CHAPTER THREE

OTHER COURTS WITH SPECIALISED JURISDICTION

THE COURT FOR CHILDREN (formerly the JUVENILE COURT)

The Court for Children was established under the Child Act 2001 in order to replace the Juvenile Court which was previously established under the Juvenile Courts Act 1947.

Composition of the Court for Children

Section 11 of the Child Act 2001 provides that the Court for Children shall consists of a Magistrate who is assisted by 2 advisers which is appointed by the Minister from a panel of persons resident in the respective state. One of the 2 advisers shall be a woman. The functions of the advisers are to inform and advise the Court for Children with respect to any consideration affecting the order made upon the finding of guilt or other related treatment of any child brought before it and if necessary, to advise the parent or guardian of the child.

Jurisdiction of the Court for Children

Under Section 11 of the Child Act 2001, the Court for Children shall have jurisdiction for the following matters;

(a) the hearing, determining or disposing of any charge against a child;

(b) to try all offences except offences punishable with death

(c) exercising any other jurisdiction conferred or to be conferred on the Court for Children by or under this Act or by any other written law

According to Section 2 of the Child Act 2001, the meaning of “child” means a person under the age of eighteen years and in relation to criminal proceedings, means a person who has attained the age of criminal responsibility as prescribed in Section 82 of the Penal Code. Section 82 of the Penal Code provides that a child under the age of 10 does not have any capacity to commit any offence.

Protection for child offenders

Under the Child Act 2001, child offenders are given some protection by way of persons who may be present in the Court for Children as well as restrictions on media reporting of any proceedings in the Court for Children.

Section 12 of the Child Act 2001 provides that no person shall be present at any sitting of a Court for Children except;

(a) members and officers of the Court
(b) the children who are parties to the case before the Court, their parents, guardians, advocates and witnesses and other persons directly concerned in that case
(c) such other responsible person as may be determined by the Court

Section 15 of the Child Act 2001 further provides for certain

restrictions on media reporting in relation to proceedings in the Court for Children, be it at the pre-trial, trial or post-trial stage. All media reports shall not be allowed to reveal the name, address or educational institution or any particulars relating to the identification of any child involved in the proceedings in the Court for Children.

THE NATIVE COURT (Sabah and Sarawak only)

A separate system and hierarchy of Native Courts has been established in Sabah and Sarawak under the Native Courts Ordinance 1992 to hear and determine disputes among natives in relation to native customary laws. The Native Courts Ordinance 1992 which replaces the previous Native Courts Ordinance 1953 in Sabah and Native Courts Ordinance 1955 in Sarawak provides for a system of Native Courts in Sabah and Sarawak with both original and appellate jurisdictions.

Native Courts in Sabah

The composition and structure in Sabah is governed by the Sabah Native Courts Enactment 1992, which replaced the Native Courts Ordinance 1953. According to Section 3 of the Native Courts Enactment 1992, the Yang DiPertua Negeri of Sabah has the power to establish Native Courts at such places, as he or she may deem fit.

The Native Court in Sabah is divided into of a three-tier structure consisting of the following;

(a) The Native Court
(b) The District Native Court

(c) The Native Court of Appeal

Composition

Under the restructured Native Court in Sabah, every level of courts consists of three members. According to Section 3(2) of the Sabah Native Courts Enactment 1992, each Native Court consists of three Native Chiefs or Headmen resident within the territorial jurisdiction of such court as maybe empowered from time to time by the State Secretary.

Jurisdiction

Section 6 of the Native Courts Enactment 1992 provides that the Native Court in Sabah has original jurisdiction over the following matters;

(a) cases arising from a breach of native law or custom where all the parties are natives; or

(b) cases arising from a breach of native law or custom in respect of religion, matrimony or sex where one of the parties is a native; a written sanction of the District Officer acting on the advice of two Native Chiefs to institute proceedings is a requirement where one party is not a native

(c) cases involving native law, custom relating to;
(i) betrothal, marriage, divorce, nullity of marriage and judicial separation;
(ii) adoption, guardianship or custody of infants, maintenance of dependants and legitimacy;
(iii) gifts or succession testate or intestate; and

(d) other cases if jurisdiction is conferred upon it by the Native Court Enactment or any other written law

As far as legal matters concerning Muslims, it was previously dealt with by the Native Courts but their jurisdiction concerning Muslims were abolished by the Native Court (Amendment) 1961. The current position is governed by Section 9 of the Sabah Native Courts Enactment 1992, which provides that;

Native Courts shall have no jurisdiction in respect of any cause or matter within the jurisdiction of the Syariah Courts or of the Civil Courts.

Native Courts in Sarawak

The structure and composition of the Native Court in Sarawak consists of the Headman's Court, Chief's Court, Chief's Superior Court, District Native Court, Resident's Native Court and the Native Court of Appeal.

