

CHAPTER TWO
THE ADMINISTRATION OF JUSTICE

The Federal Constitution provides for the exercise of governmental power by the legislature and the executive. It also provides for the establishment of the judiciary to exercise the judicial powers conferred on it by the Constitution and under federal law. In a liberal democratic system, the judiciary as the third branch of government plays an essential role in the balance of power. In the Malaysian context, apart from the traditional function of adjudicating civil matters and criminal prosecutions, it interprets the Federal and State Constitutions and pronounces on the legality or otherwise of any legislative or executive acts. In discharging the latter function, the judiciary often walks the political tightrope as the executive not infrequently takes offence and perceives judicial pronouncements as an unjustified intrusion into its domain. This tension is not uncommon even in advanced liberal democracies. In Malaysia, such tension was amply demonstrated in the strained relationship between the two branches in 1987 and 1988, and finally ending in the removal of the Lord President, then the highest judicial officer, and two Supreme Court judges.

JUDICIAL POWER

The term "judicial power" can be broadly defined as *"the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subject whether the rights relate to life, liberty or property. The exercise this power does not begin until some tribunal which has power give a binding and authoritative decision (whether*

subject to appeal or not) is called upon to take action."

This statement of the Australian Chief Justice was cited with approval by Justice Zakaria Yatim in *Public Prosecutor V Dato' Yap Peng* [1987] 2 MLJ 311 when the corresponding term in the Federal Constitution was the subject of interpretation. It is clear that the judicial power is normally exercised by the courts.

However, since the *Constitution Amendment Act 1988* (A704) which, among others, amended article 121, judicial power may no longer vest exclusively in the courts. The amendment was in direct response to the decision of the court in *Public Prosecutor V Dato' Yap Peng, ibid.*, where a provision of a federal law which attempted to confer judicial power on the Attorney-General (who is also the Public Prosecutor) was struck down on the ground of unconstitutionality. According to the Supreme Court, the power conferred by section 418A of the *Criminal Procedure Code* on the Public Prosecutor was "*both a legislative and executive intromission into the judicial power of the Federation*".

The original version of Article 121 "vested" judicial power in the courts and provided for the High Court and the Mahkamah Agung (Supreme Court) to exercise that power.³ In the amended version, the provision merely states that the courts shall exercise "such jurisdiction and powers as may be conferred by or under federal law". The terms "judicial power" and "vested" were deleted. However, the word "vested" remains in respect of the legislative and executive branches.⁴ A new clause was added to article 145 to allow the Attorney General to exercise certain "judicial power" struck down by the court. Clause 3A provides:

"Federal law may confer on the Attorney General power to determine the courts in which or the venue at which any proceedings which he has power under Clause (3) to institute shall be instituted or to which such proceedings shall be transferred."

The effect of the decision in *Public Prosecutor V Dato' Yap Peng* was neutralised and the particular power of the Attorney General restored.

The constitutional amendment was also intended, *inter alia*, to place the judiciary in what the executive perceived was its "proper place", given the executive view that it had gone too far reviewing executive acts.⁵ The executive had moved to establish executive and legislative dominance by diluting the co-equal authority previously enjoyed by the judiciary. The scale is now tilted towards executive government, thus ensuring its dominance in the system that has emerged.

While it might have been the intention of the executive to put the judiciary in its proper" place, it did not intend to remove its inherent jurisdiction. The amendment in its current form does not remove the "judicial power" despite its disappearance from the provision. Part IX of the Constitution which includes article 121 clearly provided for the exercise of judicial power. The absence of the relevant words does not affect the exercise of the express constitutional powers. A leading scholar on the subject wrote:

"Art. 121 read with other provisions of Part IX, evinces an intention notwithstanding the omission of the term 'judicial

power' from Art. 121, to vest the judicial power in the ordinary courts. If Parliament had intended such serious encroachment on the judicial power, it would have had to enact provisions far more drastic than the amendment under consideration. It would have to find some means of excluding totally and expressly the inherent jurisdiction of the courts to exercise exclusively the judicial power, and of vesting such jurisdiction in some other organ or organs. Accordingly the courts can still strike down an Act of Parliament which purports to interfere with the judicial power..."

There is little doubt that the courts' inherent jurisdiction remains. Despite the amendment, courts have continued to determine the constitutionality of governmental actions and in the recent case of *Repco Holdings Bhd V Public Prosecutor* [1997] 3 MU 681, Gopal Sri Ram JCA declared certain provisions of two Acts of Parliament to be null and void, having contravened article 145(3) of the Federal Constitution. His Lordship declared that *"the Supreme Law, namely the Federal Constitution, has committed to the hands of the Attorney General the sole power, exercisable at his discretion, to institute, conduct and discontinue criminal proceedings"*. Article 145(3) should be read with section 376(i) of the Criminal Procedure Code which provides that the Attorney General is the Public Prosecutor who has *"the control and direction of all criminal prosecutions and proceedings under the Code."*

Despite the purported downgrading of the judiciary vis-a-vis the other branches of government, it would appear that it still enjoys a degree of independence absolutely necessary for the proper discharge of its duties. Judicial independence is secured by a number of constitutional provisions, namely :

(1) Judges of the superior courts do not hold office at the pleasure of the Yang di-Pertuan Agong. Unlike public servants, once appointed they hold office till 65 years of age although they are removable by His Majesty on the limited grounds of breach of the code of ethics or of inability from infirmity of body or mind or any other cause properly to discharge the functions of their office, and then only in accordance with an elaborate procedure set out in article 125(3), (4) and (5) of the Constitution. The procedure includes the appointment by His Majesty of a tribunal consisting of not less than five judges or ex-judges to inquire into any allegation properly made. The Yang di-Pertuan Agong may then act upon the recommendation of the tribunal. This procedure was invoked twice in 1988 which culminated in the removal of the Lord President, who was then the head of the Judiciary, and two Supreme Court judges. The code of ethics for judges came into being in 1994. The *Constitution (Amendment) Act 1994* deleted removal of judges on the "ground of misbehaviour" and substituted it for the code of ethics prescribed under article 125(3A). Article 125 (3A) reads:

"The Yang di-Pertuan Agong on the recommendation of the Chief Justice, the President of the Court of Appeal and the Chief Judges of the High Courts, may, after consulting the Prime Minister, prescribe in writing a code of ethics which shall be observed by every judge of the Federal Court."

