua Negeri, and etc. Article 71²¹ mentions that all state constitutions must contain their provisions, otherwise the Parliament can enforce those provisions or abolish any provision in the state constitution that contradict with those provisions. It is made clear that the Ruler of the state shall not exercise his powers except what is written in the State Constitution²².

3.2. Legislation

Legislations are the laws that are established by the Parliaments at federal level and by the State Legislative Assemblies at the state level. In Malaysia, the legislative gets its authority from the Federal Constitution. It mentions the scope of the Parliament and the State Assembly. If the Parliament (or any State Assembly) makes a law which is not in its scope of authority or contradicts with the constitution, the courts can declare that as null and void²³. Article 74 of Federal Constitution²⁴ states that parliament may make law conferred in the Ninth schedule.

3.3. Applicable English Law

The law of Malaysia is mainly based on the common law legal system that means that English law forms part of the laws of Malaysia. In Article 160 of the Federal

²¹ Article number: 71

(1) The Federation shall guarantee the right of a Ruler of a State to succeed and to hold, enjoy and exercise the constitutional rights and privileges of Ruler of that State in accordance with the Constitution of that State; but any dispute as to the title to the succession as Ruler of any State shall be determined solely by such authorities and in such manner as may be provided by the Constitution of that State.

²² Bin Hasyim, M. S. (1976). *An introduction to the Constitution of Malaysia*. Government Printer.

²³ Harding, A. J. (1996). *Law, government and the constitution in Malaysia*.

²⁴ Article number: 74

(1) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List of the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).

(2) Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.

(3) The power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution.

Common Law of Malaysia: A Practical Approach

Constitution²⁵ states the definition of law which includes ‘the common law in so far as it is in operation in the Federation or any part thereof’ that concerns the extent to which the English law is applicable in Malaysia. In the Section 3 of the Civil Law Act 1956 (Act 67) (Revised 1972) –‘**any subsequent march in English authority is not embodied**’. gives the meaning of the English law which means ‘the common law of England and the rules of equity’ and, in prescribed circumstances, English statutes²⁶.

As it is discussed above the reception of English Common Law was introduced in staged and it is applicable up to date. However, despite the clear and categorical wording of section 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 decision made after such dates, though not binding, are persuasive²⁷.

4. Shariah Law

The Malay Sultanate of Malacca was frequently used as the starting point of reference on Islamic administration. However, it does not mean that the religion of Islam first came to Malacca but rather due to fact that the Malay Sultanate of Malacca was the epicentre of the Islamisation process in the Malay Archipelago²⁸.

The Sultan being the Head of Islamic Religion is assisted by the Islamic Religious Council in all matters but excluding Islam law and administration of justice which are within the function of the Mufti and Syariah courts. The Federal Constitution recognizes the religion of is Islam as religion of federation, Article 3 reads as follows;

²⁵ **Article number: 160**

(2) In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say –

"Existing law" means any law in operation in the Federation or any part thereof immediately before Merdeka Day;

²⁶ Shears, P., Stephenson, G., & James, P. S. (1996). James' introduction to English law. Oxford University Press, USA.

²⁷ Mohamad, T. A. H., & Trakic, A. (2015). The reception of English law in Malaysia and development of the Malaysian common law. *Common Law World Review*, 44(2), 123-144.

²⁸ Syed Naguib al-Attas (1969), *Preliminary Statement on a General Theory of theIslamization of the Malay-Indonesian Archipelago*, Kuala Lumpur: Dewan Bahasa dan Pustaka, p. 15.

*(1) Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation*²⁹.

The Federal constitution is the highest law of the Country and it also guarantees the other religions to be practiced freely within the federation³⁰. By the virtue of Article 11 of Federal constitution which states the following;

Article number: 11

(1) Every person has the right to profess and practice his religion and, subject to Clause (4), to propagate it.

4.1. Sources of Shariah Law

The main source of any Islamic Law is the Divine Book of Islam, Out of these primary sources, Quran is considered as the first primary or fundamental source of Islamic Law. The Quran is the revealed Book of God. The basic source of Islamic Law is divine revelation³¹. All sources of Islamic law must be in essential agreement with the Quran, the most fundamental source of Islamic knowledge. When the Quran itself does not speak directly or in detail about a certain subject, Muslims only then turn to alternative sources of Islamic law. The second important source is the Sunnah, the Tradition and acting of the Prophet of Islam, which Muslim adhere to his teachings which are based on the Quran.

