

DUAL JUDICIAL SYSTEM IN A MULTI-RELIGIOUS
AND MULTI-RACIAL COUNTRY:
WITH SPECIAL REFERENCE TO MALAYSIA

BY

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ABSTRACT

The dual judicial system in Malaysia is a reality in theory but in practice it comes with some challenges and unforeseen obstacles. The predicament of one spouse's conversion/reversion into Islam and in those instances to which jurisdiction parties are subjected to is one of an example of the challenges. The right of audience before the respective courts when parties are of different faiths is the other obstacle. The courts in the country are trying its level best to avoid being put in the state of dilemma and uncertainty as it may occur in the implementation of the dual judicial system in the country. This research explores and critically analyses the challenges faced by the implementation of the dual judicial system in Malaysia by glancing back at the history of the emergence of these laws, analysing the real present day cases in courts on these issues and dissecting the *ratio decidendi* of the judgements, isolating the problems faced and comparing with the real treatment accorded by the honourable courts respectively before proposing solutions. This research also critically analyses the justification of using the doctrine of "basic structure" in interpreting the Federal Constitution. The research seems to find that there might be more unforeseen challenges to emerge in future if the issues and challenges are not addressed in the right manner. This study is important to ensure that the frictions created in the implementations of dual judicial system in Malaysia are minimised for its smooth sailing in the future. In addition, this study is significant to ensure Civil Courts and the Syariah Courts are to co-exist as a parallel judicial system in Malaysia in line with the wishes of the majority of the population of this beloved multi-racial and multi-religious country.

ملخص البحث

يعتبر النظام القانوني الثنائي (إسلامي/مدني) في ماليزيا حقيقي على الورق، لكنه في الواقع مليء بالعوار والعقبات المستترة وغير الظاهرة؛ فمن الأمثلة التي تبرز هذا العوار هي المشكلة التي تحدث عندما يعلن أحد الزوجين إسلامه والاختصاص القضائي المطبق على أحد الطرفين. كما نجد إحدى المشاكل الأخرى المتمثلة في حق الجمهور أمام المحاكم المختصة عندما يكون لكل زوج ديانة مختلفة عن الزوج الآخر وخاصة في المواقف المتداخلة. تسعى محاكم الدولة لبذل أقصى ما لديها لتجنب الوقوع في المعضلات والمعوقات وفرض واقع الشك الذي يحدث نتيجة تطبيق النظام القضائي الثنائي في الدولة. يغوص هذا البحث في التحليل الدقيق للتحديات التي تنشأ من جراء تطبيق النظام القضائي الثنائي في ماليزيا من خلال الرجوع إلى تاريخ نشأة تلك الأنظمة وتحليل الحالات والمسائل والقضايا التي ترفع أمام المحاكم في هذه الأيام والنظر في الأساس المنطقي للقرارات الصادرة وفصل المشكلات الناشئة ومقارنتها بالتعامل الفعلي الحكيم من جانب المحاكم الموقعة قبل طرح الحلول. يقوم هذا البحث أيضاً بتحليل أسباب استخدام مذهب "الهيكل الأساسي" في تفسير الدستور الفيدرالي. توصل هذا البحث إلى احتمالية وجود العديد من العقبات المستترة التي قد تظهر في المستقبل إذا لم يتم التصدي لتلك العقبات كما ينبغي. تكمن أهمية هذه الدراسة في ضمان الحد من الثغرات التي تنشأ نتيجة تطبيق النظام القضائي الثنائي في ماليزيا وتطبيقه. بالشكل السليم في المستقبل كما أن هذه الدراسة مهمة لضمان استمرار وجود المحاكم المدنية والمحاكم الشرعية معاً في النظام القضائي الماليزي وذلك تماشياً مع رغبة غالبية سكان هذه الدولة التي تتسم بتعدد الأعراق والأديان.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion, it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Master of Comparative Laws.