Composition

The Headmen's Court is presided by a Headman and 2 assessors.
The Chief's Court is presided by a Penghulu and 2 assessors.

The Chief's Superior Court is presided by a Temenggong or Pemancar with 2 assessors or both Temenggong and Pemancar with one assessor. The District Native Court is presided by a Magistrate and 2 assessors. The Resident's Native Court is presided by a Resident with 2 or 4 assessors. The Native Court of Appeal is presided by a Judge with one or more assessors.

Jurisdiction

Section 5 of the Native Court Enactment 1992 provides that the Native Court in Sarawak shall have original jurisdiction in the following matters;

(a) breach of native law or custom where all the parties are subject to the same native system of personal law

(b) cases arising from breach of native law or custom relating to religious, matrimonial or sexual matter where one party is a native; and

(c) civil matters (excluding cases under the jurisdiction of the Syariah Court) in which the value of the subject matter does not exceed RM2,000 and where all the parties are subject to the same native system of personal law.

(d) any criminal case of a minor nature which are specifically enumerated in the Adat Iban or any other customary law whose custom the court is bound and which can be adequately punished by a fine not exceeding that which the Native Court can award.

(e) any matter in respect of which it maybe empowered by any other written law to exercise jurisdiction.

The Native Court in Sabah and Sarawak does not have jurisdiction over the following matters;

(a) any proceedings in which a person is charged with an offence in consequence of which is alleged to have occurred

(b) an offence under the Penal Code

(c) any proceedings concerning marriage or divorce regulated by the Law Reform (Marriage and Divorce) Act 1976 and the Registration of Marriages Ordinance 1952, unless it is a claim arising only in regard to bride-price or adultery and founded only on native law

(d) any proceedings affecting the title to or any interest in land which is registered under the Land Code

(e) any case involving a breach of native law or custom if the maximum penalty which is authorized to pass is less severe than the minimum penalty prescribed for such offence

(f) cases arising from the breach of Ordinan Undang-Undang Keluarga Islam 1991 and rules or regulations made thereunder, or the Malay custom of Sarawak

(g) any criminal or civil matter within the jurisdiction of any of the Syariah Courts constituted under the Ordinan Mahkamah Syariah 1991

(h) any proceedings taken under any written law in force in the State

THE SPECIAL COURT

In 1993, the Federal Constitution was amended to provide for the establishment of a court, known as the Special Court, solely to hear and try cases brought by or against the Yang DiPertuan Agong or a Ruler of a State. However, it must be noted that proceedings in the Special Court can be brought against the Yang DiPertuan Agong or a Ruler of a State in his personal capacity only. This means that no proceedings in the Special Court can be brought against the Yang DiPertuan Agong or a Ruler of a State in his official capacity.

Though strictly speaking, the Special Court is not part of the hierarchy of courts in Malaysia, nevertheless, as a constitutional court, a brief mention of it has to be made in discussing the judicial system in Malaysia.

Composition of the Special Court

Article 182(1) of the Federal Constitution provides that;

There shall be a court which shall be known as the Special Court and shall consist of the Chief Justice of the Federal Court, who shall be the Chairman, the Chief Judges of the High Courts, and two other persons who hold or have held office as judge of the Federal Court or a High Court appointed by the Conference of Rulers.

Jurisdiction of the Special Court

Article 182(3) of the Federal Constitution provides that;

The Special Court shall have exclusive jurisdiction to try all offences committed in the Federation by the Yang DiPertuan Agong or the Ruler of a State and all civil cases by or against the Yang DiPertuan Agong or the Ruler of a State notwithstanding where the cause of action arose.

Furthermore, Article 182(4) of the Federal Constitution provides that the Special Court shall have the same jurisdiction and powers as are vested in the inferior courts, the High Court and the Federal Court by the Federal Constitution or any federal law and shall have its registry in Kuala Lumpur.

Procedure in the Special Court

Article 182(5) of the Federal Constitution provides that until Parliament by law makes special provision to the contrary in respect of procedure (including the hearing of proceedings in camera) in civil or criminal cases and the law regulating evidence and proof in civil and criminal proceedings, the practice and procedure applicable in any proceedings in any inferior court, any High Court and the Federal Court applies in any proceedings in the Special Court.

Furthermore, Article 183 of the Federal Constitution provides for an important procedural requirement before any action can be instituted against the Yang DiPertuan Agong or the Ruler of a State in the Special Court. Article 183 provides that no action,

civil or criminal shall be instituted against the Yang DiPertuan Agong or the Ruler of a State in respect of anything done or omitted to be done by him in his personal capacity except with the consent of the Attorney General personally.

