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THE RELATIONSHIP BETWEEN THE FEDERAL AND STATE COURTS IN MALAYSIA

By

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Historical background

The Sultanate of Malacca was colonized by the Portuguese, followed by the Dutch and the British. By the 19<sup>th</sup> century the British had completed her dominance over what is now Malaysia. British colonization had led to the influx of Chinese and the Indian immigrants to what is now Malaysia. As a result, out of the total population of about 25 millions now, 50.4% are Malays, 23.7% are Chinese, 7.1% are Indians, 11% are natives of Sabah and Sarawak and the rest, others. The British introduced English law through Charters, Statutes, the Courts and British Lawyers.

The Judiciary under the 1957 Constitution.

By the time Malaysia obtained her independence in 1957 English law and English judicial system were well established in Malaysia. As a result the Federal Constitution, drafted by common law judges, entrenched the English legal and judicial systems in the country. These courts (which I shall refer to as "civil courts") are federal courts. However, the states are given the power to make laws to establish the shari'ah courts in the respective states with jurisdiction over Muslims only and limited to mainly personal laws. Shari'ah courts were established by the states. The two systems exist until today.

CIVIL COURTS

Structure

The civil courts can be divided into two groups: superior courts and subordinate courts. Superior courts consist of, from the highest, the Federal Court, the Court of Appeal and the High Court. (The term "Federal Court" here is quite misleading. It means the "Supreme Court, i.e. the highest court in the country, not "federal court" in contrast with state courts.) Below the High Court are the subordinate courts, consisting of the Sessions Court and the Magistrate's Court - . (See Appendix "A"). Appeals from the subordinate courts go to the High Court and from there to the Court of Appeal. There is no further appeal to the Federal Court. Generally speaking, judgments of the High Court in its original jurisdiction are appealable to the Court of Appeal and to the Federal Court. In civil cases, appeals to the Federal Court are with leave of the Federal Court

on questions of law arising for the first time or on issues of importance to the public that requires further argument or on constitutional issues.

The High Court sits with one Judge, without jury even though in a few cases, e.g. in land acquisition cases, with assessors who assist the judge in the assessment of the value of the property. The Court of Appeal sits with at least three judges. So is the Federal Court. Even though the Registry of the Court of Appeal and the Federal Court are in the Putrajaya (the country's administrative capital) the two courts do occasionally sit in the state capitals for convenience of the litigants. A subordinate court is presided by one judge or magistrate.

#### Appointment of judges of the superior courts

Judges of the superior courts are appointed by the King on the advice of the Prime Minister. The King has to consult the Conference of Rulers consisting of nine Malay-Muslim Rulers or "Sultans". Before tendering his appointment, the Prime Minister has to consult the Chief Justice, the President of the Court of Appeal, the Chief Judge of Malaya and the Chief Judge of Sabah and Sarawak, as the case may be - See Appendix "B" for detail.

Two categories of people qualify to be appointed as superior court judges. They are advocates and members of the Judicial and Legal Service of not less than ten years. In practice, appointees usually have not less than twenty years experience. In almost all cases, they are appointed as Judicial Commissioners for two years first, before they are "confirmed" as Judges. The two years is some kind of probation period to see whether their performance is up to the expected standard. In due course they may get their promotions to the Court of Appeal, the Federal Court or one of the top four posts i.e. from the highest, Chief Justice of the Federal Court, President of the Court of Appeal, Chief Judge of the High Court, Malaya and Chief Judge of the High Court, Sabah and Sarawak. All judges, the top four posts included, retire at the age of sixty-six with a possible extension of six months. After appointment, their salaries cannot be reduced. They can only be dismissed on ground of breach of any provision of the code of ethics prescribed under clause 3(b) or on the ground of inability, from infirmity of body or mind or any other cause, properly to discharge the functions of his office. On a representation of the Prime Minister, the King shall appoint a tribunal and refer the representation to it. On the recommendation of the tribunal the King may remove the Judge from office. The conduct of judges of the superior courts cannot be questioned in Parliament except on a substantive motion of which notice has been given by not less than one quarter of the total number of members of that House, and shall not be discussed in the Legislative Assembly of any State.