The code of ethics, which is cited as the Judges's Code of Ethics 1994, came into effect on 2 December 1994. The code is reproduced as Appendix A. It includes such mundane items as not absenting himself or herself during office hours without reasonable excuse or without prior permission of the head of

the various courts. The actual office hours are also prescribed in the code. It is reported that a system of clocking in and out of office has been introduced in the court. It is also interesting to note that in the past while the Prime Minister's role in the discipline of judicial personnel was limited to making representation to the Yang di-Pertuan Agong for their removal, under the new provision he must also be consulted in the making of a code of ethics. If nothing else, it does mean that he has now spread his tentacles a little further in matters relating to judicial conduct.

- (2) Judges' salaries are provided by an Act of Parliament and charged on the Consolidated Fund. Thus it is paid automatically and not subject to annual approval as is the case of money bills for other purposes.
- (3) Judges' salaries and other benefits of office including pension rights may not be altered to his or her disadvantage after appointment.
- (4) Judges are entitled to their pension and retire at 65 years of age. Other public servants are only eligible for pension and they retire at 55 years of age.
- (5) The conduct of a judge may not be discussed in either House of Parliament except on a substantive motion of which notice has been given by at least a quarter of the members of that House. The State Legislative Assembly may not discuss the conduct of a judge at all and rightly so, bearing in mind that the administration of justice and appointment of judges are the preserve of the Federal Government.

JURISDICTION

It is perhaps appropriate at this stage to explain certain common terminology. The term "jurisdiction" means "the right to decide" and when it is used with reference to the courts, it refers to the sort of cases that may be tried. Thus the court may be described as exercising civil or criminal or general jurisdiction. Additionally, there are terms such as "original jurisdiction" and "appellate jurisdiction". When it is said that a court is exercising "original jurisdiction", it means the court has the right to try cases at first instance before any other court in the hierarchy, that is, the power to hear the case for the first time. For example, only the High Court can exercise original jurisdiction in respect of the offence of murder. In general, a court's original jurisdiction is governed by monetary limits in civil matters and the power to inflict punishment in criminal matters. On the other hand, if a court is said to possess "appellate jurisdiction", it means the court considers the case at second or more instance and only after another lower court has made a decision which is the subject of the appeal. Thus, the High Court is said to be exercising appellate jurisdiction if it hears an appeal from a decision of a Magistrates' Court.

The term "inherent jurisdiction" refers to the power to hear and determine cases and it is a necessary corollary of judicial power. According to Lord Morris in *Connelly V DPP* [1964] AC at 1301:

"There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would

regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process."

In Malaysia, Order 92 rule 4 of the *Rules of the High Court* 1980 expresses the same sentiment:

"For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court."⁹

The term "judicial review jurisdiction" refers to the power of the court to pronounce on the legality or otherwise of a statute or an act. The authority to exercise its review jurisdiction is to be found in the inherent power of the court. It stems from the notion that it is the role and duty of the court to uphold the rule of law. Given that the powers of public authority have expanded in modern government, the court asserts the right to ensure that acts are done within their statutory limits. The courts invoke the doctrine of *ultra vires* for striking down administrative acts or decisions which are illegal or in excess of jurisdiction.

"Supervisory jurisdiction" refers to the power of the High Court to control the activities of the subordinate courts or tribunals. In respect of the subordinate courts, the supervisory and revisionary jurisdiction is provided in section 35 of the *Courts of Judicature Act* 1964 (Act 91). The supervision power is different from the review power. In particular, the High Court:

"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, may 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."

Where the High Court calls for the any record, all proceedings in the subordinate court in the matter in question must be stayed pending further order from the High Court.

In general, as a superior court, the High Court has power to supervise the conduct of and review the decisions of subordinate courts, bodies exercising quasi-judicial functions and tribunals. One of the methods of supervision is through the issue of the prerogative writs stemming from the prerogative jurisdiction inherited from the United Kingdom courts. Section 25(2) of the *Courts of Judicature Act* read with section 1 of the Schedule to the Act confers power on the Court to issue directions, orders or writs "including writs of the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose."

It may be appropriate to state that since the amendment to article 121 of the Federal Constitution, the High Court no longer has "jurisdiction in respect of any matter within the jurisdiction of the Syariah courts". Article 121(IA) of the Federal Constitution, which came into effect on 10 June 1988,

reads:

"The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the *Syariah* court."

This provision has been interpreted to mean that the High Court will have no jurisdiction if the jurisdiction in respect of any matter is given to the *Syariah* court. Conversely, the High Court will have jurisdiction if jurisdiction in respect of any matter is not given to the *Syariah* court. When there is a challenge to jurisdiction, the approach is first to determine whether the *Syariah* court has jurisdiction. Obviously the jurisdiction of the High Court is not removed if the jurisdiction of the matter does not fall within the jurisdiction of the *Syariah* court. Justice Jeffrey Tan in *Shaik Zolkaffily Shaik Natar V Majlis Agama Islam Pulau Pinang* [1997] 3 MLJ 281 at 293 further explains:

"Jurisdiction to the Syariah court (and it is only within the state) is given by state law, or for the Federal Territories, by an Act of Parliament, over any matter in the State List under the Ninth Schedule of the Federal Constitution,... but if state law does not confer on the Syariah court any jurisdiction to deal with any matter in the State List, the Syariah court is precluded from dealing with the matter, and jurisdiction cannot be derived by implication."