Decision of the Special Court

Article 182(6) of the Federal Constitution provides that the proceedings in the Special Court shall be decided in accordance with the opinion of the majority of the members and its decision shall be final and conclusive and shall not be challenged or called in question in any court on any ground.

To date, only one case has been brought before the Special Court, namely the case of Faridah Begum bte Abdullah v Sultan Haji Ahmad Shah (1996) 1 MLJ 617

In this case, the plaintiff (Faridah Begum bte Abdullah) who was a Singapore citizen, sued the Sultan of Pahang in his personal capacity for alleged libel and for damages in the Special Court established under Article 182 of the Federal Constitution. The Attorney General had given his consent to the plaintiff to sue the Sultan under Article 183 of the Federal Constitution. Both parties agreed that the court should first determine a preliminary issue raised by the defendant, that was whether the plaintiff, not being a Malaysian citizen, had the right to sue the Sultan in his personal capacity in the Special Court.

The Special Court in this case held by a majority of 4:1 that the plaintiff being a non-citizen of Malaysia has no right sue the

Sultan of Pahang because the conferment of such a right under Article 182 of the Federal Constitution would be ultra vires and illegal according to Article 155 of the Federal Constitution.

The judges of Special Court delivering the majority decision in this case made the following observations;

According to Eusoff Chin,

"…. Parliament's legislative power was subject to the special provision of Article 155 of the Constitution, which provided that where the law in force in any part of the Commonwealth conferred upon the citizens of the Federation any right or privilege it should be lawful, notwithstanding anything in the Constitution, for Parliament to confer a similar right or privilege upon citizens of that part of the Commonwealth who were not citizens of the Federation. As under the Singapore Constitution, a Malaysian citizen could not sue the President or the Republic in any Singapore court, the plaintiff, being a Singapore citizen, could not be conferred the right to sue the Sultan in this case. Even if Parliament were to confer the right on a Singapore citizen to sue the Yang di-Pertuan Agong or a Ruler, such conferment was illegal and ultra vires Article 155 of the Federal Constitution …."

According to Chong Siew Fai (CJ) Sabah & Sarawak,

"…. having regard to the principle of sovereign immunity in international law, the immunity of the Rulers existing at least for decades before the formation of Malaysia with its subsequent incorporation in the Federal Constitution, and the concept of reciprocity, it was concluded that the ambiguous or imprecise wording in Article 182(2) of the Federal Constitution did not entitle the plaintiff, as a citizen of the Republic of Singapore, to sue the Ruler in the latter's personal capacity …."

According to Mohd Azmi FCJ,

"…. in the absence of express provision, and as there was doubt in the meaning of the words used in Article 181(2) and the intention of Parliament and the Conference of Rulers, the presumption of continuity of the Rulers' privilege, sovereignty, prerogative and legal immunity must prevail, as far as foreign citizens were concerned …."

According to Mohd Suffian

"…. Article 155 rendered Article 182(3) void to the extent that it purported to allow a non-citizen to sue a Ruler in the Special Court. If Singapore were to amend its Constitution to allow a Malaysian citizen to sue the President in Singapore, the Malaysian Parliament might confer on a Singapore citizen a similar right or privilege to sue a Ruler in our country …."

THE HUMAN RIGHTS COMMISSION OF MALAYSIA (SUHAKAM)

The Human Rights Commission of Malaysia (SUHAKAM) was established under the Human Rights Commission of Malaysia Act 1999 (the 1999 Act) which was gazetted on 9th September 1999. The establishment of SUHAKAM is often regarded as an important development in the promotion and protection of human rights in Malaysia.

The initiative to set up a nation human rights commission in Malaysia began with Malaysia's active participation in the United Nations Commission for Human Rights (UNCHR) in 1993-95 when the United Nations Economic and Social Council (ECOSOC) elected it as a member of the Commission.

On 3rd April 2000, Tan Sri Dato, Musa Hitam was appointed as SUHAKAM's first chairman together with 12 other members to serve a two-year term which is renewable. The Yang DiPertuan Agong made the appointments on the recommendation of the Prime Minister. Today, Tan Sri Abu Talib Othman is the current chairman of SUHAKAM for a two-year term beginning from 2004-2006.

The Composition of SUHAKAM

Section 5 of the 1999 Act provides that SUHAKAM consists of not more than twenty members who are appointed by the Yang DiPertuan Agong on the recommendation of the Prime Minister. All members of SUHAKAM are appointed from amongst prominent personalities (which include those from various religious and racial backgrounds). Each member shall hold office for a period of two years and is eligible for reappointment.

