THE HISTORY OF THE JUDICIAL AND LEGAL SYSTEM IN MALAYSIA

by

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THE HISTORY OF MALAYSIA

(i) Malaya

Before the Japanese occupation, the States and Settlements of the Federation of Malaya was divided into three distinct political groups, which were the Crown Colony known as the Straits Settlements which included the Settlements of Singapore, Malacca and Penang, the Federated Malay States comprising the States of Negeri Sembilan, Pahang, Perak and Selangor which were protectorates, and the Unfederated Malay States comprising the States of Johore, Kedah, Kelantan, Perlis and Terengganu which were also protectorates.[1] After the Japanese occupation, the Malayan Union was set up in 1946 under an Order-in-Council which was in operation from 1946 to 1948.[2] However, the Malayan Union was never fully implemented because of strong Malay opposition.[3]

From 1946-1948, new proposals were under consideration which eventually led to the abolition of the Malayan Union and the creation of
the Federation of Malaya on 1 February 1948 pursuant to the Federation of Malaya Agreement entered into between the British Government and the Malay rulers. In July 1955, the first elections to the Federal Legislative Council were held. The Alliance, consisting of the three political parties representing the three main races in the Federation of Malaya i.e. the United Malay National Organisation (UMNO), the Malayan Chinese Association (MCA) and the Malayan Indian Congress (MIC), won fifty-one of the fifty-two seats for elected members. Y.T.M. Tunku Abdul Rahman Putra al-Haj, the President of UMNO and leader of the Alliance, became the Chief Minister of the new Government.[4] On 7 March 1956, the Federation of Malaya White Paper No 15 of 1956 was published in which it was stated that:

“The approval of Her Majesty the Queen and the Conference of Rulers has now been signified to the recommendations of the Constitutional Conference for the appointment of an independent Commission to make recommendations for a form of constitution for a fully self-governing and independent Federation of Malaya within the Commonwealth”[5]

Accordingly, the Reid Commission was set up for this purpose. The commission recommended, among others, for the inclusion of provisions establishing a strong and central government without neglecting the autonomous powers of the states, safeguarding the rights and privileges of the rulers in their own states, the appointment of the head of states from among the state rulers and the granting of a general nationality in
the Federation while preserving the special rights and privileges of the Malays and the legitimate interests of other communities.[6]

On 31 July 1957, the British Parliament passed the *Federation of Malaya Independence Act 1957* to conclude with the Rulers of the Malay States an agreement for the establishment of the Federation of Malaya as an independent sovereign country under a federal constitution.[7] On 5 August 1957, the Federation of Malaya Agreement 1957 was concluded between the High Commissioner on behalf of Her Majesty, and the Rulers. This agreement established a new federation of States called the Federation of Malaya consisting of the Malay States and the Settlements as from 31 August 1957.[8] The agreement revoked the 1948 Agreement[9] and contained the Federal Constitution[10] and the Constitutions of Penang[11] and Malacca.[12] Thereafter, the Federal Legislative Council passed the *Federal Constitution Ordinance 1957*, giving the 1957 Agreement and the three Constitutions contained in it the force of law as the Federal Constitution.[13] The new Federal Constitution came into force on 31 August 1957. This eventually led to the independence of the Federation of Malaya on 31 August 1957, and the Federal Constitution becoming the “supreme law of the Federation”.[14]

(ii) Sarawak

Sarawak was originally a part of the dominion of the Sultan of Brunei. The growth of Sarawak as an integrated State began with the landing of James Brooke in 1839 and his installation as Rajah in 1841.[15] Sarawak was ceded to James Brooke in 1841 in return for services rendered in making peace among warring tribes.[16] The administration of Sarawak
under the Brooke Rajahs has been described as an “administration of trust where Sarawak belonged to the people and the Rajah exercised authority on their behalf and in their interest”.\[17\] Sarawak’s mixed population posed problems, for its highly individualistic tribal peoples (51%) were not easily integrated with the economically more advanced Chinese (31%) or the politically more experienced Malays (18%).\[18\] To restore law and order, Brooke promulgated a set of eight laws including punishment for certain crimes such as murder and robbery, freedom of trade and labour and collection of revenue.\[19\] He established a number of courts comprising the Debtor’s Courts, Chinese Courts, Courts of Requests, Bankruptcy Courts, Native Courts and Supreme Courts.\[20\] He also set up an administrative machinery, guided by the principle that the customs of the local inhabitants should be retained as far as practicable. Provisions were made for frequent consultation with native chiefs.\[21\] In essence, English law suitable to local conditions became applicable unless modified by Orders of the Rajah.

