

## The Judiciary

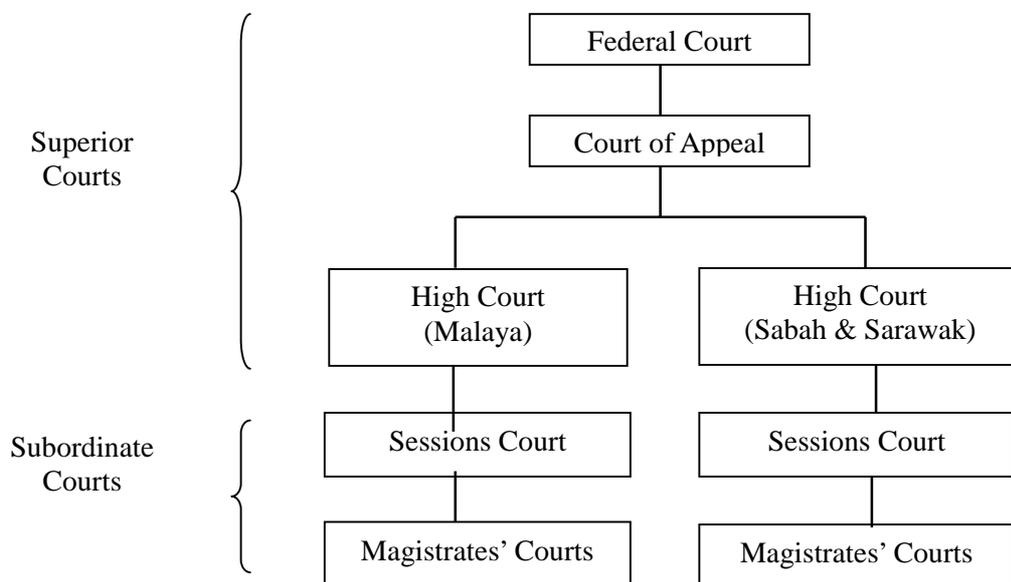
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| 著者                              | Sharifah Suhanah Syed Ahmad, Roy Rajasingham   |
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# Chapter 1

## THE JUDICIARY

The Malaysian legal system is based upon the English common law system which Malaysia inherited by virtue of a long history of colonization by the British. Central to the Malaysian legal system is a written Constitution based upon the Westminster model. The organs of government and administration, together with their respective powers and functions are to be found within the Malaysian Federal Constitution.

The Malaysian Judiciary is established under Part IX of the Constitution. Article 121 establishes the current hierarchy of courts:



The Federal Court consists of a President of the Court (styled as the Chief Justice of the Federal Court), President of the Court of Appeal, Chief Judges of the High

Courts and seven other judges.<sup>1</sup>

The Court of Appeal consists of a Chairman (styled as the President of the Court of Appeal), and ten other judges.<sup>2</sup>

The High Courts consist of a Chief Judge and not less than four other judges. The number of other judges of the High Court may not exceed forty-seven for the High Court in Malaya, and ten for the High Court in Sabah and Sarawak.<sup>3</sup>

## **1. APPOINTMENT AND QUALIFICATION OF JUDGES OF THE SUPERIOR COURTS**

The Chief Justice of the Federal Court, the President of the Court of Appeal and the Chief Judges of the High Courts and the other judges of the Federal Court, Court of Appeal and High Courts are appointed by the *Yang di Pertuan Agong* on advice of the Prime Minister and after consultation with the Conference of Rulers.<sup>4</sup> The Prime Minister's advice must be preceded with consultations made with appropriate parties. For example, before tendering his advice as to the appointment of a judge other than the Chief Justice of the Federal Court, the Prime Minister is to consult the Chief Justice.<sup>5</sup> Before tendering his advice as to the appointment of a Chief Judge of a High Court, the Prime Minister is to 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.<sup>6</sup>

Before tendering his advice as to the appointment of a Judge other than the Chief Justice, President or a Chief Judge, the Prime Minister is to consult, if the appointment is to the Federal Court, the Chief Justice of the Federal Court; if the appointment is to the Court of Appeal, the President of the Court of Appeal, and if the appointment is to one of the High Courts, the Chief Judge of that court.<sup>7</sup>

A person is qualified for appointment as a Judge of the Federal Court, a judge of the Court of Appeal or a Judge of any of the High Courts if he is a citizen and for the

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<sup>1</sup> Federal Constitution, Art. 122(1).

<sup>2</sup> *ibid*, Art. 122A(1).

<sup>3</sup> *ibid*, Art. 122AA(1).

<sup>4</sup> Federal Constitution, Art. 122B(1).

<sup>5</sup> *ibid*, Art. 122B(2).

<sup>6</sup> *ibid*, Art. 122B(3).

<sup>7</sup> *ibid*, Art. 122B(4).

ten years preceding his appointment he has been an advocate of those courts or any of them or a member of the judicial and legal service of the Federation or of the legal service of a State, or sometimes one and sometimes the other.<sup>8</sup>

## **2. TERMS OF OFFICE AND REMUNERATION OF JUDGES OF THE FEDERAL COURT**

A judge of the Federal Court is to hold office until he attains the age of sixty-five or such later time, not being later than six months after he has attained that age.<sup>9</sup> A judge of the Federal Court may at any time resign his office by writing under his hand addressed to the *Yang di Pertuan Agong*, but he may not be removed from office except in accordance with provisions of the Constitution. The *Yang di Pertuan Agong* is empowered to have a judge removed from office, but representations to that effect must first of all be made either by the Prime Minister or the Chief Justice after consulting the Prime Minister.<sup>10</sup> Removal from office may be made upon the following grounds, that is, breach of any provision of the Judges' Code of ethics or on the ground of inability, from infirmity of body or mind or any other cause. Upon such representation being made, the *Yang di Pertuan Agong* must appoint a tribunal and refer the representation to it and removal from office may be effected only upon the recommendation of the tribunal.<sup>11</sup>

The Tribunal is to consist of not less than five persons who hold or have held office as Judge of the Federal Court, the Court of Appeal or a High Court or persons who hold or have held equivalent office in any other part of the Commonwealth.<sup>12</sup> The Tribunal is to be presided over by the Chief Justice of the Federal Court, the President and the Chief Judges according to their precedence among themselves, and other members according to the order of their appointment. Pending any reference or report of the Tribunal, the *Yang di Pertuan Agong* may on the recommendation of the Prime Minister and, in the case of any other judge after consulting the Chief Justice, suspend a

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<sup>8</sup> Art. 123.

<sup>9</sup> Art. 125(1).

<sup>10</sup> Art. 125(2).

<sup>11</sup> Art. 125(3).

<sup>12</sup> Art. 12(4).

Judge of the Federal Court.<sup>13</sup>

Remuneration of judges of the Federal Court is provided for by law and charged on the Consolidated Fund. Such law may also provide for other terms of office of the judges.<sup>14</sup>

The conduct of a judge of the Federal Court, Court of Appeal or High Court is not to 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. Neither can the conduct of judges be discussed in the Legislative Assembly of any state.<sup>15</sup>

### **3. JURISDICTION OF COURTS**

The jurisdiction and powers of courts under the Malaysian hierarchy of courts are contained principally in the Courts of Judicature Act 1964 (Act 91) for the superior courts (that is, the Federal Court, the Court of Appeal and High Court) and in the Subordinate Courts Act 1948 (Act 92) for the subordinate courts (Sessions and Magistrates' courts).

#### **(1) Federal Court**

In the exercise of its original jurisdiction, the Federal Court is empowered to determine whether a law made by Parliament or by the Legislature of a State is invalid on the ground that Parliament or the Legislature of the State has no power to make laws, and as to disputes on any question between States or between the Federation and any State.<sup>16</sup>

Where in any proceedings before another court a question arises as to the effect of any provision of the Constitution, the Federal Court shall have jurisdiction to determine the question and remit the case to the other court to be disposed of in accordance with the determination.<sup>17</sup> Where in any proceedings in the High Court a question arises as to the effect of any provision of the Constitution, the judge hearing

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<sup>13</sup> Art. 125(5).

<sup>14</sup> Art. 125(6).