In short, article 121(1A) of the Federal Constitution, while delimiting the jurisdiction of the High Court in respect of matters within the jurisdiction of the *Syariah* court, does not automatically confer jurisdiction on the *Syariah* court. State

law must confer jurisdiction on the *Syariah* court in respect of those matters specified in the State List. Accordingly, if state law does not confer on the *Syariah* court any jurisdiction to deal with a matter on the State List, the *Syariah* court is precluded from dealing with the matter. In that event, the High Court may continue to exercise jurisdiction in those matters. That appears to be the approach adopted by the court.

A case in point is *Lim Chan Seng & Satu Lagi V Pengarah Jabatan Agama Islam Pulau Pinang* [1996] 3 CLJ 231 where the plaintiffs sought a declaration in the High Court that they had lawfully renounced the Islamic religion by deed polls. The defendant challenged the jurisdiction of the High Court to determine the matter. Observing that the *Penang Administration of Islamic Religious Enactment 1993* did not seem to have empowered the *Syariah* court to adjudicate on the issue of apostasy or the legal status of a renunciation or to have provided that such action should be brought. In the *Syariah* court, the High Court held that the *Syariah* court did not have jurisdiction and in consequence, there was no impediment for the civil court to hear and dispose of the action. The case was referred to with approval in *Shaik Zolkaffily Shaik Natar V Majlis Agama Islam Pulau Pinang, supra*.

The Federal Court of Malaysia

The Federal Court superseded the Supreme Court in mid-1994 and became the highest court. It is constituted by article 121 of the Federal Constitution. Like the other superior courts, it is a creature of the Constitution and therefore cannot be abolished by ordinary laws. The Federal Court consists of the Chief Justice who is the president of the Court, the President of the Court of Appeal, the two Chief Judges of the High Courts and, "until the Yang di-Pertuan Agong by order otherwise

provides, of four other judges and such other additional judges as may be appointed pursuant to Clause (1A)". The current number of Federal Court judges as provided by order of His Majesty is seven.

When hearing cases, the Court would consist of not less than three judges or such greater uneven number as the Chief Justice may in any particular case determine. Obviously, the more important cases especially those involving complex issues of law would be heard by a larger number of judges. Decisions are made by a majority of judges composing the Court.

The Federal Court has the same jurisdiction and "may exercise the same powers as are had and may be exercised by the High Court". In addition, it has exclusive original jurisdiction prescribed for it under article 128(1) and (2) of the Constitution. Its general jurisdiction may be classed as original, referral, advisory and appellate.

Original Jurisdiction

The Federal Court performs a vital constitutional function when it empowered to exercise exclusive original jurisdiction on those matters vested in it by article 128 (1) of the Federal Constitution, that is:

- (a) any question whether a law made by a legislature, federal state, is invalid on the ground that it deals with a matter which it has no power to legislate; and
- (b) disputes on any other question between states and between the federation and any state.

Judicial pronouncement in respect of the latter must be in the form of a declaratory judgement. The Ninth Schedule of

the Constitution divides legislative powers between the federation and states and any encroachment by one on the other or vice versa is an infringement of the principle of federalism and could thus be struck down by the Court as being unconstitutional. The determination of such issues rests exclusively with the Federal Court.

Referral Jurisdiction

The referral jurisdiction is its authority to determine constitutional questions which have arisen in the proceedings of another court by referred to it for a decision by way of a special case stated. When it has decided, it remits the case to the original court to be disposed in accordance with that determination. Pending determination the case by the Federal Court, the court before which the question has arisen may stay proceedings.

Advisory Function

Another important constitutional function is to give its opinion on any question referred to it by His Majesty concerning the effect any provision of the Constitution which has arisen or appears likely to arise. This is a special provision because in a common law tradition, courts as a rule, do not give opinions especially on issues which have not yet arisen. It has even led Tun Mohamed Suffian, who retired as Lord President in 1982, to comment:

"... in a common law country it is unusual for the Executive to be given power to seek legal advice from the courts ... Constitutionally the Attorney General is legal adviser to the King, and it is inconceivable that any constitutional problem is beyond him, for he has a whole host of legal officers to help research and advise him and, more-over his place in the government hierarchy is such that the Ministry of Finance is unlikely to

refuse him money to obtain the best legal advice within and without the country. So it is reasonable to suppose that the King, who of course acts on government advice, before embarking on an important step such as seeking the opinion of the Supreme Court on a constitutional question would do so only where perhaps urgent political considerations require resort to this course or where an authoritative pronouncement on an important legal issue is clearly desirable to resolve uncertainty in that field."

In the *Government of Malaysia V Government of the State of Kelantan* [1968] 1 MLJ 129, such advice was in fact sought by His Majesty. In that case, the Government of Kelantan entered into a commercial arrangement with a company, granting a mining and forest concession to it in return for advance payment of royalty under a financial package. The Federal Government was of the view that the transaction amounted to borrowing contrary to the Constitution. The former Federal Court rejected the contention ruling that it did not constitute borrowing within the meaning of the Constitution. However, the law as established by this ruling has since been negated by the *Constitution (Amendment) Act 1971* (Act A31) which brought in an extended meaning of the word "borrow", to include among other things "royalties".

Requests for advice by His Majesty are treated the same way as appeals so that arguments are heard and decisions delivered in open court.

Appellate Jurisdiction

The criminal appellate jurisdiction of the Federal Court encompasses the hearing and determination of criminal appeals 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. In criminal cases, an appeal may be made by the Public Prosecutor against acquittal,

or by any person convicted on a question of fact or of law or on mixed fact and law.

In civil appeals, it has jurisdiction in respect of appeals from the Court of Appeal with leave of the Federal Court granted in accordance with section 97 of the *Courts of Judicature Act* 1974:

(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 any such provision.