In 1888 Sarawak became a protected state.\[22\] Thereafter, it became a Crown Colony on 18 May 1946 when it was ceded to Britain by the third Rajah, Sir Charles Vyner Brooke by way of an instrument of cession executed by the Sarawak Order in Council 1946 on 1 July 1946.\[23\] In 1941, just before the Japanese occupation, the Rajah introduced a new Constitution of which the “Nine Cardinal Principles of the Rule of the English Rajahs” formed part.\[24\] These Principles had been enshrined in the First Schedule to the Sarawak (Constitution) Order-in-Council, 1956,\[25\] and were stated in the preamble to be in general accord with the
principles governing the administration of other parts of the British Commonwealth of Nations.[26]

(iii) Sabah

Like Sarawak, Sabah (then known as North Borneo), was also part of the Brunei Sultanate. However, due to internal power struggle and uprisings within the Sultanate, parts of Sabah were ceded to the Sulu Sultanate in 1450 in return for support from the Sulu Sultanate in suppressing the uprisings in Brunei.[27] In 1761, Alexander Dalrymple, an officer from the British East India Company concluded an agreement with the Sultan of Sulu which allowed him to set up a trading and commercial post in the Sulu controlled area in North Borneo.[28] In 1847, the island of Labuan in Borneo became a British colony as a result of the Treaty of Friendship and Commerce signed between the British Government and the Sultan of Brunei.[29]

From 1881, the British North Borneo (Chartered) Company acquired interest over Sabah.[30] While the Company’s interests were primarily commercial, it also undertook to provide facilities for the Royal Navy, to refrain from monopolizing trade, to administer justice with due consideration for native laws and practices and to refrain from interfering with religion.[31] In 1888, the British Government declared the territories administered by the Company, together with those in Sarawak, a protected State under the Protectorate Agreement dated 12 May 1888.[32] Sabah was governed by the British North Borneo (Chartered) Company from 1881 until 1942 when it fell to the Japanese. By an agreement with the British Government executed on 26 June 1946,
the Chartered Company ceded all its rights, powers and interests in North Borneo to the British Government to take effect from 15 July 1946.\[33\] Therefore in 1946, the territory became, with Labuan, the new Crown Colony of North Borneo.

(iv) Malaysia

The idea of a political association between Malaya, Singapore and the three Borneo territories of Sabah, Sarawak and Brunei had been discussed for many years. On 27 May 1961, a statement was made by the then Prime Minister of the Federation of Malaya, Y.T.M. Tunku Abdul Rahman Putra Al-Haj on the concept of Malaysia at a Press Luncheon in Singapore.\[34\] Before coming to any final decision, a commission under the chairmanship of Lord Cobbold was set up to ascertain the views of the peoples of Sabah and Sarawak on these questions.\[35\] The commission visited Sabah and Sarawak between February and April 1962 and its report was published on 1 August 1962. The report showed that the overwhelming sentiment of the people of Sabah and Sarawak were in favour of the establishment of Malaysia, and the Commission therefore unanimously agreed that a Federation of Malaysia was in the best interests of Sabah and Sarawak and that an early decision in principle should be reached.\[36\] According to the Cobbold Commission Report, the creation of Malaysia should be regarded “as an association of partners, combining in the common interest to create a new nation but retaining their own individualities.”\[37\]

The formation of Malaysia was strenuously opposed both externally by Indonesia, the Philippines and Brunei, as well as internally. Nevertheless,
in light of the Cobbold Commission Report and of the agreement reached between the Government of Malaya and the Government of Singapore, the British and Malayan Governments decided in principle that, subject to the necessary legislation, the proposed Federation of Malaysia should be brought into being by 31 August 1963.\[38\] On 9 July 1963, the “Malaysia Agreement” was signed in London by the British and Malayan governments, Sarawak, Sabah and Singapore for the formation of Malaysia.\[39\] On 31 July 1963, the Malaysia Act 1963 Chapter 35 was enacted by the British parliament enabling Sabah, Sarawak and Singapore (“new States”) to federate with the existing States of the Federation of Malaya. The new federation was to be known as Malaysia. On the day the new States were federated, the British’s sovereignty and jurisdiction in respect of the new States were relinquished.\[40\] Malaysia was officially formed on 16 September 1963 and Y.T.M. Tunku Abdul Rahman Putra Al-Haj became the first Prime Minister of Malaysia.\[41\] 16 September 1963 was, and still is, known as Malaysia Day.\[42\]

THE RECEPTION OF ENGLISH LAW INTO MALAYSIA

(i) Malaya

The British first introduced English law to Penang through the First Charter of Justice in 1807.\[43\] Before that, following the founding of Penang, the main preoccupation of the British administrators was the maintenance of some form of order. Before the Charter of Justice of 1807, there was already in place in Malaya a system of courts and judges, but the justice they administered was not in accordance with the rules of English law. In petty civil cases, justice was administered among the
various native populations by the headmen or captains (as they were called) of their own villages.\textsuperscript{[44]} The decisions of these headmen or captains were subject to an appeal to a European gentleman who acted as Magistrate.\textsuperscript{[45]} This Magistrate himself tried the more important civil cases in the first instance.\textsuperscript{[46]}