#### Appointment of judges of the subordinate courts

Subordinate court judges are civil servants, like any other civil servants. They are members of the Judicial and Legal Service. The term Judicial and Legal Service too may be misleading. It refers to a service in which the members are, on the judicial side, judges of the subordinate courts, registrars and others. On the legal side, they are from the Attorney General, the Solicitor General, prosecutors, legal advisors in the Ministries

and others. Judges of the superior courts are not members on the service even though most of them were, like me. In fact most of the judges of the superior courts come from the service. What happens is that, usually, when they are about 50 years old and have been in the service for more than 20 years, the good officers are appointed as Judicial Commissioners for two years before they are confirmed as High Court Judges. When they are appointed as High Court Judges, they are deemed to have retired from the service. So he gets one pension at that stage. When, at 66, he retires as a superior court judge or a Chief Justice, if he makes it, he gets another pension, the higher one is taxable!

### Jurisdiction of the civil courts

Civil courts have jurisdiction to hear and determine on all matters specified in the Federal Legislative List. In brief, they have jurisdiction over all matters, civil, criminal and interpretation of the Constitution, except those that fall under the shari'ah court jurisdiction which are confined to personal law of Muslims.

### The law administered by the civil courts.

It is a mistake to say that the Malaysian civil courts administer the English common law. The courts administer Malaysian law, made by Malaysian Parliament. The source may be original, common law or universal. There are matters which are peculiar to Malaysia. Malaysian Parliament makes laws to cater for such situations. It is true that principles of common law are absorbed into the Malaysian law either by statute or through judgments of the courts. But that is, subject to their suitability to Malaysian conditions. In the modern world, many laws are universal. However, they only become Malaysian law when the Malaysian Parliament has legislated on it.

## SHARI'AH COURTS

### The structure and composition of the shari'ah courts

The shari'ah courts are state courts, meaning that each state has its own shari'ah courts. There are three levels of shari'ah courts, from the highest, the Shari'ah Court of Appeal, the Shari'ah High Court and the Shari'ah Subordinate Court. Judges of the shari'ah courts are civil servants like judges of the civil subordinate courts. They retire at 56.

### Jurisdiction of the shari'ah courts

Shari'ah courts have jurisdictions over Muslims only on matters specified in the State Legislative List of the Constitution. They are, mainly on personal law of Muslims, e.g. marriage, divorce, maintenance and so on. shari'ah courts have limited criminal jurisdiction regarding offences against the precepts of Islam e.g. close proximity, eating in public during the day during the month of Ramadan. Proceedings in the shari'ah courts are very similar to those in the civil courts. This is because the civil and criminal procedures used in the shari'ah courts are adopted from those used in the civil courts, with some modifications where necessary.

### Relationship between civil and shari'ah courts.

I am quite sure that the drafters of the Constitution must have thought that they were creating two separate systems: one a federal court with "unlimited jurisdiction" and one a State court with limited jurisdiction. One is independent from the other, each with its own prescribed jurisdiction, one to administer the "secular law" to all, and the other to administer Islamic personal laws to Muslims only.

However, after fifty years of independence, we have come across jurisdictional problems that until today have not been solved. Briefly, there are two problem areas:

First, where one of the parties is a Muslim and the other is a non-Muslim and the subject matter falls within the jurisdiction of the shari'ah court. The shari'ah court has no jurisdiction over non-Muslims and the civil court has jurisdiction over the subject matter.

Secondly, where some of the issues in a case fall within the jurisdiction of the civil court, e.g. land law and another issue, e.g. waqf falls within the jurisdiction of the sharia'ah court. The courts, in trying to resolve the problem, have come out with conflicting judgments. In 2007, I delivered a judgment in which I said that the problem is a legislative problem and not the court's problem. It is not for the court to solve the problem of the legislature. I invited the legislature to review the provisions of the fifty-year-old Constitution and make the necessary amendments to overcome the problems not envisaged by the drafters of the Constitution that have now arisen.