The Federal Court has the power to order a new trial of any case or matter tried by the High Court in the exercise of its original appellate jurisdiction. However, a new trial must not be granted on the ground of improper admission or rejection of evidence unless the opinion of the Federal Court, some substantial wrong or miscarriage of justice has been occasioned. If it appears to the Federal Court that the wrong or miscarriage affects part only of the matter in controversy, or some or one only of the parties, the Federal Court may give final judgment as to part thereof, or as to some or one only of the parties. It may then direct a new trial as to the others as applicable.

THE APPEAL SYSTEM

We shall deal very generally with how the appeal system works. But first, it is worth looking at why there is a need for an appeal system. Amongst the principal functions of courts in a common law system is to administer justice according to law but being a human institution, they are liable to err. A decision may be wrong because the lower court has come to a wrong conclusion as to the relevant fact or made an error of law. It would be a manifest injustice to the aggrieved party if no machinery exists for correcting the error.

Appeals on questions of fact must be distinguished from appeals on questions of law. Appeals with respect to the former presented some real difficulties. All cases are now tried before a single judge or magistrate who decides on both questions of facts and law. Prior to the change brought about in 1995, criminal cases in Peninsular Malaysia involving the punishment of death were tried by judge and jury. The jury was responsible for deciding questions of facts and appeal courts were reluctant to interfere where the tribunal of fact was a jury. The jury was not required to give reasons for its verdict and if evidence were conflicting, it was difficult to demonstrate that the jury had gone wrong. On the other hand, if the trial had been before a judge or magistrate alone, an appellate court would more readily interfere with a decision as to fact. It was possible that the reasons for coming to a particular conclusion on fact may be demonstrably erroneous. Given the complete abolition of jury trials, the problems associated with such trials no longer exist.

Even with trials before a single judge or magistrate, it should be borne in mind that in relation to questions of fact, the trial judge has the advantage of personal observation of witnesses and related matters. An appellate court is unlikely to interfere with the view of the trial judge as to the credibility of such witnesses for the obvious reason that it lacks the advantage of personal observation. However, the appellate court takes a different attitude if the issue is the inferences to be drawn from the facts and not a question as to the facts. In this aspect, the court regards itself as no less competent to draw inferences than the trial judge does.

Appeals on questions of law are relatively easier to handle because courts are required to give reasons for their decisions. If indeed there is an error of law, it will appear in the judgment. An appellate court can readily identify the error and correct it, including any consequential mistake.

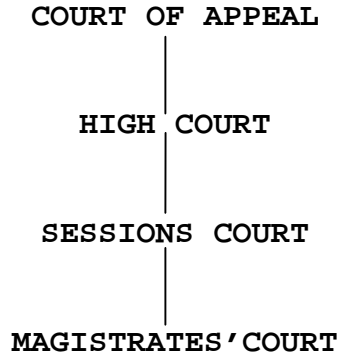
Actions taken by an appellate court also depend on whether an appeal is criminal or civil. A person convicted of an offence may appeal against conviction on a question of law or against the sentence imposed. By virtue of section 50(1) of the *Courts of Judicature Act 1964*, the Public Prosecutor may appeal against any decision made by the High Court in the exercise of its original criminal jurisdiction and this includes an acquittal. When an appeal is presented against an acquittal, the Court of Appeal may direct that a warrant of arrest be issued against the accused. The person may be remanded in custody pending the disposal of the appeal or be admitted to bail.

Where an appeal is successful against conviction, the verdict and sentence will be set aside and either a verdict of "not guilty" entered or a new trial ordered. Where an appeal is only against sentence and it is successful, the appellate court will set aside the original sentence and impose a sentence that it thinks should have been imposed and this may be greater or less than the original sentence. In respect of successful civil appeal, the appellate court will set aside the judgment below and enter a judgment it thinks proper, or in certain instances, order a new trial. As a general rule, there are monetary restrictions on civil appeals, that is to say, certain appeals are permissible only where a sum of money of not less than a specific substantial amount is in dispute.

The diagram below outlines the appeal structure centering on the courts.

FEDERAL COURT





Courts at the bottom of the hierarchy, that is, the Penghulu's Court, have no appellate jurisdiction. An appeal against the decision of the Penghulu's Court lies to a First Class Magistrate. In practice, trials before the Penghulu's Court hardly ever occur and therefore, the Magistrates' Court is not currently performing appellate functions although they are provided in the statutes. For practical purposes, one may accept the position that the Magistrates' Court is the lowest in the hierarchy having only original jurisdiction. Appeals from decisions of Magistrates in both civil and criminal matters lie to the High Court. In civil appeals, the amount in dispute or the value of the subject-matter must be in excess of 10, 000 ringgit except on a question of law but without affecting those relating to maintenance of wives and children. The same applies to appeals on criminal and civil matters from Sessions Court to the High Court. In fact, the same provisions of the Court of Judicature Act applying to the Magistrates' Court govern them.

The Court of Appeal hears both civil and criminal appeals from decisions of the High Court. In civil appeals, it does not matter if the decision of the High Court is made in exercise of

its original or appellate jurisdiction. However, certain constraints are placed on civil appeals by section 68 of the Courts of Judicature Act and some of these "non-appealable matters" are as follows:

- (a) when the amount or value of the subject-matter of the claim (exclusive of interest) is less than 250 000 ringgit, except with leave of the Court of Appeal;
- (b) when the judgment or order is made by consent of the 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 the judgment or order of the High Court is expressly declared by any written law to be final.

In criminal matters, the Court of Appeal hears and determines appeals by any person convicted or by the Public Prosecutor against any decision made by the High Court in exercising its original, appellate or revisionary jurisdiction. Where an accused has pleaded guilty and been convicted on the plea, there is no appeal except as to the extent or legality of the sentence.

An appeal system is an essential component in the administration of justice because it provides machinery for correcting errors and thus ensuring that justice is done. But it is a costly, time consuming affair and not necessarily the most efficient. The delay in finally obtaining justice is itself an injustice as appeals necessarily involves some delay. Financial considerations particularly in civil disputes also act as a severe constraint on the ability of litigants to obtain justice.