When in 1800 instructions for the administration of justice were at last issued, they prescribed that the law for Penang was to be "the law of the different peoples and tribes of which the inhabitants consist, tempered by such parts of the British law as are of universal application".\textsuperscript{[47]} When the first Judge arrived, he concluded that there was no law except the law of nature. It was to put an end to this period of legal chaos that the Charter of Justice of 1807 was granted.\textsuperscript{[48]} To give effect to the Charter, local customs and laws were allowed to continue but with such portions of the English law as were considered just and expedient.\textsuperscript{[49]} The Charter established a ‘Court of Judicature of Prince of Wales’ Island’ which had the jurisdiction and powers of the Superior Courts in England "so far as circumstances will admit"\textsuperscript{[50]} in civil, criminal and ecclesiastical matters.\textsuperscript{[51]} In essence, it had the effect of introducing English law to Penang with the necessary modifications.\textsuperscript{[52]}

When the Straits Settlements comprising of Penang, Malacca and Singapore was established, the Second Charter of Justice was introduced in 1826.\textsuperscript{[53]} The crux of the Second Charter was the reiteration of the contents of the First Charter of Justice, and the extension of its application to Malacca and Singapore.\textsuperscript{[54]} It had the effect of introducing English law in the Straits Settlements as it existed in England on 27
November 1826.\cite{55} In 1855, the Third Charter of Justice was introduced, essentially to restructure the court system whereby the court was split into two divisions, one for Penang and one for Malacca and Singapore.\cite{56} The *Civil Law Ordinance 1878* empowered the Supreme Court of the Straits Settlements to administer English common law and equity in the Straits Settlements. This Ordinance was replaced with the *Civil Law Ordinance of 1909* and later re-enacted as the *Civil Law Ordinance (Chap. 42 of the 1936 Revised Edition).*\cite{57}

The appointment of British Residents in each of the Federated Malay States led to the informal reception of English law in those states.\cite{58} In 1937, the Federated Malay States were the first to accept English law on a voluntary basis by passing the *Civil Law Enactment 1937*\cite{59} which provided for the application of English law and equity where no other provision had been made or might thereafter be made.\cite{60} The 1937 *Enactment* did not really effect any great change to the *de facto* situation but merely gave statutory endorsement to the courts to do what they had already been doing long before the passing of the legislation.\cite{61} The 1937 *Enactment* essentially introduced English common law and equity into the Federated Malay States, subject to such qualifications as local circumstances render necessary.\cite{62} Similar to the Federated Malay States, the appointment of British Advisors in each of the Unfederated Malay States also led to the informal reception of English law in those states. Officially, the Unfederated Malay States became part of the Federation of Malaya in 1948. In 1951, the *Civil Law Enactment of 1937* which was applied only to the Federated Malay States, was extended to the Unfederated Malay States when the *Federation of Malaya Civil Law*
(Extension) Ordinance 1951 was passed into law. By then, English law was officially applied in the whole of Malaya. In 1956, the Civil Law Ordinance 1956 was passed to formally receive the whole of the common law of England and of equity into the Federation of Malaya (including Penang and Malacca), subject to such qualifications as local circumstances rendered necessary. In this way, English law became the law of Malaya.

(ii) Sabah and Sarawak

The administration of justice in Sarawak in the early colonial days was relatively informal, combining tenets of the English system of justice familiar to the Rajah, and native customs. The formal reception of English law into Sarawak took place in 1928 through the Law of Sarawak Order which provided the statutory authority on the source of law to be applied by the courts. The written law of Sarawak was derived to a large extent from legislation in force in Singapore and the Federation, and therefore indirectly from the written law in India and the United Kingdom. The laws in Sarawak in the early days took the form of orders issued by the Rajah, examples of which are the Courts Order 1922, the Interpretation Order 1933 and Order L-4 (Laws of Sarawak) 1928. Order L-4 provided for a general rule that English law would apply in the absence of specific legislation. In 1949, the Application of Laws Ordinance in Sarawak was passed to further expand and clarify the application of English law. This provided that the common law of England and the doctrines of equity, together with statutes of general application as administered or in force in England at the commencement
of the Ordinance, shall be the law in force in Sarawak, in so far as the circumstances of Sarawak and its inhabitants permit and subject to such qualifications as local circumstances and native customs render necessary. Sarawak also had an additional provision for Acts of Parliament of the United Kingdom specified in the Schedule to the Ordinance to be in force in Sarawak.