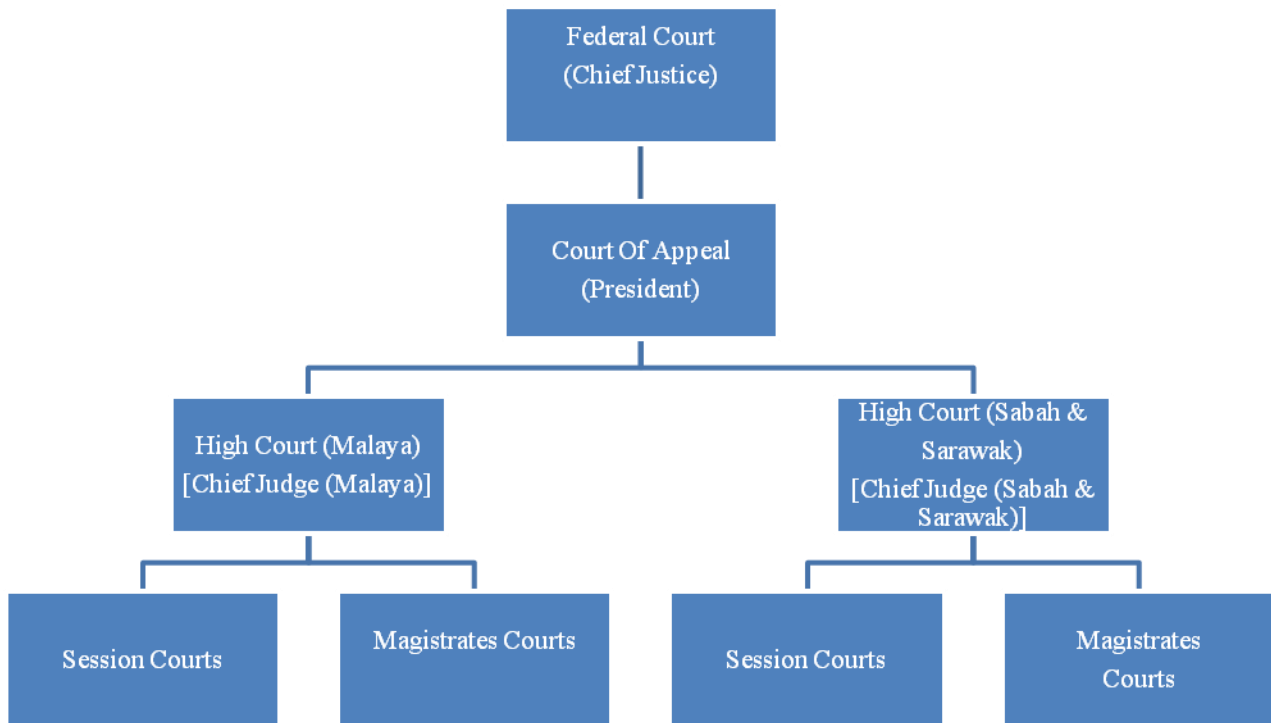
### Islamic banking, insurance and finance

Islamic banking and takaful have become a big business. Cases for collection of debts and claims for compensations against takaful companies are made, heard and decided by the civil court. That is because banking, contracts, land law, insurance are all within the jurisdiction of the Federal Government. The parties are often companies, not "persons professing the religion of Islam" to quote the words of the Constitution. There is hardly any shari'ah issue that arises. However, in case such issues arise in such cases, the law provides that the court may refer the question to the Shari'ah Advisory Council of the Central Bank. In other words, in the whole country there is only one such council to decide such issues. This is to provide for consistency of the rulings.

Thank you.

**Appendix “A”**

**Civil Courts**



**Appendix "B"**

Before tendering advice to the King, the Prime Minister has to consult:

- a) For the appointment of the Chief Justice:
  - Nil
- b) For the appointment of the President of The Court of Appeal:
  - (i) Chief Justice
- c) For the appointment of Chief Judge (Malaya)
  - (i) Chief Justice
- d) For the appointment of Chief Judge (Sabah and Sarawak):
  - (i) Chief Justice
  - (ii) Chief Minister of Sabah
  - (iii) Chief Minister of Sarawak
- e) For the appointment of Judges of the Federal Court:
  - (i) Chief Justice
- f) For the appointment of Judge of the Court of Appeal:
  - (i) Chief Justice
  - (ii) President of The Court Of Appeal
- g) For the appointment of Judge of the High Court of Malaya:
  - (i) Chief Justice
  - (ii) Chief Judge (Malaya)
- h) For the appointment of Judge of High Court (Sabah & Sarawak):
  - (i) Chief Justice
  - (ii) Chief Justice Sabah & Sarawak

**Appendix “C”**  
**Syariah Courts**