<sup>15</sup> Art. 127.

<sup>16</sup> Federal Constitution, Art 128(1),

<sup>17</sup> *ibid*, Art 128(2).

the proceedings may stay the same on such terms as may be just to await the decision of the question by the Federal Court.<sup>18</sup> An order staying proceedings in the High Court under this issue may be made by the Judge of his own motion or on the application of any party and it can be made at such stage of the proceedings as the Judge may see fit.<sup>19</sup> The reference of a constitutional question to the Federal Court by the High Court shall be by way of special case stating the question in a form, which might permit of an answer being given either in the affirmative or negative.<sup>20</sup>

The *Yang di Pertuan Agong* may refer to the Federal Court for its opinion any question as to the effect of any provision of the Federal Constitution which has arisen or appears to him likely to arise, and the Federal Court shall then pronounce in open court its opinion on any question so referred to it.<sup>21</sup>

In its appellate jurisdiction, the Federal Court is empowered with jurisdiction to hear and determine 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.<sup>22</sup>

In a civil case, an appeal shall lie from the Court of Appeal to the Federal Court with leave of the Federal Court granted in accordance with section 97 of the Courts of Judicature Act 1964 -(a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction, and (b) from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to such provision.<sup>23</sup>

## **(2) Court of Appeal**

The Court of Appeal has appellate jurisdiction in both civil and criminal matters. In respect of criminal matters the Court of Appeal has jurisdiction to hear and determine any appeal against any decision made by the High Court in the exercise of its original jurisdiction, and in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.<sup>24</sup> An appeal to the Court

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<sup>18</sup> Court of Judicature Act 1964, section 84(1).

<sup>19</sup> *ibid.*, section 84(2).

<sup>20</sup> *ibid.*, section 84(3).

<sup>21</sup> Federal Constitution, Art 128(2).

<sup>22</sup> Courts of Judicature Act 1964, section 87(1).

<sup>23</sup> *ibid.*, section 96.

<sup>24</sup> *ibid.*, section 50(1).

of Appeal in this case is with leave of the Court of Appeal and such appeal is to be confined only to 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 event of the appeal or revision.<sup>25</sup>

In civil matters, the Court of Appeal has jurisdiction to hear and determine appeals from any judgment or order of any High Court whether made in the exercise of its original or appellate jurisdiction.<sup>26</sup> There are, however, several matters, which are non-appealable to the Court of Appeal:<sup>27</sup>

- (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 parties;
- (c) where the judgment or order relates to costs only which by law are left to the discretion of the court, except with 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.

### **(3) High Court**

The High Court has both original and appellate jurisdictions for both civil and criminal matters. In its original criminal jurisdiction, the High Court is empowered to try all offences committed within its local jurisdiction; all offences committed on the high seas on board any ship or on any aircraft registered in Malaysia; all offences committed by any citizen or any permanent resident on the high seas on board any ship or aircraft; all offences committed by any person on the high seas where the offence is piracy by the law of nations.<sup>28</sup> In addition, the High Court may also try 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 written law the commission of which is certified by the Attorney-General to affect the security of Malaysia committed, as the case may be, on the high seas on board any ship or aircraft registered in Malaysia; offences by any ship or aircraft registered in Malaysia; offences by any citizen or any permanent resident on the high seas on board any ship or aircraft,

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<sup>25</sup> *ibid*, section 50(2).

<sup>26</sup> *ibid*, section 67(1).

<sup>27</sup> *ibid*, section 68(1).

<sup>28</sup> *ibid*, section 22(1)(a).

or by any citizen or any permanent resident in any place without and beyond the limits of Malaysia.<sup>29</sup> The High Court may pass any sentence allowed by law.<sup>30</sup>

The general, civil jurisdiction of the High Court include that of trying all civil proceedings where the cause of action arose within the local jurisdiction of the court, or the defendant or one of several defendants resides or has his place of business within such local jurisdiction, or the facts on which the proceedings are based exist or are alleged to have occurred, or any land, the ownership of which is disputed is situated within the local jurisdiction of the court.<sup>31</sup>

The High Court has specific civil jurisdiction in respect of the following matters:<sup>32</sup>

- (a) Jurisdiction under any written law relating to divorce and matrimonial causes
- (b) the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981;
- (c) jurisdiction under any written law relating to bankruptcy or to companies;
- (d) jurisdiction to appoint and control guardians of infants and generally over the person and property of infants;
- (e) jurisdiction to appoint and control guardians and keepers of the person and estates of idiots, mentally disordered persons and persons of unsound mind, and
- (f) jurisdiction to grant probates of wills and testaments and letters of administration of the estates of deceased persons leaving property within the territorial jurisdiction of the court and to alter or revoke such grants.

The High Court may refer any question arising in any cause or matter other than a criminal proceeding by the Public Prosecutor, for inquiry or report to any special referee. The report of a special referee may be adopted wholly or partially by the High Court and enforced as a decree, judgment or order.<sup>33</sup>

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<sup>29</sup> *ibid*, section 22(1)(b).

<sup>30</sup> *ibid*, section 22(2).

<sup>31</sup> *ibid*, section 23(1).

<sup>32</sup> *ibid*, section 24.

<sup>33</sup> *ibid*, section 24A(1).

The High Court shall, in the exercise of its jurisdiction, have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.<sup>34</sup>

The High Court hears both criminal<sup>35</sup> and civil appeals.<sup>36</sup> However, no appeal shall lie 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 RM10,000 or less except on a question of law.<sup>37</sup> An appeal shall lie from any decision of a subordinate court in any proceedings relating to maintenance of wives or children, irrespective of the amount involved.<sup>38</sup>

The High Court is imbued with special powers of revision of both criminals<sup>39</sup> and civil proceedings. The High Court may call for and examine the record of any civil proceedings before any subordinate court 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 of any such subordinate court.<sup>40</sup> In addition, the High Court is provided with general supervisory and revisionary jurisdiction over all subordinate courts, and may in particular if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested, at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof, and may remove the same into the High Court or may give to the subordinate court such directions as to the further conduct of the same as justice may require.<sup>41</sup>

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<sup>34</sup> *Ibid*, section 25(1) inherent jurisdiction of court 'may be defined as being that reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observation of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them the source of the inherent jurisdiction of the court is derived from its nature as a court of law; so that the limits of such jurisdiction are not easy to define, and indeed appear to elude definition: Sir Jack Jacob; see *R Rama Chandran v The Industrial Court* [1997] I MU 145; *Ngan Tuck Seng & Anar v Ngan nn Groundnut Factory Sdn Bhd* [1999] 5 MLJ 509.

<sup>35</sup> *ibid*, section 26.

<sup>36</sup> *ibid*, section 27.

<sup>37</sup> *ibid*, section 28(1); the 'amount in dispute or the value of the subject-mater' must relate to the judgment sum of a subordinate court and not to the sum claimed by a plaintiff or the combined sum of a clam and counterclaim *Lein Tiam Hock v Arumugam Kandasamy* [1999] 2 CLJ 853.

<sup>38</sup> *ibid*, section 28(2).

<sup>39</sup> *ibid*, section 31.

<sup>40</sup> *ibid*, section 32.

<sup>41</sup> *ibid*, section 35(1).

#### **(4) Sessions Court**

A Sessions Court shall have jurisdiction to try all criminal offences other than offences punishable with death,<sup>42</sup> and may pass any sentence allowed by law other than the sentence of death.<sup>43</sup>

In its civil jurisdiction, the Sessions Court shall have unlimited jurisdiction to try all actions and suits of a civil nature in respect of motor vehicle accidents, landlord and tenant and distress, and jurisdiction to try all other actions and suits of a civil nature where the amount in dispute or the value of the subject-matter does not exceed RM250, 000.<sup>44</sup> The exceptions to this, that is, where the Sessions Court will not have civil jurisdiction, include the following:<sup>45</sup>

- (a) relating to immovable property (except those provided in sections 70 and 71 of the Subordinate Courts Act 1948);
- (b) the specific performance or rescission of contracts;
- (c) injunction;
- (d) cancellation or rectification of instruments;
- (e) the enforcement of trusts;
- (f) accounts;
- (g) declaratory decrees, except in interpleader proceedings;
- (h) the issue or revocation of grants of representation of the estates of deceased persons or the administration or distribution thereof;
- (i) where the legitimacy of any person is in question;
- (j) guardianship or custody of infants, and
- (k) validity or dissolution of any marriage.