Similar to Sarawak, the written law of Sabah was derived to a large extent from legislation in force in Singapore and the Federation and therefore indirectly from the written law in India and the United Kingdom. In 1938, the Civil Law Ordinance was passed, formally acknowledging the reception of English law into Sabah “having regard to native customs and local conditions”. In 1951, the Application of Laws Ordinance was passed to further clarify and expand the application of English law in Sabah. The 1951 Ordinance provided that the common law of England and the doctrines of equity, together with statutes of general application as administered or in force in England at the commencement of the Ordinance, shall be the law in force in Sabah, in so far as the circumstances of Sabah and its inhabitants permit and subject to such qualifications as local circumstances and native customs render necessary. A summary of the chronology of the legislation introducing English law into Malaysia is provided in Table 1 below:

Table 1

<table>
<thead>
<tr>
<th>Year</th>
<th>Legislation</th>
<th>Purpose</th>
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<tbody>
<tr>
<td>1807</td>
<td>First Charter of</td>
<td>Statutory authority for introduction of English law</td>
</tr>
<tr>
<td>Year</td>
<td>Act</td>
<td>Description</td>
</tr>
<tr>
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<tr>
<td>1826</td>
<td>Second Charter of Justice</td>
<td>Statutory authority for introduction of English law into Penang, Malacca and Singapore</td>
</tr>
<tr>
<td>1855</td>
<td>Third Charter of Justice</td>
<td>Restructuring of court system in Straits Settlement</td>
</tr>
<tr>
<td>1878</td>
<td>Civil Law Ordinance</td>
<td>Empowered the Supreme Court of the Straits Settlements to administer English law in the Straits Settlements</td>
</tr>
<tr>
<td>1909</td>
<td>Civil Law Ordinance</td>
<td>Replaced Civil Law Ordinance of 1878</td>
</tr>
<tr>
<td>1928</td>
<td>Law of Sarawak Ordinance or Order L-4</td>
<td>Statutory authority for introduction of English law into Sarawak</td>
</tr>
<tr>
<td>1937</td>
<td>Civil Law Enactment (1937 FMS No 3)</td>
<td>Statutory authority for introduction of English law into the Federated Malay States</td>
</tr>
<tr>
<td>1938</td>
<td>Civil Law Ordinance 1938</td>
<td>Statutory authority for introduction of English law into Sabah</td>
</tr>
<tr>
<td>1949</td>
<td>Application of Laws Ordinance 1949</td>
<td>Statutory authority for introduction of English common law, equity and statutes of general application into Sarawak</td>
</tr>
<tr>
<td>1951</td>
<td>Application of Laws Ordinance 1951</td>
<td>Statutory authority for introduction of English common law, equity and statutes of general application into Sabah</td>
</tr>
<tr>
<td>1951</td>
<td>Civil Law (Extension)</td>
<td>Extended the Civil Law Enactment of 1937 (applicable only to the Federated Malay States) to</td>
</tr>
<tr>
<td>Year</td>
<td>Ordinance/Act</td>
<td>Description</td>
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<td>-----------------------------------------------------------------------------</td>
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<tr>
<td>1951</td>
<td>Ordinance 1951</td>
<td>The application of English law for the whole of the Unfederated Malay States</td>
</tr>
<tr>
<td>1956</td>
<td>Civil Law Ordinance 1956</td>
<td>The application of English law for the whole of the Federation of Malaya (including Penang and Malacca)</td>
</tr>
<tr>
<td>1972</td>
<td>Civil Law Act 1956 (Revised 1972)</td>
<td>The application of English law for the whole of Malaysia (including Sabah and Sarawak)</td>
</tr>
</tbody>
</table>

**THE COURT SYSTEM**

(i) **Malaya**

The First Charter of Justice 1807 established a ‘Court of Judicature of Prince of Wales’ Island’ which had the jurisdiction and powers of the Superior Courts in England “so far as circumstances will admit”[74] in civil, criminal and ecclesiastical matters.[75] In 1826, the Second Charter of Justice established a new ‘Court of Judicature of Prince of Wales’ Island, Singapore and Malacca’. [76] This Court of Judicature was to be presided over by the Governor of the Straits Settlements and Resident Councillor of the settlement where the court was to be held, and another professional judge known as the Recorder.[77] In brief, there was only one professional judge known as the Recorder, who was assisted by lay judges. In the beginning, all the Recorders who were sent to dispense justice made Penang their headquarters, and only visited Singapore and Malacca twice a year.[78] This led to a serious backlog in cases corresponding to the increase in population and commercial activities, especially in Singapore.[79] Therefore in 1855, the Third Charter of Justice was introduced, essentially to restructure the court system.[80] The
court was split into two divisions, one for Penang and one for Malacca and Singapore. There were two Registrars appointed for each of the divisions. An additional Recorder was appointed for Singapore and the jurisdiction of the Recorder in Penang was extended to Province Wellesley (now known as Seberang Perai).\[^{81}\]