²⁹ Article number: 3

- (1) Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.
- (2) In every State other than States not having a Ruler the position of the Ruler as the Head of the religion of Islam in his State in the manner and to the extent acknowledged and declared by the Constitution, all rights, privileges, prerogatives and powers enjoyed by him as Head of that religion, are unaffected and unimpaired; but in any acts, observance or ceremonies with respect to which the Conference of Rulers has agreed that they should extend to the Federation as a whole each of the other Rulers shall in his capacity of Head of the religion of Islam authorize the Yang di-pertuan Agong to represent him.

³⁰ Ibrahim, A. (1992). Towards a history of law in Malaysia and Singapore. Dewan Bahasa dan Pustaka, Ministry of Education Malaysia.

³¹ Ramizah Wan Muhammad, 'The Theory and Practice of Sulh (Mediation) in the Malaysian Shariah Courts' (2008) 16(1) IIUM Law J 33.

Common Law of Malaysia: A Practical Approach

Shariah Courts are still under the jurisdictions of states since Islamic matters and Islamic law fall under the state jurisdiction. Nevertheless, the JKSM took the initiative to bring uniformity to Islamic law in the states³². Consequently, the JKSM has created Shariah Court laws for the Federal Territory of Kuala Lumpur. It is expected that states in Malaysia will follow the Federal Territory Acts³³. Some of the statutes that are legislated by the state government to govern the Shariah courts;

- Administration of Islamic Law Act 1993 (Akta Undang-undang Pentadbiran Agama Islam)
- Family Law Act (Wilayah-Wilayah Persekutuan) (Amendment) 2006 (Akta Undang-undang Keluarga)
- Evidence Act 2005 (Akta Keterangan Mahkamah Syariah)
- Civil Procedural Laws Act 2005 (Akta Pentabiran Acara Mal)
- Criminal Procedural Laws Act 2005 (Akta Pentadbiran Tata cara Jenayah)
- Syariah Criminal Offences Act 1997 (Akta Kesalahan Jenayah Syariah)

One of the objectives of the Syariah Court is to give swift and efficient treatment to each case registered in each court. Cases go on trial not more than 21 days after the date of registration.³⁴ Therefore the courts must have strong governing laws especially when it comes to the sources of the Law and its procedures.

5. Court Structure

5.1. Common Law Courts

In this part we will be talking about the two courts systems. At first will be discussed the Civil Courts and the second will be the Shariah Courts.

To begin with Superior Courts, there are three courts with different jurisdiction within what is known as the Superior Court. They are the Federal Court: the highest court in the

³² Muslehuddin, M. (1977). *Philosophy of Islamic Law and the Orientalists a Comparative Study of Islamic Legal System*.

³³ *Enforcing Syariah Court Decision*, (2008) printed: New Straits Times (Malaysia) 16.

³⁴ Practice Direction No. 2/2001 issued by JKSM on 2 February 2001.

land, the Appeal Court, the High Court of Malaya and the High Court of Sabah and Sarawak. Each is head by a federal judge called the Chief Justice of the Federal Court, President of the Appeal Court and Chief Judge of the High Courts of Malaya and Sabah and Sarawak respectively

Secondly, the lower courts are called Subordinate Courts. The lower courts consist of the Magistrates' Courts and Sessions Courts in Malaysia have the power in control the both criminal and civil matters³⁵.