#### **(5) Magistrate's Courts**

There are two classes of magistrates - first class magistrate and second class magistrates. No person shall be appointed to be a First Class Magistrate unless he is a member of the Judicial and Legal Service of the Federation.<sup>46</sup> The *Yang di Pertuan*

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<sup>42</sup> Subordinate Courts Act 1948, section 63.

<sup>43</sup> *ibid.*, section 64.

<sup>44</sup> *ibid.*, section 65(1).

<sup>45</sup> *ibid.*, section 69.

<sup>46</sup> *ibid.*, section 78A.

*Agong* may appoint any fit and proper person to be a Second Class Magistrate in and for the Federal Territory (and the State Authority may make the appointment in and for the State).<sup>47</sup>

A First Class Magistrate in its criminal jurisdiction may try all offences for which the maximum term of imprisonment provided by law does not exceed 10 years' imprisonment or which is punishable with-fine only and offences under sections 392 and 457 of the Penal Code.<sup>48</sup>

In West Malaysia a First Class Magistrate shall have jurisdiction to hear and determine criminal appeals by persons convicted by a Penghulu's Court situated within the local limits of his jurisdiction.<sup>49</sup> A First Class Magistrate may pass any sentence allowed by law not exceeding: (a) 5 years' imprisonment; (b) a fine of RM10,000; (c) whipping up to 12 strokes, or (d) any sentence combining any of the sentences aforesaid.<sup>50</sup>

A second Class Magistrate shall only have jurisdiction to try offences for which the maximum term of imprisonment does not exceed 12 months or which are punishable with fine only.<sup>51</sup> A Second Class Magistrate may pass any sentence allowed by law not exceeding 6 months imprisonment; a fine of not more than RM1,000 or any sentence combining either of the aforesaid.<sup>52</sup>

In its civil jurisdiction, a First Class Magistrate shall have jurisdiction to try all actions and suits where the amount in dispute or value of the subject-matter does not exceed RM25,000,<sup>53</sup> and hear civil appeals from Penghulu's court.<sup>54</sup> A Second Class Magistrate shall only have jurisdiction to try original actions or suits of a civil nature where the plaintiff seeks to recover a debt or liquidated demand in money payable by the defendant, with or without interest, not exceeding RM3,000.<sup>55</sup>

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<sup>47</sup> *ibid*, section 79.

<sup>48</sup> *ibid*, section 85.

<sup>49</sup> *ibid*, section 86.

<sup>50</sup> *ibid*, section 87(1).

<sup>51</sup> *ibid*, section 88.

<sup>52</sup> *ibid*, section 89.

<sup>53</sup> *ibid*, section 90.

<sup>54</sup> *ibid*, section 91.

<sup>55</sup> *ibid*, section 92.

#### 4. ADMINISTRATION OF COURTS – PROBLEMS

The main problem facing, not only the Malaysian judiciary, but the justice system in Malaysia as a whole today, is the rise in the number of litigation, so much so that cases have piled up within the system, causing a severe backlog (see table below):

| <b>COURT STATISTICS as at DECEMBER 2000</b> |                           |                         |                            |                           |
|---|---------------------------|-------------------------|----------------------------|---------------------------|
|   | <b>No. of cases filed</b> |                         | <b>No of cases cleared</b> | <b>No of active cases</b> |
| <b>Magistrates' Court</b>                   | 299,411                   | (civil)                 | 140,248                    | 159,163                   |
|   | 1,087,617                 | (criminal)              | 749,399                    | 338,218                   |
| <b>Sessions Court</b>                       | 155,478                   | (civil)                 | 71,149                     | 84,329                    |
|   | 7,997                     | (criminal)              | 4,876                      | 3,121                     |
| <b>High Court</b>                           | 100,047                   | (civil)                 | 45,812                     | 54,235                    |
|   | 4,068                     | (criminal)              | 2,265                      | 1,803                     |
| <b>Court of Appeal</b>                      | 3,048                     | (civil applications)    | 1,867                      | 1,181                     |
|   | 8,061                     | (civil appeals)         | 3,629                      | 4,432                     |
|   | 128                       | (criminal applications) | 101                        | 27                        |
|   | 1,010                     | (criminal appeals)      | 552                        | 458                       |
| <b>Federal Court</b>                        | 584                       | (civil applications)    | 421                        | 163                       |
|   | 3,229                     | (civil Appeals)         | 3,216                      | 13                        |
|   | 63                        | (criminal appeals)      | 43                         | 20                        |

**Source:** Federal Court

It is reported that the backlog is being cleared steadily, and the number of pending cases have fallen from about 800,000 to 647,000 in the last one-year.<sup>56</sup> The government has initiated a RM20 million computerization project for the courts, which is due to be implemented soon. Under this project, the courts' case management system will be computerized to enable it to monitor the movement of files. Legal clerks will also be used to prepare immediate transcripts of court proceedings.

#### 5. CASE-MANAGEMENT AS A METHOD OF RESOLVING PROBLEM

On September 22, 2000, the Rules of the High Court were amended. The amendments governed the administration of civil cases and its main aim is to enable the

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<sup>56</sup> New Straits Times, 23 February 2001, p. 6.

judges to control the proceedings and progress of cases instead of lawyers. It is hoped that this will help to clear the backlog of cases within the court system.

Briefly, the new Rules have instituted case management and timetables to keep cases moving. A judge may decide if a case could be resolved only by deciding on a question of law, and may accept affidavit evidence for examination-in-chief. The new Rules also shorten the lifespan of a writ from twelve to six months, and only two renewals of six months each are allowed for writs where previously the renewals were limitless.

Parties must now move to bring their cases up for case management fourteen days after pleadings are closed. Through this method, a judge may narrow down the issues for trial, and issues that can be agreed upon or which are irrelevant may be struck out. This principle of allowing the court to play a more active role instead of leaving it to the lawyers or the parties, is keeping with similar moves in Britain and other countries in the Commonwealth, such as Singapore.<sup>57</sup>

Lawyers, however, expressed reservations on two main aspects of the changes – first, the requirement that there must be an attempt to serve a writ within one month of its issuance, a particularly difficult obligation if the defendant could not be found, is out of town or overseas; and secondly, the requirement for parties to prepare a list of documents ahead of time, where failure to include any document may preclude it from being tendered later in court.<sup>58</sup> Another reservation is that litigation costs may actually rise as lawyers might charge higher fees because they can no longer take as many files or cases as they used to.

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<sup>57</sup> The Woolf Reforms – see also *New Straits Times*, 15 September 1999, and *New Sunday Times*, 3 December 2000, p.6.

<sup>58</sup> According to Datuk Dr Cyrus Das, the Bar Council's Civil Procedure Committee Chairman, in an interview with Carolyn Hong – *New Sunday Times*, 3 December 2000, p. 6.

## **6. COURT DIVISIONS AND NUMBER OF MAGISTRATES, JUDICIAL COMMISSIONERS AND JUDGES IN MALAYSIA**

### **(1) At Kuala Lumpur**

#### **1. Federal Court: Lord President**

- President of the Court of Appeal
- Chief Justice (Malaya)
- Chief Justice (Sabah and Sarawak)
- 3 other Federal Court judges

#### **2. Court of Appeal: 10 judges**

#### **3. High Court (Kuala Lumpur):**

- Criminal Division – 3 judges
- Commercial Division – 6 judges
- Civil Division – 5 judge
- Appellate Division – 3 judges

#### **4. Sessions Court (Kuala Lumpur):**

- Criminal Division – 4 judges
- Civil Division – 8 judges

#### **5. Magistrates' Courts (Kuala Lumpur):**

- Civil Division – 6 judges
- Criminal Division – 11 judges

### **(2) Distribution of Magistrates' and Sessions Courts in other States:**

| <b>State</b>   | <b>Sessions Court</b> | <b>Magistrates' Court</b> |
|----------------|-----------------------|---------------------------|
| Perlis         | 1                     | 1                         |
| Kedah          | 2                     | 11                        |
| Penang         | 4                     | 5                         |
| Perak          | 4                     | 18                        |
| Selangor       | 6                     | 11                        |
| Negri Sembilan | 1                     | 8                         |
| Malacca        | 1                     | 3                         |

|            |   |    |
|------------|---|----|
| Johore     | 3 | 12 |
| Pahang     | 2 | 9  |
| Terengganu | 2 | 5  |
| Kelantan   | 1 | 9  |
| Sabah      | 3 | 8  |
| Sarawak    | 3 | 6  |

Source: Legal Directory – Bar Council.