After handover of the Straits Settlements by the East India Company to the Colonial Office in London in 1867, the court system was re-organised again. The Recorder of Singapore became Chief Justice of the Straits Settlements and a new court was established known as the ‘Supreme Court of the Straits Settlements’.\[^{82}\] The Penang Recorder was designated ‘Judge of Penang’.\[^{83}\] By *Ordinance 5 of 1868*, the Court of Judicature of Prince of Wales Island, Singapore and Malacca was abolished.\[^{84}\] In 1873, further restructuring was made to the Supreme Court which now had four judges namely the Chief Justice, the Judge of Penang, the Senior Puisne Judge and the Junior Puisne Judge. The Court of Quarter Sessions, which had jurisdiction over criminal cases was established and it was presided over by the Junior and Senior Puisne Judges in Singapore and Penang respectively.\[^{85}\] This was followed by the establishment of the Court of Appeal.\[^{86}\] In 1878, the *Courts Ordinance 1878*\[^{87}\] was introduced which amended the constitution of the civil and criminal courts of the Straits Settlements. The Ordinance established the following courts: (i) the Supreme Court of the Straits Settlement (with the same jurisdiction as the English High Court); (ii) Courts of Requests at each of the Settlements; (iii) Courts of two Magistrates, at each of the Settlements; (iv) Magistrates’ Court, at each of the Settlements; (v)
Coroners’ Courts at each of the Settlements; and (vi) Justices of the Peace.\[^{88}\]

Before 1896, appeals in each of the Federated Malay States lay to the Courts of the Residents with a final appeal to the Sultan-in-Council.\[^{89}\] In 1896, the Judicial Commissioner’s Regulations and Orders in Council came into force, which abolished the Courts of the Residents and Sultans-in-Council and introduced a Judicial Commissioner as the final Court of Appeal for the Federation.\[^{90}\] He was appointed by the Sultans with the consent of the Residents, the qualification being a barrister or solicitor of at least ten years’ standing. He usually heard appeals from the Senior Magistrates (who had unlimited jurisdiction), but he could order trials before himself instead of before the Senior Magistrates, and he heard capital cases in the first instance.\[^{91}\]

Mr. L.C. Jackson, Q.C., was appointed first Judicial Commissioner for the Federated Malay States and arrived in July 1896.\[^{92}\] Rules for procedure and for admission of advocates and solicitors were drafted by him and passed. The courts of the Senior Magistrates were then opened to members of the Bar. By 1905 the work done included 23 civil appeals, 14 criminal appeals and 24 murder cases.\[^{93}\] The Senior Magistrate system was introduced at different times in the four States. They were civil servants appointed and transferred from and to other civil service posts in the ordinary way.\[^{94}\] The judicial system was reorganized by the *Courts Enactment 1905* which came into force on 1 January 1906. The Judicial Commissioner’s and Senior Magistrates’ Courts were abolished and a Supreme Court created, consisting of a Chief Judicial Commissioner and
two Judicial Commissioners appointed by the Resident-General with the approval of the High Commissioner.\textsuperscript{[95]} The Court of Appeal consisted of any two or more of the judges. A third Judicial Commissioner was added subsequently.\textsuperscript{[96]} With the establishment of an English based court system and the appointment of English trained judges, local cases were decided according to English law.\textsuperscript{[97]}

Before the introduction of English law, there was already in place a system of Kadhi or Syariah Courts in Malaya whereby the hierarchy was the penghulu or Imam at first instance, appeal to the Kadhi or Syariah Court, and a final appeal to the Sultan (the highest court of appeal).\textsuperscript{[98]} Besides the introduction of English law, the British also changed the court system from the Kadhi or Syariah Court to the English court system. Following the formation of the Federated Malay States in 1895, the Judicial Commissioner replaced the Sultan as the final authority.\textsuperscript{[99]} In 1905, the \textit{Courts Enactment} was introduced which provided that appeals from the Syariah Court were to be heard before a British Magistrate Court Judge.\textsuperscript{[100]} In 1919 the British introduced the \textit{Courts Enactment 1919} which created a hierarchy of courts which consisted of a High Court, Court of Appeal and the Supreme Court of the Federated Malay States.\textsuperscript{[101]} In this hierarchy the Kadhi Courts were placed second last in the hierarchy.\textsuperscript{[102]}

In 1923, it was provided that the Federated Malay States Court of Appeal should consist of not less than three judges.\textsuperscript{[103]} In 1925, the titles were altered from ‘Chief Judicial Commissioner’ and ‘Judicial Commissioner’ to ‘Chief Justice’ and ‘Judge’ with the style ‘The Honourable Mr.
In 1924, a Committee was formed with the Chief Justice as Chairman to arrange for the reporting of cases. The task of printing and publishing case reports free of charge were undertaken by the Government. Each judge’s secretary was required to send to the Committee a copy of every written judgement delivered by the judge, and registrars, deputy public prosecutors, and members of the Bar were asked to send reports and notes of oral decisions. In 1948, the British introduced the Courts Ordinance 1948 for the Federation of Malaya which repealed the Courts Enactment 1919 except the provisions on Kadhi Courts. This meant that the Kadhi Courts were pushed down to the state level and the Malay Rulers regained authority over Islamic matters. This then was the start of the dual court system which is still prevalent in Malaysia today, i.e. civil courts for all non-Islamic matters, while Islamic matters were left with the Kadhi Courts (now known as Syariah Courts) and Islamic laws were applied.