The Court of Appeal

On 24 June 1994, the Court of Appeal was created to act as an appeal chamber, thus giving litigants an additional forum for appeal. It is established under article 121 of the Federal Constitution. The creation of a Court of Appeal restores the three-tier system that existed prior to the abolition of appeals to the Privy Council. The Supreme Court, which previously heard appeals, has also become defunct under this new scheme.

Its appellate criminal and civil jurisdictions are conferred by sections 50 and 67 of the *Courts of Judicature Act 1964* respectively. The composition of its judicial personnel is prescribed in article 122A of the Constitution.

The Court of Appeal consists of a "chairman" (to be styled the 'President of the Court of Appeal) and, until the Yang di-Pertuan Agong by order otherwise prescribes, of ten other judges". However, a judge of the High Court may sit as a judge of a Court Appeal where the President considers that the interests of justice so require. In that case, the President can nominate the judge for the purpose, after consulting the Chief Judge.

Proceedings in the Court of Appeal are heard and disposed of by three judges or such greater uneven number of judges as the President may in any particular case determine. Decisions will be made by a majority of judges.

An appeal to the Court of Appeal is by way of re-hearing and in relation to such appeals, it has all the powers and duties of

the High Court, together with full discretionary power to receive further evidence by oral examination in court or by affidavit, or by disposition.

In civil matters, the amount or value of the subject matter of the claim must exceed 250,000 ringgit and if it is less than that amount, it must be with leave from the Court of Appeal.

THE HIGH COURT IN MALAYA AND THE HIGH COURT IN SABAH AND SARAWAK

The Superior Courts comprises the High Court in Malaya, the High Court of Sabah and Sarawak, the Court of Appeal and the Federal Court. The High Courts and Federal Court exercise both original and appellate jurisdiction whereas the Court of Appeal exercises only appellate jurisdiction.

Article 121(1) of the Federal Constitution establishes two High Courts of co-ordinate jurisdiction and status, namely; the High Court in Malaya for the States of Peninsular Malaysia with its principal registry in Kuala Lumpur and the High Court of Sabah and Sarawak with its principal registry in the two States as determined by His Majesty. Each of the two High Courts is headed by a Chief Judge. Prior to the court restructure in 1994, the title was "Chief Justice" but this title is now held by the head of the Federal Court. The title of "Lord President" used previously by the head of the judiciary has been dropped. As a matter of administrative practice, the High Courts may be organised into Divisions for the purpose of hearing cases, for example, criminal, appellate, commercial, probate, family and property and industrial.

The jurisdiction of the High Court is original, appellate and supervisory. The High Court is created by statute and its authority derived from written law. It has "such jurisdiction and powers as may be conferred by or under federal law." Sections 22, 23 and 24 of the *Courts of Judicature Act* 1964 lay down in broad terms the criminal and civil jurisdiction of the High Court. Section 25(1) preserves the powers vested in it prior to Malaysia Day and "such other powers as may be vested in it by any written law in force within its local jurisdiction." Section 25(2) provides for it to exercise the additional powers set out in the Schedule to the Act₁ for example, the issue of prerogative writs, writs of distress for arrears of rent, sale of land and many others.

In reference to the meanings of the words "limited" and "unlimited in relation to its jurisdiction, Hashim Yeop Sani J (as he then was) in *Zainal Abidin bin Hj Abdul Rahman V Century Hotel Sdn Bhd* [1982] 1 MLJ 40 said as follows:

(1) The jurisdiction of the High Court is "unlimited" in the sense that it is as wide a jurisdiction as that of the High Court in England.

(2) The expression "unlimited jurisdiction" merely describes the extent or area where the judicial authority or power of the High Court is exercisable.

(3) The manner in which the judicial authority or power of the High Court is exercised is not unlimited.

(4) The High Court, being a creature of statute, derives all its powers from written law, expressly or by necessary implication.

In the exercise of its original jurisdiction, it possesses "unlimited" criminal and civil powers in the sense that there is

no upper limit. It can try any criminal case irrespective of the gravity and any civil case regardless of value although in respect of the latter, in most instances, it hears matters which cannot be determined in the subordinate courts. In practice, both criminal and civil matters which can not be brought in the subordinate courts are tried before the High Court. Except as provided by written law, every proceeding in the High Court is heard and disposed of before a single judge.

Prior to the passing of the *Criminal Procedure (Amendment) Act 1995*, which came into effect on 17 February 1995, exceptions were made by other statutes whereby certain offences had to be tried before a judge and jury or with the aid of assessors. Section 11 of the *Amendment Act* deleted various chapters of the *Criminal Procedure Code*. In practical effect, trials by jury and with the aid of assessors are abolished. With the abolition of this mode of trial, a new section 177A was introduced. It provides that a prosecution in respect of an offence to be tried by the High Court in accordance with Chapter XX of the *Criminal Procedure Code* cannot be instituted except by or with the consent of the Public Prosecutor. The absence of such consent will most likely affect the validity of the trial.

The 1995 amendment marks the final demise of trial by jury or with assessors which had been progressively whittled away since independence. Just prior to the amendment, it was still possible in Peninsular Malaysia for a person charged with murder to be tried by judge and jury, unless the case was certified a security case in which event, it would be tried by a single judge. In a charge of kidnapping under the *Kidnapping Act 1961* the offence was tried by a single judge with the aid of assessors.

Under normal circumstances, each High Court tries offences committed within its territorial jurisdiction so that the High Court in Malaya tries those offences committed in the peninsula and the corresponding situation applies in Sabah and Sarawak. In the absence of statutory authority, the High Courts do not usually have jurisdiction over offences committed abroad, even by a citizen, except on the high seas. The general jurisdictional rule in relation to criminal matters is reflected in section 22(1)(a) of the *Courts of Judicature Act* 1964. It provides that the High Court shall have jurisdiction to try all offences committed.