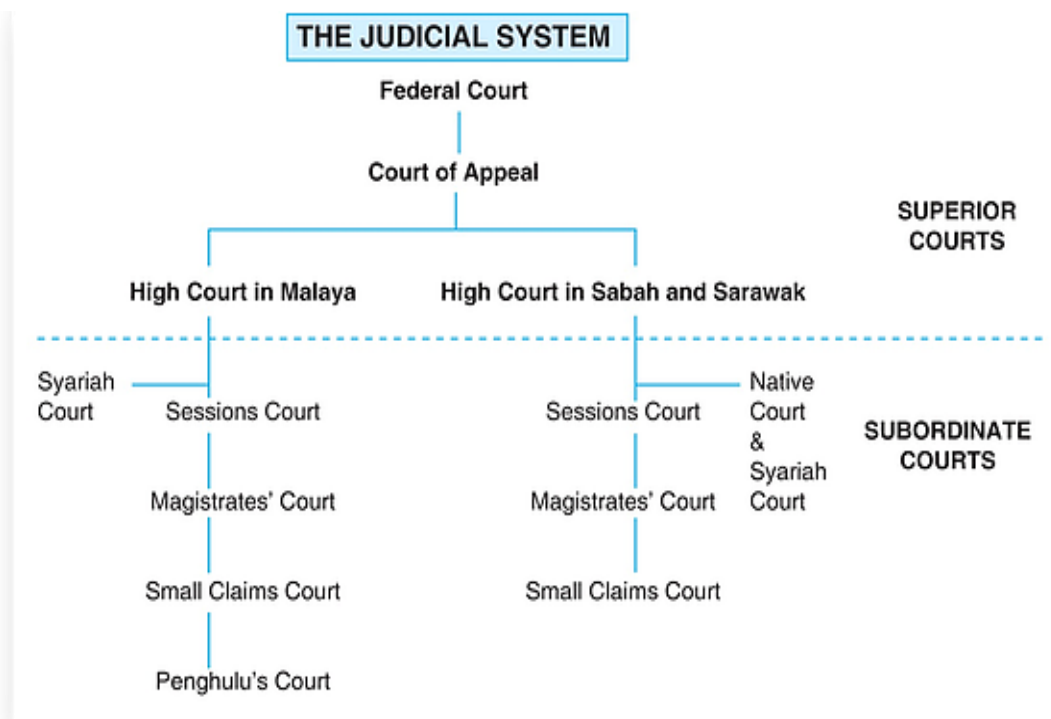


Table A, illustrates Court Structure in Malaysia

The Judiciary System, includes two types of trials, criminal and civil. The hierarchy of courts begins from Pengulu's Court though it does not have clear provisions as it is based on adat or the local traditions, the lowest organized court is the Magistrates' Court, Sessions Court, High Court, Court of Appeal, and finally, the Federal Court³⁶. The

³⁵ Aun, W. M. (1975). An introduction to the Malaysian legal system. Heinemann Educational Books (Asia).

³⁶ Teik, K. B. (1999). The Malaysian judiciary since independence. *Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions*, 174.

Common Law of Malaysia: A Practical Approach

jurisdiction of the courts in civil or criminal matters are contained in the Subordinate Courts Act 1948.

The superior courts are governed by the Courts of Judicature Act 1964³⁷. Article 121 of the Constitution³⁸ provides for two High Courts of co-ordinate jurisdiction, the High Court in Malaya, and the High Court in Sabah and Sarawak. Thus this creates two separate local jurisdictions of the courts – for Peninsular Malaysia and for East Malaysia.

5.2. Appointment of Judges

The appointment of the Chief Justice is governed by Article 122B of the Constitution of Malaysia³⁹ whereby the Yang di-Pertuan Agong (King) appoints the Chief Justice on the advice of the Prime Minister of Malaysia after consulting the Conference of Rulers. As for the appointment of the President of the Court of Appeal, the Chief Judge of Malaya, the Chief Judge of Sabah and Sarawak, and other Federal Court

³⁷ Teik, K. B. (1999). The Malaysian judiciary since independence. *Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions*, 174.

³⁸ **Article number: 121**

(1) Subject to Clause (2) the judicial power of the Federation shall be vested into High Courts of co-ordinate jurisdiction and status, namely-

(a) one of the States of Malaya, which shall be known as the High Court in Malaya and shall have its principle registry in Kuala Lumpur; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Borneo and shall have its principle registry at such place in the States of Sabah and Sarawak as the Yang di- Pertaun Agong may determine;

³⁹ **Article number: 122**

(1) The Supreme Court shall consist of a president of the Court (to be styled "the Lord President of the Supreme Court"), of the Chief Justices of the High Courts and, until the Yang di- Pertaun Agong by order otherwise provides, of four other judges and such additional judges as may be appointed pursuant to Clause (1A).