Functions of SUHAKAM

Section 4(1) of the 1999 Act provides that for the purposes of protection and promotion of human rights in Malaysia, the main functions of SUHAKAM are;

1. To promote awareness of and provide education in relating to human rights.
2. To advise and assist the Government in formulating legislation and procedures as well as to recommend the necessary measures to be taken.
3. To recommend to the Government with regards to the subscription or accession of treaties and other international instruments relating to the issue of human rights.
4. To inquire into complaints regarding infringement of human

rights.

SUHAKAM's function of inquiring into complaints about infringement of human rights under Section 4(1) of the 1999 Act is however subject to certain conditions imposed by Section 12 of the 1999 Act.

Section 12(1) provides that SUHAKAM may, on its own motion or on a complaint made to it by an aggrieved person or group of persons include a person acting on behalf of an aggrieved person or group of persons, inquire into an allegation relating to the infringement of human rights of such person or group of persons.

However, Section 12(2) provides that SUHAKAM cannot inquire into any complaint relating to any allegation of infringement of human rights which is still the subject matter of any proceedings pending in any court including any appeals or any allegation of infringement of human rights which has been finally decided by any court.

Powers of SUHAKAM

Section 4(2) of the 1999 Act provides that for the purpose of discharging its functions, SUHAKAM may exercise any or all of the following powers;

1. To undertake research by conducting programs, seminars and workshops and to disseminate and distribute the results of such research
2. To advise the government and/or relevant authorities in relation to complaints against them and to recommend appropriate measures to be taken
3. To study and verify any infringement of human rights

4. To visit places of detention in accordance with procedures prescribed by laws relating to places of detention and to make necessary recommendations

5. To issue public statements on human rights as and when necessary

6. To undertake appropriate activities as are necessary

CONFERENCE OF RULERS

Article 38(1) of the Federal Constitution provides for a Conference of Rulers (Majlis Raja-Raja) which shall be constituted in accordance with the Fifth Schedule.

Among the functions of the Conference of Rulers are electing in accordance with the provisions of the Third Schedule, the Yang Di Pertuan Agong and Timbalan Yang Di Pertuan Agong, and also agreeing or disagreeing to the extension of any religious acts, observances or ceremonies to the Federation as a whole.

In addition to this, the Conference also consents or withhold consent to any law and making or giving advice on any appointment which under this Constitution requires the consent of the Conference or is to be made by or after consultation with the Conference.

The powers also include in appointing members of the Special Courts under Clause (1) of Article 182 and granting pardons, reprieves and respites or of remitting, suspending or commuting sentences, under Clause (12) of Article 42.

When the Conference deliberates on matters of national policy the Yang Di Pertuan Agong shall be accompanied by the Prime Minister,

and the other Rulers and the Yang Di Pertua Negeris by there Menteri Besars or Chief Ministers. The deliberations shall be among the functions exercised, by the Yang Di Pertuan Agong in accordance with the advice of the Cabinet, and by the others Rulers and the Yang Di Pertuas in accordance with the advice of their Executive Councils.

It is also interesting to note that no law directly affecting the privileges, position, honours or dignities of the Rulers shall be passed without the consent of the Conference of Rulers.

THE JUDICIAL AND LEGAL SERVICE

From the beginning, the Judicial and Legal Service was taken for granted. The service has now developed to a proportion far beyond the dream of its architect. In the year of its establishment in 1956, there were only a few officers, who formed the bulk of the service, but today the number of officers has increased from year to year.

One of the ways in which we can make ourselves realise the weaknesses and the shortcomings of the service is that each officer should have a little thought whether the way he or she exercises his or her duty either as a Magistrate or as a DPP is in accord with justice or in line with public interest or whether it is just following one's instinct.

Today officers on the bench should be aware of such social and economic problems drug-trafficking, revenue evasion, black-marketing and hoarding of goods. By all means we must acquit those who are innocent, but once the guilty ones are convicted proper sentence must be imposed having regard to the hardships

and the damage done to the community.

The DPPs should be thorough in every aspect of their work, whether when advising the police or when preparing for cases before the Courts. Their ability is often judged by the way they present their cases before the Courts.

Thus as a criterion of acceptability and respectability of justice, professional skill and experience are important. England, for the, could have completely professionals her Lower Court Benches within twenty four hours if she wants to because there can never be any shortage of qualified people, but because she always likes to keep her tradition of localising justice, appointed by the Lord Chancellor on a voluntary basis to do part-time work of dispensing justice in the County or Borough where they are appointed, the institution of Justices of Peace goes on. The Justices of Peace are lay people often retired civil servants or retired businessmen who in their career have achieved distinguished records.

Perhaps for the purpose of Lower Courts, having regard to the perennial shortage of officers due to the rapid expansion of service that in turn caused by development of the country, there is room for employing retired civil servants who should be properly selected to be resident Magistrates in certain towns. The contributions made by the services of these people in previous years are well known.