- (i) within its local jurisdiction;
- (ii) on the high seas on board any ship or on any aircraft or on any aircraft registered in Malaysia;
- (iii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft;
- (iv) by any person on the high seas where the offence is piracy by the law of nations;

Under international law, the high sea is neutral territory and, therefore, it is legitimate for countries to exercise jurisdiction over offences committed on board ships or aircraft of their registration. A number of propositions has been offered in support of the exercise of such jurisdiction but the more acceptable of the arguments appears to be that of a floating or flying territory: a crime committed on board a ship or aircraft registered in that nation is in fact perpetrated in its territory. As regards piracy on the high seas, it has been long established under customary international law that it is an international crime, legitimately punishable by all nations.

The High Court possesses additional jurisdiction through section 22(1)(b): a "catch-all" clause permitting the exercise of jurisdiction to 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 the Federation committed, as the case may be,

(i) on the high seas on board any ship or on any aircraft registered in Malaysia;

(ii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft; or

(iii) by any citizen or any permanent resident in any place without and beyond the limits of Malaysia.

Chapter VI of the Penal Code concerns offences against the state and the offences specified in the Schedule to the Extra-Territorial Offences Act 1976, namely, offences under the Official Secrets Act 1972 and Sedition Act 1948. The Yang di-Pertuan Agong is authorized through the issue of orders to amend or add to the list of offences.

One may well argue that item (iii) is rather extensive, applying to a Malaysian or a permanent resident of Malaysia, who commits a certified act while living in, for instance, the United Kingdom, even though such act does not constitute an offence in that country. Although there are certain procedural requirements, the provision seems to confer far-reaching powers on the Court to try offences committed by citizens and permanent residents outside the country. The Attorney General may also

extend the range of offences under any written law by certifying that they affect the security of the country Much will depend on the judicious exercise of this power by the Attorney General.

Two other provisions confers jurisdiction on local courts to try offences committed abroad, that is, section 22 of the Prevention of Corruption Act 1961 (Act 57) and the Penal Code (Amendment) Act 1986 (Act A651) relating to bigamy committed overseas by Malaysians.

Upon conviction, the High Court may pass any penalty, including death, allowed by the appropriate law. Another major change to the legal system brought about by Criminal Procedure (Amendment) Act 1995 is the abolition of preliminary inquiries. For a long time under the old law, in relation criminal matters no case may be brought to the High Court for unless the accused has been properly committed for trial after preliminary hearing in a Magistrates' Court although exceptions to rule do exist. Preliminary inquiry was a mandatory procedure failing which a trial would be declared void as in *Fan Yew Teng V Public Prosecutor* [1973] 2 MLJ 1. The respondent was originally charged for sedition before the Sessions Court. He successfully applied under s.417(b) of the *Criminal Procedure Code* for the transfer of his trial to the High Court. The case was then proceeded in the High Court without a preliminary inquiry being previously held. The Federal Court by a majority allowed the appeal, declaring the trial to have been a nullity. This are no longer law given the amendment.

Following the abolition of preliminary inquiries, consequential and other amendments were also made. However, they have been less than thorough so that some references to preliminary

inquiries and associated procedures remain in the statute book. There needs to be a further 'tidying up exercise', for example, of sub section 82 and 100 of the *Subordinate Courts Act 1948* where references to preliminary inquiries remain.

Subject to certain exclusive jurisdiction vested in the Federal Court under article 128 of the Federal Constitution, the High Court exercises unlimited jurisdiction to try all civil proceedings within the local jurisdiction of the Court. There are only two local jurisdictions, that of the peninsula under the High Court in Malaya and that of East Malaysia under the High Court in Sabah and Sarawak. Though a High Court has unlimited civil jurisdiction, in practice it tries mostly disputes where the amount involved is in excess of 250 000 ringgit. The Sessions Court is competent to try any case involving a lesser sum.

In addition to its general civil jurisdiction, a High Court also exercises specific civil jurisdiction which is enumerated in section 24 of the *Courts of Judicature Act 1964*. It includes the following:

- (a) divorce and matrimonial causes;
- (b) admiralty matters;
- (c) bankruptcy and companies;
- (d) appointment and control of guardians of infants and generally over the person and property of infants;
- (e) appointment and control of guardians and keepers of the person and estates of idiots, mentally disordered persons and persons of unsound mind; and,
- (f) grant, alter or revoke probates of wills and testaments and letters of administration of the estates of deceased persons leaving property within the Court's territorial jurisdiction.

In the exercise of its appellate jurisdiction, the High Courts hear civil and criminal appeals from the subordinate courts. In civil appeal from the decision of subordinate courts, the amount in dispute or the value of the subject-matter must ordinarily exceed 10,000 ringgit except on a question of law but without affecting any other written law which may provide otherwise and proceedings relating to maintenance of wives and children. All civil appeals are by way of re-hearing.

COURTS OF JUSTICE

The Federal Court, the Court of Appeal, the two High Courts of co-ordinate jurisdiction and subordinate courts exercise the judicial powers of the country as enacted in the Federal Constitution and other written law. The Head of the Judiciary is now titled the Chief Justice. Prior to the 1994 changes, which included the abolition of the Supreme Court, the office was titled "Lord President of the Supreme Court". Judicial appeal to the Yang di-Pertuan Agong longer exists since the progressive abolition of appeals to the Privy Council in 1978. In that year, appeals in relation to constitutional criminal matters ceased, and those concerning civil matters follow suit in 1985. Previously, the Yang di-Pertuan Agong would refer such appeals to the Privy Council for advice. The severance formal judicial links with England marked the final chapter colonialism in Malaysia.