- (1A) Notwithstanding anything in this Constitution contained, the Yang di- Pertaun Agong acting on the advice of the Lord President of the Supreme Court may appoint for such purposes or for such period as he may specified any person who has held high judicial office in Malaysia to be an additional judge of the Supreme Court: Provided that no such additional judge shall be ineligible to hold office by reason of having attained the age of sixty- five years.

- (2) A judge of High Court other than the Chief Justice may sit as a judge of the Supreme Court where the Lord President considers that the interests of justice so require, and the judge shall be nominated for the purpose (as occasion requires) by the Lord President.

judges, similar procedure is taken with the additional requirement of consultation with the Chief Justice⁴⁰.

The lower courts, the appointment of Sessions Court judges is governed by Section 59 of the Subordinate Court Act 1948⁴¹. They are appointed by the Yang di-Pertuan Agong upon the advice of the respective Chief Judges.

Section 78 of the Subordinate Courts Act 1948 provides that the appointment of magistrates are done by the respective state government upon the advice of the respective Chief Judges, except for magistrates in the Federal Territory, where they are appointed by the Yang di-Pertuan Agong upon the advice of the Chief Judge.

Section 60 reads as follows: *Qualifications of Sessions Courts Judges, No person shall be appointed to be a Sessions Court Judge unless he is a member of the Judicial and Legal Service of the Federation.*

In light with the provisions, a person is qualified to be appointed as a judge of the Superior Courts if he or she is a Malaysian citizen and either:

- a lawyer who has practised in any of the Superior Courts for at least 10 years just before his or her appointment; or
- a member of the Judicial and Legal Service or of the legal service of a State for at least 10 years just before his or her appointment.

5.3. Becoming a Lawyer

In Malaysian practice a law graduate can be an advocate and solicitor at the same time. All matters pertaining to the qualifications and requirements for admission to the Bar in Malaysia are governed by the provisions under the Legal Profession Act 1976 (the

⁴⁰ Jawan, J. A. (2003). *Malaysian politics & government*. Karisma Publications.

⁴¹ Section 59 of the Subordinate Court Act 1948 reads as follows: Constitution and territorial jurisdiction of Sessions Courts: (1) The Yang di-Pertuan Agong may, by order, constitute so many Sessions Courts as he may think fit and shall have power, if he thinks fit, to assign local limits of jurisdiction thereto. also be held at any other place within the limits of their jurisdiction

Common Law of Malaysia: A Practical Approach

Act). To be eligible for admission, a candidate must satisfy all requirements as are provided in the Act which may be broadly categorized as follows:

- Academic requirements
- Practical requirements
- Formal requirements

As to the academic requirements, this is satisfied if a candidate can show that he/she is a 'qualified person' within the meaning of section 3 of the Act⁴². Under the Act, 'qualified person' means any person who *(a) has passed the final examination leading to the degree of Bachelor of Laws of the University of Malaya, the University of Malaya in Singapore, the University of Singapore or the National University of Singapore;*

Those who have not graduated from the local universities can become and advocate and solicitor through The Certificate in Legal Practice (CLP), which is a 9-month long post-graduate course and examination taken by foreign law graduates and graduates of Bachelor of Jurisprudence (Hons)/B.Juris (Hons) from University of Malaya and Bachelor of Legal Studies (Hons)/BLS (Hons) from Universiti Teknologi MARA, to become a qualified lawyer in Malaysia.

The examination is conducted by the Legal Profession Qualifying Board of Malaysia and is governed by the Legal Profession Act 1976. The Board allows degree holders from shortlisted universities in the United Kingdom, Australia, and New Zealand to sit for the examination

Malaysian law and its practice are part and parcel of the Common law of England according the same act it states that; *` is a barrister-at-law of England`* in order to be

⁴² Legal Profession Act 1976 (the Act); Section 3, "Faculty of Law" means the Faculty of Law of a University established under the Universities and University Colleges Act 1971 [Act 30], the Faculty of Law of the Universiti Teknologi MARA established under the Universiti Teknologi MARA Act 1976 [Act 173] and the Kuliyyah of Law of the International Islamic University of Malaysia established pursuant to the Companies Act 1965 [Act 125]

admitted to the Bar Council and become an advocate and solicitor one must be a barrister in England⁴³. These are the requirements that a person must then satisfy the practical and formal requirements before he/she may petition for admission.