**(3) Distribution of High Court/High Court judges in other States.**

| <b>State</b>   | <b>High Court</b> | <b>No of judges</b> |
|----------------|-------------------|---------------------|
| Perlis         | 1                 | 1                   |
| Kedah          | 1                 | 3                   |
| Penang         | 1                 | 4                   |
| Perak          | 2                 | 5                   |
| Selangor       | 1                 | 4                   |
| Negri Sembilan | 1                 | 1                   |
| Malacca        | 1                 | 3                   |
| Johore         | 2                 | 5                   |
| Pahang         | 2                 | 2                   |
| Terengganu     | 1                 | 1                   |
| Kelantan       | 1                 | 3                   |
| Sabah          | 3                 | 3                   |
| Sarawak        | 3                 | 4                   |

Source: Legal Directory – Bar Council.

## **7. THE ATTORNEY GENERAL'S CHAMBERS**

In Malaysia, the Attorney General is not the Head of the Judicial and Legal Service – he is a civil servant. He belongs to the Judicial and Legal Service and is the highest paid officer in the service. The Attorney General is appointed by the *Yang di Pertuan Agong* on the advice of the Prime Minister, and the appointment is made from

amongst those qualified to be a judge of the Federal Court.<sup>59</sup>

His duties include, among others, to advise the *Yang di Pertuan Agong* or the Cabinet or any Minister upon any legal matters and to perform such legal duties on behalf of the government. The Attorney General is conferred discretionary power to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a *Syariah* court, a native court or a court martial.<sup>60</sup> The Attorney General is also empowered to determine the courts in which or the venue at which any legal proceedings shall be instituted, or to which such legal proceedings shall be transferred.<sup>61</sup> The Attorney General holds office at the pleasure of the *Yang di Pertuan Agong* and may, at any time, resign his office.

Within the Judicial and Legal Service of the Federation, the Attorney General is the head of the Department known as the Attorney General's Chambers. He is assisted by several senior officers or Senior Federal Counsels, the highest in rank of whom is the Solicitor General. Deputy Public Prosecutors form part of the corps of legal officers in the Attorney General's Chambers.

The work of the Chambers is divided into four divisions, namely:

- (i) Criminal Division, which handles all criminal prosecutions;
- (ii) Civil Division, which handles all civil cases;
- (iii) Drafting Division, responsible for the drafting of statutes, and
- (iv) International Division, responsible for the management of international affairs.

Law Revision, headed by a Commissioner for Law Revision, forms part of the work of the Chambers as well. While carrying out his duties in criminal matters, the Attorney General is styled as the Public Prosecutor.

### **(1) The Judicial and Legal Service Commission**

The Judicial and Legal Service is governed by the Judicial and Legal Service Commission, which consists of the Chairman of the Public Services Commission (who also acts as the Chairman of the Judicial and Legal Service Commission); the Attorney General, and one or more members appointed from among persons who are or have

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<sup>59</sup> Art. 145(1).

<sup>60</sup> Art. 145(3).

<sup>61</sup> Art. 145 (3A).

been or are qualified to be a judge of the Federal Court, Court of Appeal or a High Court.<sup>62</sup>

The functions of the Commission include appointing, confirming, emplacing on the permanent or pensionable establishment, promoting, transferring and exercising disciplinary control over members of the service.<sup>63</sup> The Commission must prepare annual reports on its activities and submit them to the *Yang di Pertuan Agong*. Copies of those reports must be laid before both Houses of Parliament.<sup>64</sup>

## **8. PARALLEL COURT SYSTEMS**

The Courts established under the Federal Constitution constitute the major civil court system in Malaysia. Apart from this system of courts, there are at least three other important court systems running parallel to the main civil court system – the Native Court System of Sabah and Sarawak, the *Syariah* Court System and the Industrial Court. These courts are not established by the Federal Constitution but by specific enacted legislation

### **(1) Native Courts System**

The Native Courts System is established to settle disputes pertaining to native customs and customary laws of the different tribes of native inhabitants of Sabah and Sarawak. The Federal Constitution recognizes the special position of the Natives of Sabah and Sarawak and makes provision for their protection. The Federal Constitution defines a “native” in relation to Sarawak to mean a person who is a citizen and either belongs to one of the races specified as indigenous to the state or is of mixed blood deriving exclusively from those races.<sup>65</sup> The races or tribes to be treated as natives of Sarawak are identified as the Bukitans, Bisayahs, Dusuns, Sea Dayaks, Land Dayaks, Kadayans, Kalabits, Keyans, Kenyahs, Kajangs, Lugats, Lisums, Malays, Melanos, Muruts, Penans, Sians, Tagals, Tabuns and Ukits. In relation to Sabah, a native is a person who is a citizen, is the child or grandchild of a person of a race indigenous to

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<sup>62</sup> Art. 138(2).

<sup>63</sup> Art. 144(1).

<sup>64</sup> Art. 146(1).

<sup>65</sup> Art. 161A(a).

Sabah, and was born either in Sabah or to a father domiciled in Sabah at the time of birth.<sup>66</sup> The native customs of these tribes were part of a great oral tradition in the manner of other native tribes of the world, such as the Indians of North America. The arrival of the British transformed these oral traditions into written “codes” of native laws and customs. While this formalization of native customary law has the effect of making it certain and ensuring its survival through written codes, it also places such laws now within the formal, secular legal system, with a hierarchical court structure, appellate system and system of precedent, evidentiary rules and burden of proof.

**(a) Sarawak**

The Native Courts System of Sarawak is established by state law, that is, the Native Courts Ordinance, 1992. In order to give effect to the administration of native laws and customs, the Native Courts Rules 1993 was also enacted.

The Central Registry, headed by a Chief Registrar and located in Kuching is the Headquarters of the Native Courts. The Chief Registrar is the Chief Administrator of the Native Courts system and supervises all Native Courts Registrars throughout Sarawak. The functions of the Central Registry are, among others, the preparation of yearly financial estimates; consultation with State Attorney General on issues touching on the interpretation of the Native Courts Ordinance 1992 and Rules; assist in the enforcement of Native Court judgments; publication of important judgments of Native Courts; the giving of advice and consultation to persons who have to use the Native Courts as an avenue to resolve disputes as well as those whose duty is to adjudicate disputes; and assisting the *Majlis Adat Istiadat* (Council for Customs and Traditions) in the revision of native laws.