As a matter of historical interest, this change was brought about through the repeal of article 131 of the Federal Constitution. The repeal came into force on 1 January 1985. It may be noted that appeals on constitutional and criminal matters

were abolished in 1978 when section 13 of the *Courts of Judicature (Amendment) Act 1976* came into operation. The progressive abolition of appeals to the Privy Council in the judicial system seems to be the common trend in other Commonwealth countries and understandably so. With independence comes the desire to chart one's own destiny including the field of jurisprudence, using indigenous forum. Even the old Dominions such as Australia with a far closer ethnic, cultural and social affinity with the United Kingdom has chosen to sever the umbilical link. By section 11 of the *Australia Act 1986* it abolished all appeals "from or in respect of any decision of an Australian Court" to the Privy Council.

The administrative head of the courts is the Chief Registrar who is directly supervised by the Chief Justice. The person is responsible to the Chief Justice on any matter connected with proceedings in the Federal Court. All senior staff are appointed by the Yang di-Pertuan Agong as provided in section 10 of the *Courts of Judicature Act 1964*.

Registrars and other associated administrative staff are responsible for the general administration of courts. It may be noted that there is a continuing link to courts in England by way of reference. Section 10(3) of the Act provides that the designated administrative offices "shall subject to this Act or any other written law have the same jurisdiction, powers and duties as the Masters of the Supreme Court, Clerks of Criminal Courts, Registrars and the like officers in the Supreme Court of Judicature in England..."

ORGANIZATION OF COURTS

The court system is organized in a hierarchy like a pyramid with the subordinate courts at the base as illustrated in the diagram. The administration of justice is a federal matter and civil courts are therefore federal courts. Even if the issue being litigated was one involving a state law such as land matters, it would be tried in the courts constituted by federal law. The only state courts are the *Syariah* Courts, other than in the Federal Territories, and Native Courts in the states of Sabah and Sarawak. Although the view that *Syariah* Court be constituted as federal courts for the purpose of uniformity has often been canvassed, the proposal has not been realized due in part of the reluctance of several rulers to surrender yet another of their authorities to the federal authority. In any event, such a change will require constitutional amendment and consent of the respective rulers.

A court hierarchy is an integral part of an appeals system for without such a hierarchy there could be no appeal. Appeal is premised on the ability to take a matter to a higher authority. A hierarchy of courts provides the necessary tiers and distinguishes between higher and lower courts so that if a party to a dispute feels that an incorrect legal principle has been applied in a lower court or there has been an extremely unreasonable finding of facts, that party should be able to have his dispute reconsidered by a higher court. Furthermore, if all courts were of equal standing, confusion will be the inevitable consequence if there is more than one view of the law. Justice is obviously better served where a degree of certainty exists.

The appeal system is also an integral part of the doctrine of precedent. In addition to offering an avenue of second opinion for dissatisfied litigants, the system as it presently stands,

where some courts are more authoritative than others, ensures that courts are reasonably clear as to which precedent is binding on them. There is a good level of certainty although some confusion does occur from time to time due in part to the frequent reorganisation of the court structure. From time to time in cases before the courts, parties when dealing with precedents will find it necessary to ask if a particular court is the successor of a defunct court. Several changes have been made since independence for a variety of reasons and they have generally been unhelpful to the lay person trying to comprehend the working of the judicial system.

Specialization in the judicial process is another important consideration in a hierarchy of courts. The judicial workload is distributed among the various courts by limiting the jurisdiction of each court. The personnel and procedures of the courts can then be adapted to suit the demands of the particular case. For instance special rules on procedure are drawn up for subordinate courts and they are different from the rules applying in the superior courts. The High Court handles the most serious criminal offences such as murder, drug trafficking and kidnapping, and civil litigation where large sums of money are involved. The theory is that these matters are best handled by more experienced judges, leaving less serious offences to be tried and civil disputes resolved in the lower courts. Magistrates' Courts are particularly suited to determine minor matters and operate in major towns throughout the country. Minor cases do not usually involve sophisticated legal analysis and consequently could be expeditiously decided at a lower level at minimum legal costs.

In the Federal Capital of Kuala Lumpur where the largest number

of cases are heard, the High Court sits in division to provide for greater efficiency, namely, the Criminal Division, the Family Division, the Commercial Division and the Appellate and Special Division. The High Court sitting in regional centres do not have such divisions.

A final reason for the existence of a hierarchical structure relates to efficiency and administrative expediency. Bearing in mind that financial resources available for the administration of justice are limited and they are often not political priority in financial allocation, there is a need to gain maximum efficiency. The practical effect of a court hierarchy is the provision of an extensive system of lower courts dispensing justice inexpensively in local areas and superior courts in the main centres. The cost of maintaining a lower court is obviously much less than the cost of maintaining a higher court, taking into consideration infrastructure, personnel requirements and salaries. It would be inefficient and a sheer waste of ability and human resources for superior court judges to resolve minor disputes or try minor offences.

The Subordinate Courts

The subordinate courts in Malaysia comprise the Penghulu's Court, Magistrates' Courts and Sessions Courts. Jurisdiction and related matters concerning these courts are governed by the *Subordinate Courts Act 1948* (revised 1972).

The Penghulu's Court

The Penghulu's Court sits at the lowest level of the court hierarchy. It is presided by a *Penghulu* or Headman who is

appointed by the State Government for a *mukim*(an administrative district). It exists only in the states of Peninsular Malaysia and while it remains in the statute book, it is hardly ever used in today's context. The resolution of disputes is achieved informally rather than through a formal trial of a court. This being so, pursuant to the Act, the *Penghulu* is empowered to try civil disputes where the subject matter does not exceed 50 ringgit in value and in criminal cases, to impose a fine not exceeding 25 ringgit.

In criminal cases, an accused retains the right to be tried by a Magistrates' Court and the *Penghulu* must inform him of this right to so elect before commencement of the trial. An appeal against the decision of the *Penghulu's* Court lies to a First Class Magistrate. Orders of the *Penghulu's* Court are enforced by the Magistrates' Court. It is interesting to note the colonial legacy in that the Act still refers to its jurisdiction being limited to parties of "an Asian race speaking and understanding the Malay language" in respect of civil matters and charges against "persons of an Asian race in criminal matters. There is no statutory definition of what constitutes "an Asian race".