According to the rules set by the bar council once the requirements are fulfilled then pupillage is the next step a 9 months of practice. The graduate from law school has at least a basic knowledge of substantive and adjectival law but the advocate and solicitor is concerned with the practice of law which is very different from the academic study of law.

The work of an advocate and solicitor covers a very large field. He has to know the law or where to find it. The law is a vast subject and no one can hope to know all of it. A competent advocate and solicitor has a practical working knowledge of those parts of the law with which his practice is commonly concerned but he has to know where to look to be able to find the answers to the questions which his client's problem pose. A substantial part of his work consists of diagnosing accurately what questions arise out of the situation presented to him by his client and the research to find the answers⁴⁴.

6. Shariah Courts

Malaysia has a dual system, where the civil courts are the general courts and the Shariah Courts cater only to the issues of Muslims. In short there is a parallel system of state Shariah Courts which has limited jurisdiction over matters of state Islamic (Shariah) law⁴⁵. The Shariah Courts have jurisdiction only over matters involving Muslims, and can generally only pass sentences of not more than three years imprisonment, a fine of up to RM5,000, and/or up to six strokes of the cane. In this part we will look at the Shariah courts and sharia lawyers⁴⁶.

⁴³ Section 3 of the Legal Profession Act 1976

⁴⁴ <http://www.malaysianbar.org.my/pupillage.html>; as per time when it was retrieved on 03 January 2017.

⁴⁵ Jusoh, H. (1991). *The position of Islamic law in the Malaysian constitution with special reference to the conversion case in family law*. Dewan Bahasa dan Pustaka, Kementerian Pendidikan Malaysia.

⁴⁶ Ibrahim, A. (1982). *Islamic law in Malaysia*.

Common Law of Malaysia: A Practical Approach

The Shariah courts have passed through different changes since the time Malaysia had the merdeka (Independence). One of the most important stages was in 1988 with the clear separation of civil courts and Shariah courts by the virtue of article 121 (1A)⁴⁷. The next big step was in 1998 with the introduction of Jabatan Kehakiman Syariah Malaysia (here onwards to be abbreviated as JKSM) the Department of Shariah Courts. In 1998, the federal government took measures to improve the administration of Shariah Courts in Malaysia and established the JKSM on 1 March 1998. The judicial department at the state level was also established so that there would be coordination between the state and the federal level. The administration of Syariah Courts was streamlined whereby the summons and warrants by the Syariah Courts in one state could be served in another state⁴⁸.

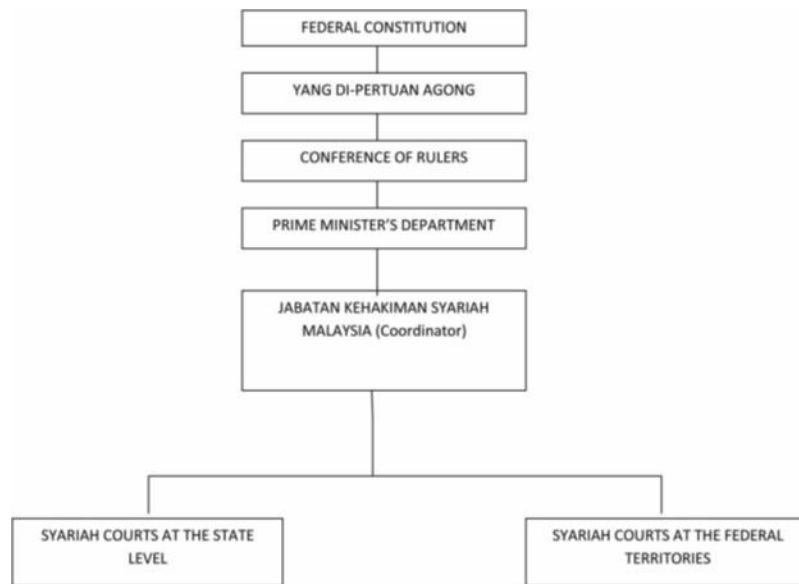


Table 2, Structure of Shariah Courts

Shariah Courts in Malaysia have seen a positive change since the merdeka (independence), the system at the first was a floating system as it has not been stabilized due to mission regulations and governing institutions. The most important step in this

⁴⁷ As it is explained in above sections.