In addition to the Central Registry, there are also established District Registries for the many districts and sub-districts of the State of Sarawak. The District Registry is under the charge, control and supervision of a District Officer or Sarawak Administrative Office in-charge of the District and sub-district. The functions of a District Registry include to accept lodgements of claims, complaints, appeals and other legal applications; to keep records of case registers, to keep case files and records of proceedings; to transmit case files of appeals to appropriate appellate courts; to assist in

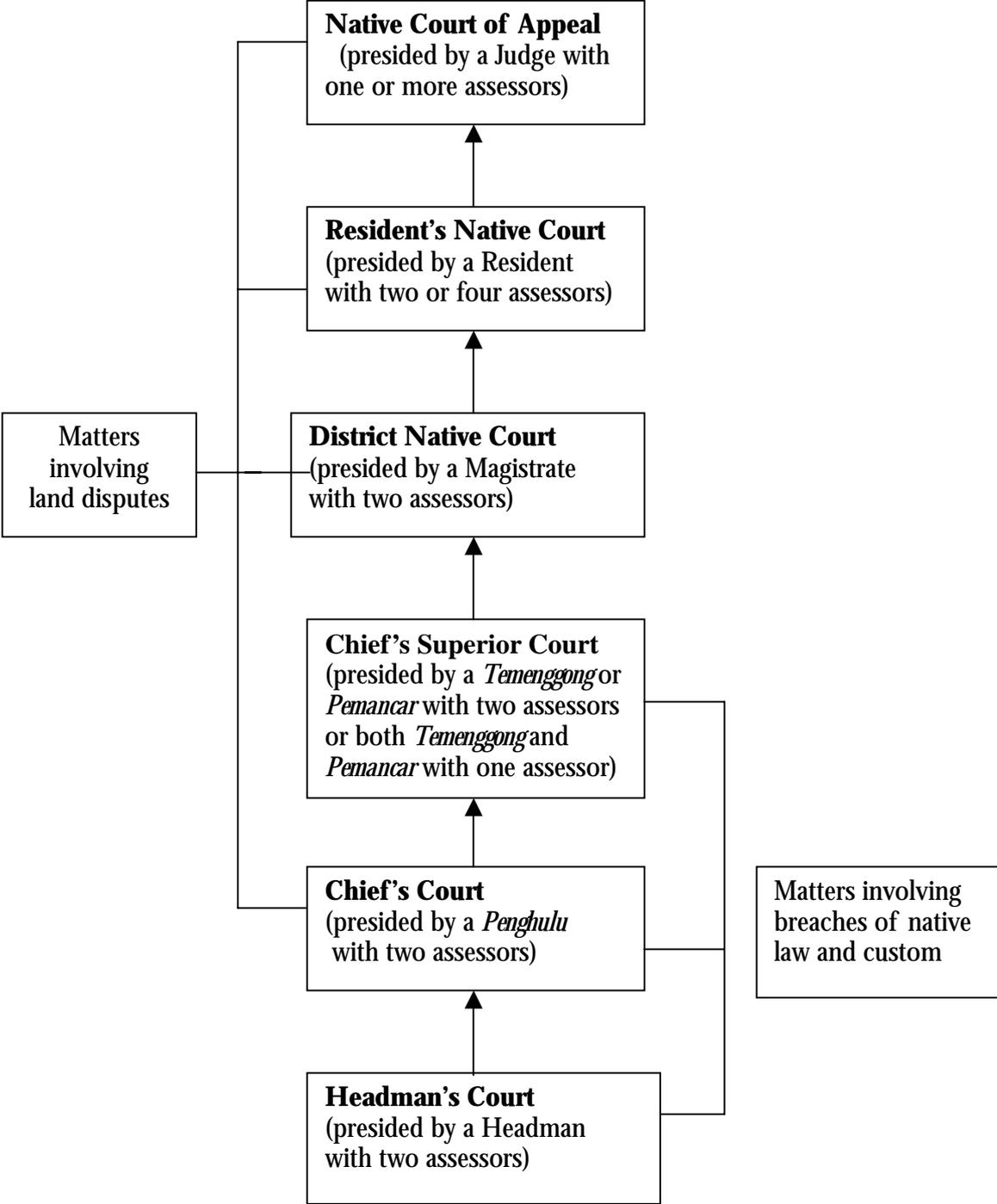
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<sup>66</sup> Art. 161A(b); this must be read together with section 2(1) Interpretation (Definition of Natives) Ordinance, 1952 which details the requirements for a “native” of Sabah.

the enforcement of court judgments and orders, and to submit periodical returns.

The Native Courts System Sarawak forms a part of the office of the Chief Minister, and hence its principal officers come under the jurisdiction of the State Secretary.

### The Appellate Structure of Native Courts



The jurisdiction of Native Courts is circumscribed by statute, and consists of the following specified matters:<sup>67</sup>

- (i) cases arising from the breach of a native law or custom (other than the Ordinan Undang-Undang Keluarga Islam 1991 or the Malay custom of Sarawak) in which all the parties are subject to the same native system of personal law;
- (ii) cases arising from breach of native law or custom (other than the Ordinan Undang-Undang Keluarga Islam 1991 or the Malay custom of Sarawak) relating to 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 of the Syariah Courts constituted under the Ordinan Mahkamah Syariah 1991, in which the value of the subject matter does not exceed RM2,000 and all the parties are subject to the same native system of personal law;
- (iv) any criminal case of a minor nature which ate specifically enumerated in the *Adat Iban* or any other customary law by whose custom the court is bound and which can be adequately punished by a fine not exceeding that which, under section 11 of the Ordinance, a Native Court may award;
- (v) any matter in respect of which it may be empowered by any other written law to exercise jurisdiction;

A Native Court shall not have jurisdiction over the following matters:<sup>68</sup>

- (i) any proceeding in which a person is charged with an offence in consequence of which death is alleged to have occurred;
- (ii) an offence under the Penal Code;
- (iii) any proceeding concerning marriage or divorce regulated by the Law Reform (Marriage and Divorce) Act 1976 and the Registration of Marriages Ordinance 1952, unless it is a claim arising only in regard to bride-price or adultery and founded only on native law and custom;
- (iv) any proceeding affecting the title to or any interest in land which , is

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<sup>67</sup> section 5.

<sup>68</sup> section 28.

registered, under the Land Code;

- (v) any case involving a breach of native law or custom if the maximum penalty which it is authorized to pass by virtue of section 11 of the Ordinance is less severe than the minimum penalty prescribed for such offence;
- (vi) cases arising from the breach of Ordinan Undang-Uhdang Keluarga Islam 1991 and rules or regulations made there under, or the Malay custom of Sarawak;
- (vii) any criminal or civil matter within the jurisdiction of any of the Syariah Courts constituted under the Ordinan Mahkamah Syariah 1991;
- (viii) any proceeding taken under arty written law in force in the State.

In addition, section 20(1) empowers a District Native Court with special jurisdiction to hear and determine the following cases:

- (i) for the purposes of section 9 of the Land Code, the question whether any non-native has become identified with a particular native community and subject to the native system of personal law of such community;
- (ii) the question whether a person who is subject to a particular system of personal law (whether native or otherwise) has become or became, by virtue of subsequent events, or by conduct or mode of life, subject to a different personal law;
- (iii) the question whether a person subject to the personal law of a particular native community ceased or has ceased to be so subject.

In determining any question under section 20(1) above, it is provided that a District Native Court shall be entitled to take into consideration public opinion in the community which the person has become so identified, even where it conflicts with a strict application of the system of personal law of such community, and, unless such community is an Islamic community, may disregard the fact that the person in question was or is a Christian and that some modification of the system of personal law of such community is, was or may be required on that account.<sup>69</sup>

The following is a table of Native Courts of original jurisdiction and their

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<sup>69</sup> section 20(2)(a).

constituted members:<sup>70</sup>

| <b>Classes of Native Courts</b> | <b>Constitution of Native Courts</b>   |
|---------------------------------|--|
| District Native Court           | Magistrate and 2 assessors   |
| Chief's Superior Court          | <i>Temenggong</i> or <i>Pemancar</i> with 2 assessors, or both <i>Temenggong</i> and <i>Pemancar</i> with one assessor |
| Chief's Court                   | <i>Penghulu</i> and 2 assessors  |
| Headman's Court                 | Headman and 2 assessors  |

The judgment or order of a Chief's Superior Court involving offences relating to native law and custom other than land disputes is final and conclusive and shall not be a subject of appeal.<sup>71</sup>

The following penalties may be imposed by the courts specified respectively:<sup>72</sup>

- (a) District Native Court: Imprisonment not exceeding two years and fine not exceeding RM5, 000.
- (b) Chief's Superior Court: Imprisonment not exceeding one year and a fine not exceeding RM3, 000.
- (c) Chief's Court: Imprisonment not exceeding six months and a fine not exceeding RM2, 000.
- (d) Headman's Court: Fine not exceeding RM300.

Although the Native Courts of Sarawak do not form part of the main civil courts system, the jurisdiction of the High Court is not ousted from examining decisions of Native Courts. The Native Courts are creatures of statute and the High Court can exercise its general supervisory powers through judicial review of Native court decisions, and the grant of prerogative writs, such as the writ of *certiorari*.<sup>73</sup>

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<sup>70</sup> sections 3 and 4(1).