The Courts Ordinance 1948 established a Supreme Court, which was to be a Court of Record of unlimited civil and criminal jurisdiction, and consisted of a High Court and a Court of Appeal. It also established the Sessions Courts, Magistrates’ Courts (First Class and Second Class), Penghulu Courts and justices of the peace. The Chief Justice was to be the President of the Supreme Court, and had to be a person who was qualified to practice as an advocate in a Court in the Federation or in England, Scotland, Northern Ireland or some other part of His Majesty’s dominions, and been so qualified for not less than 5 years. The 1948 Ordinance also provided for the appellate civil and criminal jurisdiction of the Court of Appeal. Hearings and proceedings in the Court of
Appeal were to be heard and disposed of before three or greater uneven number of Judges. The Chief Justice was to be the President of the Court of Appeal.[116] For the High Court, every proceeding was to be heard and disposed of before a single Judge.[117] The High Court was vested with original criminal jurisdiction,[118] original civil jurisdiction,[119] appellate jurisdiction which is generally for all appeals arising from the Sessions and Magistrates’ Courts[120] and revisionary jurisdiction over subordinate court matters.[121]

Leading up to the independence of the Federation of Malaya, the Reid Commission recommended that the current legal regime in place, i.e. the segregation between the two court systems, namely the civil and Shariah courts, which run in parallel, continue to be retained. With particular regard to the Judiciary, the Reid Commission recommended that the existing Supreme Court (consisting of a High Court and a Court of Appeal) be continued and have the function of interpreting the Constitution and protecting State rights and fundamental liberties in addition to its ordinary functions.[122]

(ii) Sabah and Sarawak

The Courts Order 1922 established the Supreme Court, Resident’s Courts, District Courts, Magistrate’s Courts and Native Courts for the administration of civil and criminal law in Sarawak. The Courts Order 1933 repealed the 1922 Order, and by Section 9(a) prescribed that the Supreme Court shall have jurisdiction in every suit and by Section 9(b) that the Magistrates’ Courts “shall have jurisdiction in every suit which they are otherwise competent to hear” provided that the value in dispute
did not exceed certain figures which, in the case of the Courts of Magistrates of the First Class or Resident’s Courts, was unlimited. Sabah and Sarawak were ceded to the Crown in 1946 and came directly under colonial rule. In 1947, the Circuit Courts Ordinance was enacted whereby two Circuit Courts were constituted.\[^{123}\] Section 7(1) of the 1947 Ordinance removed all jurisdiction of the Courts of the Residents into Circuit Courts except for matters reserved in the Schedule. In 1951, the Courts Ordinance was enacted and came into force on 1 May 1952. The Courts Ordinance 1951 repealed the Circuit Courts Ordinance and the jurisdiction of the Circuits Courts then passed to the High Courts constituted by the Sarawak, North Borneo and Brunei (Courts) Order-in-Council of 1951.\[^{124}\] A Supreme Court of Sarawak, North Borneo and Brunei comprising the Court of Appeal and High Court was also established. The Supreme Court existed until 1963 when North Borneo, renamed Sabah, and Sarawak became part of Malaysia.\[^{125}\]

The first judges and magistrates were the states administrators, with the highest court in each territory known as the Supreme Court.\[^{126}\] Sarawak had its first legally qualified judge in 1928, namely Justice TS Stirling Boyd who served as the Judicial Commissioner of the Supreme Court of Sarawak until 1939.\[^{127}\] Sabah received its first legally qualified Judicial Commissioner in 1912, a post that was later known as ‘Chief Justice.’\[^{128}\] When Sabah and Sarawak became Crown Colonies after World War II (1931-1945), both these states together with Brunei formed a combined judiciary. In addition to the High Court, a Court of Appeal was then established. The combined judiciary was headed by a Chief Justice, the first of whom was Sir Ivor Brace.\[^{129}\]
(iii) The Privy Council

When the British colonial empire was greatly expanded, it became necessary to make adequate provisions for the determination of appeals from the colonies and possessions. Consequently, in 1833, the Judicial Committee of the Privy Council was reorganized to accommodate such appeals, and was the final court of appeal for Malaysia\textsuperscript{[130]} until 1985, starting with the Straits Settlements. The actual starting date for appeals to the Privy Council could not be ascertained, as this was not clearly spelt out in any of the British legislation. The earliest reported appeal case from the Straits Settlements to the Privy Council was in 1875.\textsuperscript{[131]} By the \textit{Federated Malay States Appeals Order-in-Council 1906} passed by His Majesty the King-Emperor-in-Council on 11 May 1906, provision was made for an appeal in civil actions from the new Supreme Court of the Federated Malay States to the Privy Council.\textsuperscript{[132]} As for the Unfederated Malay States, no such right existed as it was not provided for in the respective \textit{Courts Enactments}, except for Johore when such a provision was included in its \textit{Courts Enactment} in 1919.\textsuperscript{[133]} Uniformity in legislation for all final appeals to lie with the Privy Council was only achieved in 1948 when \textit{Clause 83 of the Federation of Malaya Agreement} provided for appeals to be made to His Majesty in Council from the Malayan Supreme Court.\textsuperscript{[134]}

