

Judiciary of malaysia



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Question 1 (1168 words) Jurisdiction Chosen: Country - Malaysia Malaysia has a unique legal system as it is the only country in the world that adapts a dual-track legal system where Islamic courts co-exist alongside with civil-institutions. Apparently, because of the dual legal system, Malaysia inherits legal tradition from both the Islamic law and the common law. The more interesting discussion of this research would elaborate how co-existence is possible in Malaysia without conflict.

Before British colonization in Malaya (confined to all states in the Peninsular Malaysia and excluding Sabah and Sarawak in the Borneo islands), Islamic law is only applicable in the state of Malacca. In Malacca the law was compiled in the Malacca Laws and when the Malacca Empire fell versions of the Malacca Laws were applied in the other States (Liam Yock Fang (Editor) Undang-undang Melaka, The Hague, 1976 Subsequent to the fall of Malacca Empire and as a result inter-state migration that took place during that time, Islamic laws were then being spread across to other states of Malaya.

However, when British colonized Malaya in year 1920, the influence of Islamic law became less significant. The British law was implemented in form of codes enacted from India which includes the Contract Act, Criminal Procedure Code and civil Procedure Code. Interestingly enough, the land law legislation introduced at that point of time was based on Torrens System from the Australia. However, the fact that the Torrens system was introduced during the British colonization in both Australia and Malaya clearly explains how the land law legislation originated in Australia was being implemented in Malaya.

In the today world, the Torrens system and law legislation has been widely implemented in most commonwealth country. As a result of the implementation of the British laws in Malaya the Shariah law is no longer applicable to those areas covered by the British laws. The British proceeded to set up courts that were headed by British Judges trained in the English Common Law. The Civil Law Ordinance 1956 stated that in the absence of any written law, the court shall apply in West Malaysia the Common Law of England and the rules of equity as administered in England on the 7th day of April 1956. Civil Law Ordinance. 1956, Federation of Malaya Ordinance No. 5 of 1956). As a result of the enactment of Civil Law Ordinance, although Islamic law is the law of the land in Malaya, in actuality, English law became the basic law of the land in Malaya at that Juncture. In the case of Ramah v Laton a majority of the Court of Appeal in the Malay States held that Islamic Law is not foreign law but it is the law of the land and as such it is the duty of the courts to declare and apply the law. (Ramah v Laton (1927) 6 FMSLR 128).

However during the hearing of that case, the Judge does not have prior knowledge of Islamic law and hence have to refer questions of Islamic Law and customs to the State Executive Council. Due to the complication and constant references back to the Mufti during hearing, Muslim Law was enacted in the States and the Shariah Courts to deal with cases under the enactments. The important fact to take note is that the Shariah courts deals only with Muslims in the Malaya and therefore the Islamic laws are confine to Malays or other races that have converted to Muslims.

Judicial Montesquieu puts forward the idea that there is no liberty, if the Judiciary power is not separated from the legislative and the executive. He said if it were joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; the Judge would then be the legislator. If it were joined with the executive, the Judge would behave with violence and oppression (Montesquieu, *The Spirit of the Laws*, Book X'). In Malaysia, the Judges of courts are appointed by the Yang-Dipertuan- Agong (Monarch) on the advice of the Prime Minister.

The prime minister, before advising the Monarch is required to consult the Chief Justice beforehand. The Judges are usually appointed from the Judicial and Legal Service or the bar council. The independence of Judiciary in Malaysia is questionable for a couple of reasons. In Article 22 of the Federal Constitution, Judicial commissioners can be appointed to perform the role of a Judge of the High Court. However the appointment is for an initial term of 2 years. If the commissioner performs his duty up to a satisfactory level, he may then be recommended by the Prime Minister to be a Judge.

As the judicial commissioners does not have a secured tenure and is playing the role of a probationary Judge being evaluated subjectively by the Prime Minister, his ability to not be subjected by external influences in this case the parliament headed by the Prime Minister himself can be questionable.

Moreover, the fact that Judicial independence in Malaysia is questionable is further evidenced during the Malaysia judicial crisis in 1988. It all began with the then Supreme court's decision in *JP Berthelsen vs Director General of Immigration Malaysia & Ors* [1987] 1 MLJ 134).

The Supreme Court overruled the decision of the Minister and allowed Bethelsen to lawfully stay in the country. The then Prime-minister made a remark during the parliamentary debate that the minister should have the final say of how long a foreigner stays in the country. In May 1988, 20 Judges and the then Chief Justice wrote to the monarch expressing the concerns of the executive criticism of the judiciary publically. As a result, the prime minister invoked the procedure provided under Article 125 Federal Constitution (Malaysia) to remove the chief Justice on the ground of misbehavior.

These series of event leading to the sacking of the then chief justice appeared to be the darkest history in Malaysia's Judicial independence. Comparison to Judiciary independence in Australia Australia, in comparison to Malaysia, though being a Commonwealth country that shares common legal tradition from the British has a Judicial system that is much more independent. Since 1900, the Australian government has adapted a tripartite separation of power of their political system. The roles and responsibility of the tripartite are clearly elaborated in the three chapters of the Australian Constitution.

Chapter 1 explained the parliament as the party that deals with legislation, chapter 2 on the Executive Government on providing executive powers and chapter 3 the Judicature exercising their Judicial independence via the High court and federal courts. Under Chapter 3 section 72 Australian Constitution (Australia), the Judges' tenure of prime minister alone as opposed to Malaysia. Moreover, section 72 also clearly mentioned that the remuneration of the Judges may not be reduced while they are in office.

In Malaysia, the Judiciary does not have control of their own budget and hence the remuneration of the Judges could be affected by the Ministry of Finance. Question 2 (1140 words) As Malaysia has a law tradition that rooted from British law during the British colonization, common law of contracts became the base of Jurisdiction in enforcing promises. However, the fact that Syariah law exist, it is not uncommon for financial institutions to offer products under the Islamic law of contract.

However, the discussions here are generalized to the common law as it still appears to be the most relevant contract law in Malaysia. The common law in Malaysia, similar to common law in British, has freedom as the fundamental of promises between parties. Hence, a promise that benefits a single party more than the other is not uncommon in promises agreed in Malaysia. As long as the contract is clearly communicated in writing, and the other party is well informed of the content of the contract, it will be held valid.

Unlike Islamic law of contract, a verbal promise will not qualify as a contract. The validity of a contract in common law requires 'consideration' which basically implies that a contract must be bilateral. Although most promises are made in order to get something in return, in rare occasion, the in return promise could be abstract. In the case of a father giving money to a man to marry his daughter, the consideration for that case is the fact that the father simply wanted to see his daughter getting married (*Sharrington vs Strotton* (1556) Plowden at 303) .

Contrasting with the Islamic law, a single sided promise is held valid in Wa'd which means unilateral promise in Arabic. In the case of purchase of goods in Malaysia, the purchaser is obliged to perform his own due diligence on the goods before the purchase. It is an obligation in any commercial (sale-purchase) that the seller is to allow the buyer prior to enter into agreement to inspect the goods in order to ensure that it is defect free.