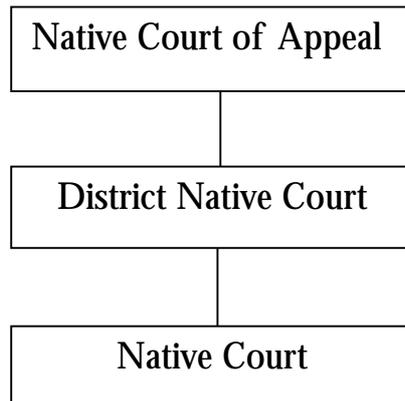
<sup>71</sup> section 4(1), proviso (ii).

<sup>72</sup> section 11(1).

<sup>73</sup> *Haji Laungan Tarki bin Mohd Noor v Mahkamah Anak Negeri Penampang* [1988] 2 MLJ 85.

**(b) Sabah**

The Native Courts System of Sabah is much less elaborate than that of Sarawak. The Native Courts are constituted under the Native Courts Enactment 1992, and is made up of a native court, constituted by a District Chief and two other members; a District Native Court, constituted by a District Officer and two other members, and a Native Court of Appeal, made up of a Judge who acts as President, and two other members:



A Native Court is constituted with original jurisdiction to hear and determine cases pertaining to:<sup>74</sup>

- (i) breach of native law or custom, where all parties are natives;
- (ii) breach of native law or custom which is religious, matrimonial or sexual, where one of the parties is a non-native, and the written sanction of the District Officer acting on the advice of two native chiefs have been obtained;
- (iii) native law or custom relating to betrothal, marriage, divorce, nullity of marriage and judicial separation, adoption, guardianship or custody of infants, maintenance of dependents and legitimacy, gifts, succession testate and in testate.

Any sentence of imprisonment by a Native court needs to be endorsed by a magistrate before it might take effect.<sup>75</sup> A Native court is also empowered to order a guilty party to pay to the person injured or aggrieved by any act or omission,

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<sup>74</sup> Native Courts Enactment 1992, s. 6(1).

<sup>75</sup> *ibid*, s. 11.

compensation in cash or kind.<sup>76</sup> In default of the payment of the penalty or compensation, a Native court may order the offender to suffer such period of imprisonment as will justify the justice of the case.<sup>77</sup>

## (2) The Syariah Courts System

It has been argued, that if colonization had not been responsible for the introduction and application of English law, Islamic law would have developed to become the law of the land.<sup>78</sup> Islamic law, coupled with the customary law of the various races, indeed represent the indigenous sources or basic foundation upon which the eventual growth of a legal system could have been founded.<sup>79</sup> However, the grant of the Charters of Justice to the Straits Settlements, and the eventual application of English law both through the judicial process and through legislation in the Malay States had effectively displaced Islamic law from its premier position. The role, which Islamic law now plays in the system, is extremely limited.

Under the Federal Constitution, Islamic law is a matter falling within the State List, that is, it is a matter over which the State Legislature has jurisdiction, and not the Federal Legislature.<sup>80</sup> In this regard, matters over which the State Legislatures have been permitted to make laws have been stated to be 'Islamic law and personal and family law of persons professing the religion of Islam', and this includes matters such as, *inter alia*, succession, betrothal, marriage, divorce, maintenance, adoption, guardianship, trusts, Islamic religious revenue and mosques. With regard to offences, or Islamic criminal law, the Federal "Constitution goes on to provide that the State Legislature may make laws 'for the creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List. Likewise, the State Legislature has jurisdiction over the (constitution, organization and procedure of Syariah courts which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law.'

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<sup>76</sup> *ibid.*, s. 12.

<sup>77</sup> s. 14(1).

<sup>78</sup> Wilkinson, RJ, 'Papers on Malay Subjects' (1971) k. Lumpur.

<sup>79</sup> See also, *Shaik Abdul Latif & Ors v Shaik Elias Bux* (1915) 1 FMSLR 204, 214.

<sup>80</sup> Federal Constitution, Article 74, Ninth Schedule.

While it may be true that the practice of Islamic law differed among the various Malay States due to the varied influences of custom, British intervention in the affairs of the Malay States had the effect of formalizing the manner in which Islamic law was administered. Islamic law was left to be administered by the respective states, with the Sultans proclaimed as (Head' of Islamic religion in each state, thus giving rise to the lack of uniformity in the administration of Islamic law in Malaysia, whereas the uniform application of English law throughout the land was guaranteed.

### **(3) The Administration of Islamic Law**

The Administration of Islamic Law (Federal Territories) Act 1993<sup>81</sup> provides for the Federal Territories of Kuala Lumpur and Labuan, a law concerning the enforcement and administration of Islamic law, the constitution and organization of the Syariah Courts, and other related matters.

#### **(a) The *Majlis Agama Islam***

Section 4(1) of the Act establishes a '*Majlis Agama Islam Wilayah Persekutuan*' advise the *Yang di Pertuan Agong* in matters pertaining to the religion of Islam. The *Majlis* is a body corporate having perpetual succession and corporate seal, may sue and be sued in its corporate name, and is given the power to enter into contracts and acquire, purchase, take, hold and enjoy movable and immovable property, which includes the conveyance, assignment, surrendering and yielding, charging, mortgaging, demise, reassignment and transference of any such property.<sup>82</sup> The *Majlis* also has the power to act as an executor of a will, or as an administrator of the estate of a deceased person, or as a trustee of any trust.<sup>83</sup>

The main function of the *Majlis* for which it has been established is to 'promote, stimulate, facilitate and undertake the economic and social development and well-being of the Muslim community in the Federal Territories consistent with Islamic law.'<sup>84</sup> For the above purpose, the *Majlis* has been given several powers. For example, it may carry out activities of commercial and industrial nature, such as manufacturing, assembling,

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<sup>81</sup> Act 505.

<sup>82</sup> *ibid*, section 5(3).

<sup>83</sup> *ibid*, section 5(4).

<sup>84</sup> *ibid*.

processing, and packing, grading and marketing of products.<sup>85</sup> It may invest in any authorized investment, establish any scheme for the granting of loans to Muslim individuals for higher learning and establish, and maintain Islamic schools.<sup>86</sup> In pursuit of the above main objective, the *Majlis* may so establish companies under the Companies Act 1965 (with the approval of the Yang di-Pertuan Agong).<sup>87</sup>

#### **(b) Appointment of Mufti, and the Islamic Legal Consultative Committee**

The *Mufti* and Deputy *Mufti* shall be appointed by the *Yang di Pertuan Agong*.<sup>88</sup> The main function of the *Mufti* is to aid and advise the *Yang di Pertuan Agong* in respect of all matters of Islamic Law. Upon the direction of the *Yang di Pertuan Agong* or on his own initiative or on the request of any person by letter, the *Mufti* may make and publish in the *Gazette*, a *fatwa* or ruling on any unsettled or controversial question of or relating to Islamic law.<sup>89</sup> Upon publication in the *Gazette*, the said *fatwa* will be binding on every Muslim resident in the Federal Territories as a dictate of his religion and it shall be his religious duty to abide by and uphold the *fatwa* ...<sup>90</sup> All courts in the Federal Territories shall recognize the *fatwa* as authoritative of all matters laid down therein.<sup>91</sup>

Section 37(1) of the Act establishes an Islamic Legal Consultative Committee consisting of the *Mufti* as Chairman, the Deputy *Mufti*, two members of the *Majlis* nominated by the *Majlis*, not less than two fit and proper persons to be appointed by the *Majlis* and an officer of the Islamic Religious Department of the Federal Territories to be appointed by the *Majlis*, who shall act as the Secretary. The main duty of the Committee is to provide a forum for discussion and thereby aid the *Mufti* in the making of any *fatwa*.

#### **(c) The Syariah Court**

The Syariah Court System is made up of the Syariah Subordinate Courts, the Syariah High Court and the Syariah Appeal Court. It is headed by a Chief Syariah Judge

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<sup>85</sup> *ibid*, section 7(2)(a).