In the negotiations leading to the independence of the Federation of Malaya, the Reid Commission recommended that the Judicial Committee should continue to hear appeals from local courts. However, it recognized that existing procedure governing appeals was not appropriate for an
independent country with its own monarch, given that a decision of the Privy Council took the form of an advice to the British monarch. Therefore, *Article 131(1) of the Federal Constitution* was included to empower the Yang di-Pertuan Agong to make arrangements with Her Majesty for the reference to the Privy Council of appeals from the Federal Court. In that arrangement, appeals would be made to the Yang di-Pertuan Agong who referred them to the Privy Council. A decision of the Privy Council took the form of an advice to the Yang di-Pertuan Agong who would give effect to it.[135]

Appeals to the Privy Council were abolished in stages. Beginning from 4 October 1975, appeals to the Privy Council in security cases were abolished.[136] On 1 January 1978, appeals to the Privy Council in criminal and constitutional matters were abolished.[137] On 1 January 1985, all other appeals i.e. civil appeals except those filed before that date were abolished via the *Constitution (Amendment) Act 1983*[138] which repealed *Article 131 of the Federal Constitution*. In the same act, the Federal Court was renamed as the Supreme Court which became the apex court. By virtue of the *Constitution (Amendment) Act 1993*,[139] a Special Court for Rulers was established on 30 March 1993 and which is now provided for in *Articles 182 and 183 of the Federal Constitution*. Finally, by the *Constitution (Amendment) Act 1994*, on 24 June 1994, the apex court was once again renamed as the Federal Court of Malaysia, and a Court of Appeal was set up. The British left with the Malaysian courts a jury trial in criminal cases involving death penalty. Jury trials were finally abolished in 1995.[140]
A summary of the history of the Malaysian judiciary is set out in Figure 1 below:

**Figure 1 : The history of the Malaysian judiciary**
Adapted from the Malaysian Judiciary webpage: www.kehakiman.gov.my
The current civil court system in Malaysia may roughly be divided into the superior courts and the subordinate courts. The superior courts comprise of the Federal Court, the Court of Appeal and the High Courts in Malaya and in Sabah and Sarawak. The subordinate courts consist of the Sessions Court and the Magistrates’ Court.\footnote{141} Figures 2 and 3 below are an overview of the current hierarchy of courts in Malaysia retrieved from the Malaysian Judiciary’s website:

**Figure 2: Hierarchy of Malaysian courts**

Source: Malaysian Judicial Structure, retrieved from:

Figure 3: Organisation Chart of the Judiciary (Administration)

Source: Malaysian Judicial Structure, retrieved from:

THE LEGAL PROFESSION

The legal profession in Malaysia is a fused profession i.e. there is no division between solicitors and barristers as in England. Malaysian lawyers take on both functions and this is why a practicing lawyer is called an advocate and solicitor in West Malaysia. Historically, both members of the Bar and Bench were almost entirely trained and educated
in English law so that far greater weight was placed on English law and jurisprudence than were at times warranted. The first lawyers were known as “law agents” or “advocates and attornies” and categorised as special and general agents. According to James William Norton Kyshe Esq., who served as court registrar at the Straits Settlements Court at Malacca, the first person admitted to the rolls as a law agent was on John Hewitt whose date of admission was 4 November 1808, and his qualification was “attorney of the Court of Kings Bench”.

A body which resembles the Malaysian Bar today was established as early as 1914 through the enforcement of the *Advocates and Solicitors Ordinance 1914*. The ordinance aimed to regulate legal practitioners in the Federated Malay States. It was later replaced by the *Advocates and Solicitors Ordinance 1940*. Johor had its own enactment, i.e. the *Advocates and Solicitors Enactment of Johor (Johore (Cap. 104))*.

Advocates and solicitors in the Straits Settlements were regulated by the *Advocate and Solicitors Ordinance of the Straits Settlement (Straits Settlements) (Cap. 62)*. After the Japanese occupation, all the ordinances and enactments were replaced by one ordinance which was a legislative instrument of the Malayan Union termed as Legislation No. 4 of 1947, i.e. the *Advocates and Solicitors Ordinance 1947* which applied throughout the Federation, i.e. West Malaysia, which was then known as the Malayan Union consisting of Settlements and States.