⁴⁸ Ramizah Wan Muhammad, 2008) 'The Theory and Practice of Sulh (Mediation) in the Malaysian Shariah Courts' (16(1) IIUM Law J 33.

stage was the clear separation of jurisdiction which came into force by the Article 121 (1A) of the Federal Constitution.

6.1. Appointment of Judges

The formal power to appoint Shariah judges belongs to the traditional head of religion in those states that have hereditary rulers, and to the head of state in those that do not. In the Federal Territories, the formal appointment of Shariah judges is by the head of state of Malaysia, the Yang di-Pertuan Agong, who is elected from among the hereditary rulers⁴⁹. In the Federal Territories, for example, the Chief Shariah Judge, Shariah high court judges, and the Shariah Court of Appeal judges are appointed by the Yang di-Pertuan Agong on the advice of the minister responsible for Islamic affairs, after consulting the Majlis.

Shariah subordinate court judges are appointed by the Yang di-Pertuan Agong on the recommendation of the Chief Shariah Judge. In the state of Selangor, the sultan appoints judges to the Shariah High Court on the advice of the Majlis and after consulting with the Chief Shariah Judge⁵⁰.

It is a very clear that the religious affairs are subject to the state laws and there is a specific law of each state, as it can be seen the case of appointment of the judges is very diversified as it is based on the local laws.

Qualifications for Shariah court judges are almost uniform. The appointment to the Shariah courts there and in other parts of Malaysia is open only to those who have obtained at least a bachelor's degree. This is because judges are appointed from the ranks of the civil service, and the basic educational qualification required for appointment as a Shariah officer within the civil service is a bachelor's degree⁵¹. This degree may be obtained from any recognized institution of higher education either in Malaysia or abroad. In addition to the required bachelor's

⁴⁹ Administration of Islamic Law (Federal Territories) Act 1993, Act 505 of 1993, §§41-44

⁵⁰ Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003 [Administration of the Religion of Islam (State of Selangor) Enactment 2003], Enactment 1 of 2003, § 38.

⁵¹ Kamali, M. H. (2000). *Islamic law in Malaysia: Issues and developments*. Ilmiah Publishers.

Common Law of Malaysia: A Practical Approach

degree, however, candidates for a position on the Shariah court must obtain a professional qualification in the form of either a postgraduate professional diploma from the International Islamic University or another recognized institution, or a double degree in both law and Shariah, called an “LL.B. in Shariah⁵².”

In general the Shariah Courts requires an extra qualification from the normal judges. Basically the process is as follows the judges has to be first holding a bachelor degree in laws named LLB, with this qualification that can apply to be judges in lower courts in Malaysia⁵³. To be a judge in Shariah courts there has to be another degree in Shariah Law or Islamic Law. After receiving it, one is eligible to become a judge in lower Shariah Courts of Malaysia.

6.2. Becoming a Lawyer

In order for he/she to be an a lawyer in Syariah courts are two ways;

- a. Being a practicing advocate and solicitor
- b. Graduated with a degree in Islamic Law (Shariah Law) from a recognized university

The practicing lawyers are eligible to apply for becoming a Shariah lawyers if they have been practicing as advocate and solicitor in the Malaysian courts. The eligibility of the Shariah lawyer is based on these conditions:

- Muslim
- Malaysia Citizen
- Aged 21 years
- Academically Qualified

⁵² See generally, IIUM, *supra* note 35, Bachelor of Law Shariah (Hons.) LL.B.S., <http://www.iiu.edu.my/aikol/programmes-courses/undergraduate-programmes/bachelor-law-shariah-llbs>; for the curricular requirements of the prerequisite LL.B. program, see Bachelor of Law (Hons.) LL.B., <http://www.iiu.edu.my/aikol/programmes-courses/undergraduate-programmes/bachelor-law-llb>.