<sup>86</sup> *ibid*, section 7(2) generally.

<sup>87</sup> *ibid*, section 8A(1).

<sup>88</sup> *ibid*, section 32(1).

<sup>89</sup> *ibid*, section 34(1).

<sup>90</sup> *ibid*, section 34(3).

<sup>91</sup> *ibid*, section 34(4).

appointed by the *Yang di Pertuan Agong*.<sup>92</sup>

### **Jurisdiction of the Syariah Subordinate Court**<sup>93</sup>

In its criminal jurisdiction, the court may try any offence committed by a Muslim under the Enactment or any other written law prescribing offences against precepts of the religion of Islam for which the maximum punishment provided does not exceed RM2, 000 or imprisonment for a term of one year or to both.

In its jurisdiction, the court is authorized to hear and determine all actions and proceedings in which the amount or value of the subject matter in dispute does not exceed RM50,000 or is not capable of estimation in terms of money.

An appeal from the Syariah Subordinate Court shall lie to the Syariah High Court.<sup>94</sup>

### **Jurisdiction and Powers of the Syariah High Court**

In its criminal jurisdiction, the Syariah High Court may try any offence committed by a Muslim and punishable under the Enactment or the Islamic Family Law (Federal Territory) Act 1984, or any other written law prescribing offences against precepts of the religion of Islam, and may impose any punishment provided therefore.<sup>95</sup>

In its civil jurisdiction,<sup>96</sup> the court may hear and determine all actions and proceedings in which all the parties are Muslims and which relate to the following matters:

- (i) betrothal, marriage, *ruju'*, divorce, nullity of marriage (*fasakh*), *nusyuz*, or judicial separation (*faraq*) or other matters relating to the relationship between husband and wife;
- (ii) any disposition of, or claim to, property arising out of any of the matters set out under (i);
- (iii) the maintenance of dependants, legitimacy, guardianship or custody of infants;
- (iv) the division of, or claims to, *harta sepencarian*;

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<sup>92</sup> *ibid*, section 41(1).

<sup>93</sup> *ibid*, section 47.

<sup>94</sup> Act 505, section 48(1).

<sup>95</sup> *ibid*, section 46(2)(a).

<sup>96</sup> *ibid*, section 51(1).

- (v) wills or death-bed gifts;
- (vi) gifts *inter vivos*, and settlements made without adequate consideration in money or money's worth;
- (vii) *wakaf* or *nazr*;
- (viii) division and inheritance of testate or interstate property;
- (ix) the determination of the persons entitled to share in the estate of a deceased Muslim or of the shares to which such persons are respectively entitled; and
- (x) other matters in respect of which jurisdiction is conferred by any written law.

The Syariah High Court also has supervisory and revisionary jurisdiction over all Syariah Subordinate Courts and may, if it appears desirable in the interest of justice, either of its own motion or at the instance of any party or person interested, at any stage in any matter or proceeding, whether civil or criminal in any Syariah Subordinate Court, call for and examine any records thereof and give such directions as justice may require.<sup>97</sup>

### **An Appeal from the Syariah High Court**

And appeal from the Syariah Court shall lie to the Syariah Appeal Court.<sup>98</sup>

The Syariah Appeal Court is given the power to determine any question of law of public interest which has arisen in the course of an appeal in the Syariah High Court, and which has affected the result of the appeal.<sup>99</sup>

The Syariah Appeal Court also has supervisory and revisionary jurisdiction over the Syariah High Court, in the same way that the Syariah High Court has such jurisdiction over the Syariah Subordinate Courts.<sup>100</sup>

### **Prosecution and Representation**

A Chief Syariah Prosecution is appointed by the *Yang di Pertuan Agong*,<sup>101</sup> who has the power to institute, conduct or discontinue any proceedings for an offence before a Syariah Court.

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<sup>97</sup> *ibid.*, section 51(1).

<sup>98</sup> *ibid.*, section 52(1).

<sup>99</sup> *ibid.*, section 52(2).

<sup>100</sup> *ibid.*, section 53(1).

<sup>101</sup> *ibid.*, section 58.

The *Majlis* may admit any person having sufficient knowledge of Islamic law to be the *Peguan Syarie* to represent parties in any proceeding before the Syariah Court.<sup>102</sup>

#### **(4) The Industrial Court**

The Industrial Court was established under the Industrial Relations Act 1967 as a specialist tribunal for the adjudication of industrial or trade disputes, that is, disputes between employers, workmen and their trade unions. The Industrial Court is the main, indeed the only adjudication tribunal within the Malaysian industrial relations system. There is no hierarchical structure, as there are no appeals from decisions of the Industrial Court to a higher appellate Industrial Court. Industrial Court decisions are open to review by the High Court in the exercise of its general powers of revision over decisions of inferior courts.

The Industrial Court consists of a President and eight Chairmen, each in charge of a division, appointed by the *Yang di Pertuan Agong*, and two panels of members representing employers and workmen, appointed by the Minister of Human Resources. Each panel consists of about 100 members. For the purposes of any sitting of the Industrial Court to hear a trade dispute, the Court is constituted by the President as Chairman and one representative from each panel selected by the President.

##### **(a) Jurisdiction of the Industrial Court**

The Industrial Court has jurisdiction to hear and settle complaints of unfair labour practices, representations of unfair dismissals, and trade disputes, but this jurisdiction is exercisable only when the Minister of Human Resources refers them to the court, either of his own motion or upon the joint request of the parties concerned. The court is also empowered to hear cases pertaining to collective agreements, namely, questions pertaining to interpretation of collective agreements, variation of terms of collective agreements and complaints of non-compliance with collective agreements. In these instances, parties concerned may make direct application to court without the necessity of a Ministerial reference.

The requirement for Ministerial reference before adjudication by the court might commence in certain cases arises out of the system of industrial dispute resolution

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<sup>102</sup> *ibid*, section 59.

in Malaysia, where the dispute is first brought to the attention of the Ministry of Human Resources in the hope that its officers might be able to settle the dispute through conciliation and mediation before it is brought for arbitration. Failing conciliatory measures the dispute is referred to the Industrial Court for arbitration. Once the process of conciliation and mediation has been started, parties to the dispute, especially trade unions, are prevented from resorting to industrial action, such as strikes. The Malaysian industrial relations system is premised upon the doctrine of compulsory arbitration as opposed to voluntary arbitration, that is, parties must settle all disputes through the conciliation and arbitration process as quickly as possible without taking industrial action. Once the Minister or the Court has handed down its decision, such decision binds all parties to the dispute, and no industrial action may be taken in consequence thereof.

#### **(b) Powers of the Industrial Court**

The Industrial Court, as a court of industrial adjudication or arbitration, functions with less formality than a normal court of law and the court's powers are also much broader in scope than the powers of a civil court. Under the main provision of section 30 of the Industrial Relations Act 1967, the court is empowered to make an award (decision) relating to all or any of the issues in dispute. In making its award, the court is to have regard to the public interest, the financial implications and the effect of the award on the economy, the industry concerned and also as to the probable effects in related or similar industries. It is also provided that in making its award the court is not to be restricted to the specific relief claimed by the parties, but may include in the award any matter or thing which the Industrial Court thinks necessary or expedient for the purpose of settling the dispute. Principally, in all matters, the court is enjoined to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

#### **(c) Problems with the Industrial Adjudication Machinery**

As in the civil court system, a major problem faced by the Industrial Court relates to rising litigation and an administrative machinery that is no longer sufficient to deal with the bulk of cases, thus causing a severe backlog, as shown in the tables below (1)-(2):

### (1) CLAIMS FOR REINSTATEMENT 1995-2000

| <b>Particulars</b>                                   | <b>1995</b> | <b>1996</b> | <b>1997</b> | <b>1998</b> | <b>1999</b> | <b>2000<br/>(Jan – June)</b> |
|--|-------------|-------------|-------------|-------------|-------------|------------------------------|
| Brought forward from previous years                  | 1,507       | 1,812       | 1,459       | 2,123       | 4,275       | 4,511                        |
| Reported to Minister                                 | 3,099       | 3,055       | 3,524       | 8,819       | 5,369       | 2,482                        |
| Still being dealt by Industrial Relations Department | 4,606       | 4,867       | 4,983       | 10,942      | 9,644       | 6,993                        |
| Resolved   | 2,794       | 3,408       | 2,860       | 6,667       | 5,133       | 1,740                        |

Source: The Sun, 4 August 2000.