The Magistrates' Court

The Magistrates' Court is familiar to most urban people and it deals with minor civil and criminal cases. There are two classes of Magistrates : First Class and Second Class Magistrates. However, a Magistrate of either class may sit in any Magistrates' Court within the local limits of his jurisdiction for the purpose of trying any matter over which he has jurisdiction. The Second Class Magistrate normally performs minor functions which include the granting of bail and

mentioning of cases but where it is a criminal offence, he can only deal with those cases where the maximum punishment imposed is no more than twelve months' imprisonment or which are punishable with fine only. If he tries such an offence, his power to sentence is limited and may not exceed six months' imprisonment or a fine not exceeding 1000 ringgit or a combination of the two. Where he is of the opinion that if an accused is found guilty, should receive a heavier penalty than he can impose, he may transfer the case for trial by a First Class Magistrate. Second Class Magistrates are particularly useful in more remote places where there is no resident First Class Magistrate. They are usually public servants and minor court officers engaged in administrative duties.

First Class Magistrates on the other hand are qualified in law and drawn from the Judicial and Legal Service. Since 1978, they possess jurisdiction to try all offences with up to ten years imprisonment or with a fine only and offences under section 392 (punishment for robbery) and 457 (lurking house trespass or house-breaking by night in order to commit an offence punishable with imprisonment) of the Penal Code. Their power to impose sentence upon a finding of guilt is more limited. They may pass any sentence allowed by law but not exceeding:

- (a) five years imprisonment;
- (b) a fine of up to 10,000 ringgit;
- (c) whipping of up to twelve strokes; or
- (d) any one of the above sentences combined.

Whipping is not usually ordered unless a person is allowed for a grave offence or is a habitual offender.

In civil matters, they have the jurisdiction to try all allegations where the matter in dispute or value of the subject matter does not exceed 25,000 ringgit. Additional powers set out in the Third Schedule are provided by section 99A of the *Subordinate Courts Act* 1948.

It may be noted that from time to time the *Subordinate Court Act* has been amended to increase either limits of criminal jurisdiction or monetary limits in civil matters or both. The *Subordinate Courts Act* is not the only statute that confers jurisdiction on the Magistrates' Court. Additional jurisdiction in respect of criminal matters are contained in the *Courts of Judicature Act* 1964 and the *Criminal Procedure Code*. Prior to 1995, they included conducting preliminary inquiries in respect of cases triable before the High Court for the purpose of determining if there is sufficient evidence for an accused to be sent for trial. This examination of prosecution evidence and witnesses in respect of the charge is also called committal proceeding. The conduct of preliminary inquiries was abolished by the *Criminal Procedure Code (Amendment) Act* 1995. The same act also abolished trial by jury and trials with the aid of assessors. Although the change removed a long standing common law tradition, it went largely unchallenged. Jury trials were progressively phased out as being inefficient and not appropriate in the Malaysian context. In light of the abolition, a new section 177A was introduced into the *Criminal Procedure Code*. It provides that a prosecution in respect of an offence to be tried by the High Court must not be instituted except with the consent of the Public Prosecutor. The absence of such consent prior to the trial will render a trial void.

Magistrates also hold coroner's inquest into the cause of and

the circumstances connected with any death such as is referred to in sections 329 and 344 of the *Criminal Procedure Code*, for instance, suicide, death of a person while in a mental hospital or prison.

The Sessions Court

Like the Magistrates Court, the Sessions Court is also a court of general jurisdiction with authority to try criminal and civil cases. Their criminal jurisdiction extends to all offences other than offences punishable with death and it may impose any sentences allowed by law except sentence of death. Curiously, it may also hold preliminary inquiries and although this has been abolished since 1995 and the fact that this provision remains is an aberration. It is probably an oversight that requires rectification.

As regards to its civil work, it has jurisdiction to try suits where the amount in dispute or the subject matter does not exceed 250 000 ringgit and more, if the parties usually consent. If the defence or counterclaim of the defendant raises matters which exceed the court's normal jurisdiction, the court may nevertheless proceed to determine the plaintiff's claim and the defence raised, but no relief in excess of the court's jurisdiction may be awarded to the defendant on the counterclaim. Alternatively, an application may be made to the High Court for the case to be transferred for trial in that court. Sometimes, a plaintiff may actually relinquish part of his claim so as to bring it within the jurisdiction of the Sessions Court and such a move is usually guided by the prospect of a faster and less expensive disposal of the claim. The

waiting period before a case can be brought before the High Court for trial is usually much longer.

The Sessions Court has unlimited jurisdiction to try all actions and suits of a civil nature in respect of certain matters, such as motor vehicle accidents, and landlord and tenant distress. It is not limited by the value of the claim. However, several types of civil matters are outside the jurisdiction of the Sessions Court even if the amount involved is less than its legal limits, for instance, matters relating to probate and administration of estates, divorce, bankruptcy, specific performance, injunctions, enforcement of trusts, declaratory decrees and others. Disputes involving these matters more often than not raise difficult points of law and are therefore best determined by High Court judges.

Under section 54 of the *Subordinate Courts Act*, the Sessions Court also assumes a limited supervisory role over the Magistrates' and Penghulu's Courts. A Sessions Court judge may call for and examine the record of any civil proceedings before a Magistrates' Court or a Penghulu's Court which is within the local limits where he or she has jurisdiction. The purpose for such action is to satisfy himself or herself as to the correctness, legality or propriety of the decision recorded or arrived at, and the regularity of the proceedings. If in the view of the judge a decision is illegal or improper or that a proceeding is irregular, he or she must forward the record together with the appropriate remarks to the High Court, who is authorized to make such orders as are necessary to secure substantial justice.