The 1947 Ordinance was enacted by the Governor of the Malayan Union in accordance with provisions of *Section 85 of the Malayan Union Order-in-Council 1946*. It expressly repealed the *Advocates and Solicitors Enactment of the Federated Malay States 1940*, the *Advocates and
Solicitors Enactment of Johore and the Advocates and Solicitors Ordinance of the Straits Settlements. The 1947 Ordinance established the first independent and self-governing Bar Council covering Malaya, and dealt with the admission and enrolment of advocates and solicitors, and the control of practitioners such as through disciplinary proceedings. It sought to combine and bring all private legal practitioners in West Malaysia under one legal regime. With the attainment of independence in 1957, the growth in the number of local lawyers and the establishment of the first Malaysian law school at the University of Malaya, the 1947 Ordinance was then replaced with the Legal Profession Act 1976 which came into effect on 1 June 1977. On 1 January 1971, the door officially closed on non-resident lawyers practicing in Malaysia. This led to the immediate exodus of about 63 Singaporean practitioners from Malaysia on 31 December 1970, which was the deadline issued by the Malaysian Government for all non-resident (principally Singaporean) lawyers to cease practicing in Malaysia.

The Legal Profession Act 1976 is stated to apply throughout Malaysia. However, this is not the case because lawyers in Sabah and Sarawak have their own respective legislation governing the legal profession in those states, namely the Advocates Ordinance in Sabah and the Advocates Ordinance in Sarawak. They also have their own law association and society which is not part of the Malaysian Bar or the Bar Council of Malaysia. Hence, although the Legal Profession Act 1976 states that the Act applies throughout Malaysia; in reality, since even before the independence of Malaya in 1957, the legal profession in West Malaysia,
Sabah and Sarawak had always been kept separate, and continue to be so even after the formation of Malaysia.

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Endnotes:


[5] Ibid., Chapter 1, paragraph 1.

[6] Ibid., Chapter 1, paragraphs 10 and 11.


[10] See the First Schedule to the Federation of Malaya Agreement 1957.


[12] See the Third Schedule to the Federation of Malaya Agreement 1957.


[17] Ibid., at pages 10-11.


[21] Ibid.


[25] Ibid., paragraph 27.


[31] Ibid.


[38] Excerpt from the Joint Public Statement Issued by the British and Malayan Governments on 1 August 1962.


[40] Malaysia Act 1963, Section 1(1).


[45] Ibid.

[46] Ibid.

[47] Ibid.
[48] Ibid.
[51] Ibid.
[52] See Yap Cheah Neo v Ong Cheng Neo (1875) LR 6 PC 381 at page 392.
[58] Ibid., Chapter 6, page 138.
[62] See Section 2(i) of the Civil Law Enactment 1937 (No. 3 of 1937) F.M.S.
[63] See Section 2.

[66] Ibid.


[68] Ibid.


[75] Ibid.


[79] Ibid.


[82] Ibid., Chapter 6, page 122.

[83] Ibid.

[84] Ibid.

[85] Ibid.


[87] No. 111 of 1878.

[88] See the Courts Ordinance 1878.


[90] Ibid.

[91] Ibid.

[92] Ibid.

[93] Ibid.

[94] Ibid.

[95] Ibid.

[96] Ibid at page 81.

[97] Ibid.


[99] Ibid.

[100] Ibid.

Ibid.

Ibid.

Ibid.

Ibid.

Federation of Malaya No. 43 of 1948.


Federation of Malaya No. 43 of 1948.

Section 3(1) of the Courts Ordinance 1948.

Section 3(2) of the Courts Ordinance 1948.

Section 98 of the Courts Ordinance 1948. Justices of the peace were appointed by the Ruler, and had the same powers as a Second Class Magistrate within the State or Settlement.

Section 6 of the Courts Ordinance 1948.

Section 8 of the Courts Ordinance 1948. This was later amended under Act 7/64 (LN 174/58) to read that the Chief Justice shall be qualified for appointment under Article 123 or 174(3) of (4) of the Federal Constitution.

Section 14 of the Courts Ordinance 1948.

Section 13 of the Courts Ordinance 1948.

Section 43 of the Courts Ordinance 1948.

Section 46 read together with the First Schedule of the Courts Ordinance 1948.

Section 47 read together with the Second Schedule of the Courts Ordinance 1948.

Section 48 of the Courts Ordinance 1948.
[121] Sections 52 to 56 of the Courts Ordinance 1948.

[122] The Reid Commission Report, Chapter VI, paragraph 123.


[127] Ibid.

[128] Ibid.

[129] Ibid, at page 147.


[134] Ibid, at page 11.


[136] See the Essential (Security Cases) (Amendment) Regulations 1975. PU(A) 320/75.


Act A848.


Ibid, Chapter 1, page 24.


Ibid.

FMS No. 22/1914.

FMS Enactment No. 1 of 1940.


Ibid.


[156] Act 166/76.


[158] Ibid.