### (2) METHOD OF SETTLEMENT

|                               | <b>1995</b> | <b>1996</b> | <b>1997</b> | <b>1998</b> | <b>1999</b> | <b>2000<br/>(Jan-June)</b> |
|-------------------------------|-------------|-------------|-------------|-------------|-------------|----------------------------|
| Resolved through conciliation | 1,981       | 1,972       | 2,060       | 5,003       | 3,346       | 1,239                      |
| Referred to Industrial Court  | 596         | 393         | 713         | 886         | 1,419       | 444                        |

The peculiarity of the Malaysian Industrial Relations System where disputes are referred in the first instance to the Industrial Relations Department for conciliation, or, in the case of claims for reinstatement, to the Minister, has meant that a lot of cases begin to pile up at the Ministerial level before they even reach the Industrial Court. As table (1) shows, a lot of cases have to be dealt with or are still being dealt with at the Ministry level, but due to limited personnel, these cases cannot be resolved as expeditiously as they should. Hence, the backlog.

As table (2) shows, a lot of cases, which cannot be resolved through conciliation, are then referred to the Industrial Court. Due to shortage of personnel, the Industrial Court is not able to clear the bulk of cases that gets referred to it. In order to try and resolve this problem, the Government has recently appointed six new Industrial Court chairmen to try and speed up the resolution of disputes.

## 9. OTHER COURTS

### (1) The Juvenile Court

The Juvenile Court is established under the Juvenile Courts Act, 1947, to provide for the care and protection of children and young persons. The Act applies to a child, that is a person under the age of fourteen, and juveniles, defined as persons under the age of eighteen.<sup>103</sup>

A Juvenile Court consists of a Magistrate of the first class who is assisted by two advisers chosen from a panel of persons resident in the Federal Territory or a State, nominated by the Minister or the State Authority. It is provided that one of the two advisers shall, if practicable, be a woman.<sup>104</sup> The advisers are to inform and advise the Court with respect to any consideration affecting the punishment or other treatment of any child or young person brought before it. A Juvenile Court may try all offences except those punishable with death.

A Juvenile Court sits either in a different building or room from that in which sittings of regular courts are held, or on different days from those on which sittings of those courts are held. No person is allowed to be present at any sitting of a Juvenile Court except<sup>105</sup>-

- (i) members and officers of court;
- (ii) parties to the case before the court, their parents, guardians, advocates and witnesses;
- (iii) *bona fide* representatives of newspapers, and
- (iv) such other persons as the court may specially authorize to be present.

A Sessions Court or Magistrate's court may try in a summary way any juvenile alleged to have committed a petty offence.<sup>106</sup> A Sessions Court Judge or a magistrate exercising jurisdiction over a juvenile must sit in Chambers, or if that is not practicable, in camera. A Juvenile may be arrested with or without a warrant, but he must be brought before a Juvenile Court or, failing which, a Sessions Court Judge or Magistrate who shall inquire into the case and release the person on a bond, with or without

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<sup>103</sup> Juvenile Courts Act 1947, s. 2(1).

<sup>104</sup> *ibid*, s. 4(2).

<sup>105</sup> S. 5.

<sup>106</sup> S. 3A(1).

sureties.<sup>107</sup> This is not applicable if the charge against the juvenile is one of murder or other grave crime or where his release would defeat the ends of justice.

## **(2) Procedure in Juvenile Court<sup>108</sup>**

Where a juvenile is brought before a Juvenile Court for any offence, it is the duty of the Court as soon as possible to explain to him in simple language the substance of the alleged offence. After this, the Court shall ask the juvenile whether he admits the facts constituting the offence. If the juvenile does not admit the facts, the court shall then hear the evidence of the witnesses in support thereof. At the closes of the evidence in chief of each witness, the juvenile (or his parent or guardian) shall be asked if he wishes to put any question to the witness. If, instead of asking questions, the juvenile wishes to make a statement, he will be allowed to do so.

If it appears to the court that a *prima facie* case has been made out, the court shall explain to the juvenile the substance of the evidence against him and, in particular, any points therein which specially tell against him or require explanation. At this stage, the juvenile will be allowed to give evidence on oath or affirmation or to make any statement if he so desires, and the evidence of any defence witness will be heard.

If the juvenile admits the offence or the court is satisfied that it is proved, he shall then be asked if he desires to say anything in mitigation. Before deciding how to deal with him, the court must obtain such information as to his general conduct, home surroundings, school record and medical history.

## **(3) Powers of a Juvenile Court on proof of offence**

When a Juvenile Court is satisfied that an offence has been proved, the court has the following powers:<sup>109</sup>

- (i) to admonish and discharge the offender;
- (ii) to discharge the offender upon his entering into a bond to be of good behaviour;
- (iii) to commit the offender to the care of a relative or other fit person;
- (iv) to order his parent or guardian to execute a bond to exercise proper care and guardianship;

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<sup>107</sup> S. 6(1).

<sup>108</sup> S. 10.

<sup>109</sup> S. 12(1).

- (v) to make a prohibition order;
- (vi) to order the offender to be sent to an approved school or the Henry Gurney School for boys;
- (vii) to order the offender to pay a fine, compensation or costs, and
- (viii) where the offender is a young person and the offence is punishable with imprisonment, the court may impose upon him any term of imprisonment which could be awarded by a Sessions Court, or commit him to the High Court for sentence.

Appeals from the Juvenile Court lie to the High Court.

Sentence of death shall not be pronounced or recorded against a person convicted of an offence if at the time the offence was committed he was a juvenile. In lieu thereof, the Courts shall order him to be detained during the pleasure of the Yang di Pertuan Agong.<sup>110</sup>

Where a juvenile is found guilty of an offence other than murder, and the Court is of the opinion that having regard to the circumstances, including the nature of the offence and the character of the offender, it is expedient to do so, the court may make a probation order.<sup>111</sup> A probation order shall have effect for a period not less than one year and not more than three years from the date of the order, and shall require the probationer to submit during that period to the supervision of a probation officer.

Where an order is made committing a child or young person to the care of a fit person, or sending him to a probation hostel, an approved school, a Henry Gurney School or an approved institution or home, the court may make an order requiring the parent or guardian or other person having custody of the child or young person to make such monthly contributions as the court thinks fit, and it shall then be the duty of the parent or guardian to comply with the order.<sup>112</sup>

#### **(4) The Special Court**

Under the Federal Constitution, the Rulers (Malay Sultans or Rajas) and the Ruling Chiefs of the State of Negeri Sembilan enjoy sovereign immunity.<sup>113</sup> No

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<sup>110</sup> S. 16.

<sup>111</sup> S. 21.

<sup>112</sup> S. 34(1).

<sup>113</sup> Art. 181(1)..

proceedings whatsoever shall be brought in any court against the Ruler of a State in his personal capacity, except in the Special Court established under Part XV of the Constitution.

The Special Court consists of the Chief Justice of the Federal Court, who acts as Chairman, the Chief Judges of the High Courts and two other persons who hold or have held office as judge of the Federal Court or a High Court appointed by the Conference of Rulers.

The Special Court shall have exclusive jurisdiction to try all 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 *Yang di Pertuan Agong* or the Ruler of a State, notwithstanding where the cause of action arose.<sup>114</sup>

The Special Court shall have the same jurisdiction and powers as are vested in the inferior courts, the High Court and the Federal Court, and the practice and procedure applicable in any proceedings in any inferior court, High Court and the Federal Court shall apply in any proceedings in the Special Court.<sup>115</sup>

The proceedings in the Special Court shall be decided in accordance with the opinion of the majority of the members and its decision shall be final and conclusive and shall not be challenged or called in question in any court or any ground.<sup>116</sup>

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<sup>114</sup> Art. 182(3).

<sup>115</sup> Art. 182(4) & (5).

<sup>116</sup> Art. 182 (6).