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of Laws

DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

Al-Sabri Bin Haji Ahmad Kabri

Signature

Date

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This thesis is dedicated to

My respected parents

HAJI AHMAD KABRI (AL MARHUM),

HAJJAH UMMUL VAJIHAH

My beloved wife

RODZIAH BINTI MOHAMED AMIR,

My lovely son and daughters

AL-ASRI AL-SABRI

ANIS SOFIA

ANIS SURAYA

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Syariah Civil Procedure
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Syariah Courts (Criminal Jurisdiction) (Amendment and Extension) Act, 1989 (Act A730 of 1989)
Syariah Courts (Criminal Jurisdiction) Act, 1965 (Revised-1988) (Act No. 355 of 1988)
Syariah Criminal Offences (Federal Territories) Act, 1997 (Act No. 559 of 1997)
Syariah Criminal Offences (Johor) Enactment, 1997 (Enactment No. 4 of 1997)
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Syariah Criminal Offences (Sembilan) Enactment, 1992 (Enactment No. 4 of 1992)
Syariah Criminal Procedure
Trengganu Enactments, 1904-1914
Undang-Undang Laut Melaka

B. FOREIGN STATUTES

Contracts Act 1872 (India)
Criminal Code (India)

LIST OF ABBREVIATIONS

ABIM	<i>Angkatan Belia Islam Malaysia</i>
A.D	After the death of Christ
AG	Attorney General
A.H.	(Anno Hegirae): in the year of the <i>Hijrah</i>
AIKOL	Ahmad Ibrahim Kulliyah of Law
AIR	All India Reporter
All ER	All England Law Reports
<i>a/l</i>	<i>anak lelaki</i>
Anor	Another
<i>a/p</i>	<i>anak perempuan</i>
art	Article
ARIE 2003	Administration of the Religion of Islam (Selangor) Enactment 2003
ASEAN	Association of Southeast Asian Nations
B.C	Before the birth of Christ
<i>Bhd</i>	<i>Berhad</i>
CA	Court of Appeal
Cap./Cap	Chapter
CBMA	Central Bank of Malaysia Act
C.E	Common era, Christian era
Ch	Chancery Report
CJ	Chief Justice
CJA	Courts of Judicature Act
cl	clause
CLJ	Current Law Journal
Dr.	Doctor
ed./eds.	edition/editions; editor/editors; edited by
Edn	Edition
et al.	(et alia): and others
etc	(et cetera): and so forth
FC	Federal Court
FC	Federal Constitution
FCJ	Federal Court Judge
FCJJ	Federal Court Judges
FJ	Federal Judge
FMLSR	Federated Malay States Law Reports
FMS/F.M.S.	Federated Malay States
HC	High Court
i.e.	That is to say; in other words

ibid.	(ibidem): in the same place
id.	(idem): the same below
IIUM	International Islamic University Malaysia
J	Judge
JC	Judicial Commissioner
JCA	Judge of the Court of Appeal
JMBRAS	Journal of Malaysian Branch of the Royal Asiatic Society
<i>JPN</i>	<i>Jabatan Pendaftaran Negara</i>
Ky	Kyshe's Reports
L.J.	Lord Justice of Appeal
LNS	Legal Network Series
LP	Lord President
Ltd	Limited
LRA 1976	Law Reform (Marriage and Divorce) Act 1976
<i>Lwn</i>	<i>Lawan</i>
MLJ	Malayan Law Journal
n.	footnote
NCSA	National Security Council Act
n.d.	no date
NGO	Non-Governmental Organisation
n.p.	no place: no publisher
no./no.s	number/numbers
NRIC	National Registration Identity Card
op. cit.	(opus citatum): the work cited
Ors Rep.	Others Report
PAS	Parti Islam Se-Malaysia
PCA	President of Court of Appeal
Perak Enactment	Administration of Islam (Perak) Enactment 2004
PERKIM	Pertubuhan Kebajikan Islam Malaysia
PP	Public Prosecutor
RM	<i>Ringgit Malaysia</i>
SAC	Syariah Advisory Council
SARI	International Journal of the Malay World and Civilisation
SC	Supreme Court
Sdn Bhd	<i>Sendirian Berhad</i>
SOSMA	Security Offences (Special Measures) Act
S.A.W.	<i>salallahu 'alaihi wa salam</i> , May peace and blessing of Allah be upon him
S.W.T.	<i>subhānahu wa ta'ālā</i> , Praised be to Allah, the Most Exalted
TPPA	Trans-Pacific Partnership Agreement
UFMS	Unfederated Malay States
UK	United Kingdom
UMNO	United Malays National Organization
UN	United Nations
US	United States of America
v.	versus, against

vol./vols.
Y.A.A.