⁵³ Shuaib, F. S. (2008). Strengthening Administrative Institutions of Islamic Law in Malaysia: An Overview. *Shariah Journal*, 16, 443-464.

- Not a bankrupt
- No Syariah or Civil criminal offence⁵⁴

The second way is for those who graduated directly from a university that issues Degrees in Shariah Laws⁵⁵. In Malaysia at the time of merdeka, the Islamic law was much weaker to to the supremacy of common law, however the practice was wide in rural areas. A brief history, the first professional diploma program for Syariah officers was created in the 1980s under the leadership of Professor Ahmad Ibrahim in the Kulliyah of Laws at the International Islamic University of Malaysia (“IIUM”), which offers a bachelor’s degree in Shariah Laws⁵⁶.

In Malaysian Syariah Courts issue the Certificate of practice, which is given after a committee is set up to evaluate the application and see if the criteria set above are satisfied. In case the criterias are satisfied then the committee approves the certificate to be issued.

Conclusion

In conclusion, the Malaysian Common Law system has a very long history. The long history has created a dual system, that is the result of two distinct set of laws which were applied at the same time for centuries. Islamic Laws were in place long before the colonial powers arrived. Colonial powers like Dutch and the Portuguese did not directly interfere with the religion but slowly introduced their set of laws in Melaka as the only part the occupied was the Sultanate of Melaka. However the British ruled the country through advisers and protection given to the Sultans. The advisers could give advises in

⁵⁴ The Department of Shariah Courts of Malaysia, official web portal.

<http://www.esyariah.gov.my/portal/page/portal/Portal%20E-Syariah%20BI/Portal%20E-Syariah%20Permohonan%20Peguam/Portal%20E-Syariah%20Peguam%20Syarie%20WP#c>

⁵⁵ Yahya, M., Nadzar, F., Masrek, N., & Rahman, B. A. (2011, July). Determinants of UTAUT in measuring user acceptance of e-syariah portal in syariah courts in Malaysia. In *The 2 nd International Research Symposium in Service Management Yogyakarta, Indonesia*.

⁵⁶ Bachelor of Law Shariah (Hons.) LL.B.S. Programme Description, INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA, [hereinafter named as IIUM] <http://www.iium.edu.my/aikol/programmes-courses/undergraduate-programmes/bachelor-law-shariah-llbs> (list visited Dec. 12, 2015).

Common Law of Malaysia: A Practical Approach

every matter except Islamic matters. The Shariah matters were solely matters of the Sultan and his appointed Mufti, which was allocated place in the Common Law.

Merdeka or the independence gave to Malaysia a great constitution which was formed by Reid commission after a long research. This resulted in a great separation of powers also created a new style of government which was the Constitutional Monarchy with an extensive power given to the Prime Minister and creating two houses of Parliament. The Judiciary in this part was the crucial point where the constitution has created then a free and fair judiciary system. More importantly it gave birth to the dual system of judiciary. Where the normal civil courts is allocated the Shariah Courts, it was by the virtue of Article 3 of Constitution of Malaysia and later Article 121 (1A) gave a clear distinction on the powers of jurisdiction for the two system of courts.

Another aspect discussed was the judges and lawyers, at the time of independence and today in the civil law there is a very slight change. Judges are suggested by the president of each court to the Prime Minister, whom has to suggest these names to the YDPA to appoint the judges. The same procedure applies for the Shariah Court Judges. In order for one to be an advocate and solicitor has to graduate from a local university and the good part of this is that the law is very flexible with those who are graduated abroad under Common Law system they still have the eligibility to become a lawyer. In addition those who are qualified to become lawyers in Shariah Courts must first be lawyers in civil courts. Then they are able to apply for the Shariah lawyer under Shariah courts.

To sum up, the modern times of Democracy and Liberalism has shown that more choices more solid system you create. The modern judiciary of Malaysia is a set of two distinct systems which are intertwined with one another that from a great system catering to the people of Malaysia.

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