volume/volumes
Yang Amat Arif

CHAPTER ONE

INTRODUCTION

In this chapter, the researcher provides a general introduction which includes the background of the research, statement of problem, research questions, objectives of the research, hypothesis, literature review, the scope and limitation of the research, the research methodology and summary of the research for the purpose of giving an overview of the research.

1.1 BACKGROUND OF THE RESEARCH

Malaysia is always regarded as a showcase nation thriving in its diversity founded on the plurality of its population consisting of various races and religious believes. We as a nation cherish its diversity. This research tries to indulge as much as possible into the duality of legal systems and/or judicial systems that this beloved nation of us had embraced to manage the affairs of the plural population. This research wishes to embark on a study of when, why, where and how the dual legal jurisdictions being implemented in Malaysia. The research is thought to be of paramount importance to the well-being of the country's population and for the future of a balanced judicial system.

In this now termed as borderless world and with the advancement and quantum leap of Information Technologies, this world that we live in though politically,

religiously, and culturally demarcated but the reality of easy, fast, and borderless communications and intermingling between humans makes it possible for information to flow very rapidly.

Malaysia being a pluralistic country in terms of its population inherited the present population, culture, religion and way of life from the inhabitants of the yesteryears and decades of the then inhabitants of pre Malaya, pre Merdeka and Pre Malaysia days.

The present inhabitants and citizens of Malaysia consists of Malays of Islamic faith, Chinese of Christian and Buddhism followers, Indians of Hinduism devotee and other races. The Government of the day need to rule the nation and ensure all its citizens are accorded the protection of law that the respective citizen wishes to be bound.

The majority of the population being Muslims wishes their personal life (at least) to be bound by Syariah law but on the same breath naturally the other non-Muslim population would not want their lives to be bound by Syariah, something alien to them.

According to statistics, Malaysia's population segregated by the religion they profess and practice, 61.3% are Muslims who professes Islam, 19.8% professes Buddhism, Christianity 9.2%, Hinduism 6.3% and the traditional Chinese practitioners 3.4%.¹

According to the statistics the predominant ethnic group in the Malaysian Peninsular are the Malays, the Sabah population constituted by the race of Iban (30.3%) while in the State of Sarawak the majority are tribe of Kadazan/Dusun.²

¹ Population of the World, Population of Malaysia (2020), <<https://www.livepopulation.com/country/malaysia.html>> viewed on 14 May 2020.

² Ibid.

Being the variation by population as it is, the legal system in the country must accommodate to the wishes of the predominant population of this country. This research is commenced to examine the origin of the legal systems in the country since

its historical and pre independence, its evolution into a dual legal system with dual jurisdiction as it stands today.

The researcher wishes to explore the terrains of history going back to medieval days in terms of tribal laws, then the coming into being of the colonial laws before the country secured its independence in 1957. The journey of the legal system in the country continues with the coming into being of the Federal Constitution post independence.

Post independence the country moves a step further into realising the aspiration of the majority of the population with the amendment of Article 121(1A) of the Constitution which gave birth to the dual judicial system in Malaysia.

It is against this background that this research is embarked upon and shall endeavour to enlighten the readers on the dual jurisdictions that this country Malaysia practices. The British left many marks on the Malaysian legal system which is very significant in regulating a multi-racial, multi-ethnic and multi-religious society. The Malaysian legal system is a relatively young one, barely over half a century old. It possesses a dual judicial system comprises of Civil Courts and Syariah Courts, and thereby both streams of courts have had to deal with some overlapping issues arising out of the evolving legal system over the years and much to be developed further in the future.

1.2 STATEMENT OF PROBLEM

Although the dual judicial system, i.e., the Civil Courts and the Syariah Courts are to