# Business and Commercial Law in Malaysia

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# Foreword

In the dynamic and fast-evolving business environment in Malaysia, understanding the complexities of the legal framework that governs business and commercial activities is increasingly important. Corporate entities must navigate various issues, from corporate structures to trade regulations, consumer protection, and dispute resolution.

With that said, *Business and Commercial Law in Malaysia* provides an excellent reference to the various laws and regulations shaping the business landscape in Malaysia. With its focus on the nuances of Malaysian law, the book is meticulously designed to provide an in-depth analysis of critical areas of business and commercial law.

Comprising 29 chapters, the book covers an extensive range of topics, each of which plays a significant role in the regulation and governance of business and commercial activities in Malaysia. From foundational concepts to highly specialised fields of business and commercial law, the content is structured to provide readers with both theoretical insights and practical applications. The chapters address a broad spectrum of the subject areas, providing a thorough overview of the legal principles and regulations that govern business operations, commercial transactions and dispute resolution.

The general concepts of law and legal systems and the essentials of the Malaysian legal system lay the foundation of the book followed by more specific topics on business and commercial law. Since contracts are fundamental to any business transaction, the book captures the essential components of the law of contract together with the remedies for breach of contract and ways businesses can mitigate risks. Also discussed are the essentials of torts law which deals with civil wrongs outside contract law by offering insights on how businesses can protect themselves from tortious claims. The formation, operation and legal implications of the various business entities are discussed with reference to sole proprietorships, partnerships and company law.

Other interesting chapters include agency law, franchise law, competition law, construction law, insurance law, cyber law, consumer protection law, revenue law, employment law, sale of goods, hire-purchase, bailment, banking and digital banking, and Islamic banking and finance. Further,

the book also covers the law relating to immovable property, e-commerce, data protection and cyber security, intellectual property and trade secrets, insolvency, and e-commerce laws. Money laundering and terrorism financing, commercial crimes, international trade law, international investment law, and settlement of commercial disputes are also featured in the book.

Undoubtedly, this book is an indispensable resource for anyone seeking to navigate the business and commercial legal landscape in Malaysia. With its comprehensive coverage of key legal areas of the subject, the book certainly offers a solid foundation for understanding how laws and regulations shape business practices in this vibrant and growing economy. The book therefore would serve as an essential guide for anyone seeking to understand the complexities of the theme of the book, whether they are students, entrepreneurs, business executives, or even legal counsel. May this work inspire a deeper appreciation of the role law plays in shaping the Malaysian business environment and help pave the way for more informed and responsible business practices.

With that said, I heartily congratulate all contributors for their extensive research, and to the editors for successfully completing this onerous task and coming up with this useful legal material which would certainly contribute to the pool of legal knowledge from the Malaysian perspective.

I wish you all great success with this publication.

Thank you.

**Tun Dato' Seri Utama Abdul Hamid bin Haji Mohamad**

Former Chief Justice of Malaysia

# Preface

Business Law and Commercial Law are two different components of law that oversee business and commercial matters. The former essentially encompasses contracts, intellectual properties, laws of corporations and other business-related transactions, while the latter includes the traditional legal topics, such as agency, partnership, sale of goods, hire-purchase, insurance, banking, digital banking, and electronic commerce or e-commerce, among others. In a business and commercial environment, it is essential to have a good understanding of the dynamics of business and commercial laws as this would ensure the know-how of business operations, protecting the rights and liberties of the parties, and resolve commercial disputes.

The book *Business and Commercial Law in Malaysia* consists of 29 chapters capturing the above two important areas of law by discussing the specific subject matter of each of the above subjects from the Malaysian perspective. It encompasses an introduction to law and legal systems with special features of Malaysian laws and the courts, the essentials of the law of contracts and law of torts and the various business entities such as sole proprietorship, partnership and corporations. The book also covers the law relating to agency, franchise, competition, bailment, banking and digital banking, and essentials of Islamic banking. Further, the laws relating to immovable property, consumer protection, revenue law, employment law, sale of goods, hire-purchase, insurance law, cyber law, intellectual property and trade secrets, insolvency and e-commerce laws are also included as specific chapters and discussed with reference to the law and practice in Malaysia.

The additional featured of this book are chapters relating to anti-money laundering, anti-terrorism financing, commercial crimes, international trade law, international investment law, and the settlement of commercial disputes. All in all, this book is an excellent source of reference as it is an all-embracing manuscript on the business and commercial law contributed by a pool of academics who are extensively involved in the research and publication on this subject. This book will be a precious source of reference and be immensely beneficial to a wide range of readers, and an essential reading for students pursuing Business Law and/or Commercial Law.

At the outset, as the general editors of this title, we would like to express our heartfelt appreciation to all the contributors for their extensive research in terms of the collection of laws, principles and authorities. Their research and multifarious knowledge of this subject would certainly make this book an excellent source of reference for all those interested in this subject.

Our heartiest appreciation and thanks are also due to Tun Dato' Seri Utama Abdul Hamid bin Mohamad, the former Chief Justice of Malaysia, for spending his precious time preparing the Foreword to this book. Further, we would like to extend our gratitude to the publisher, LexisNexis Malaysia Sdn Bhd, for taking a great deal of interest in the publication and for the support in finally getting this book published.

The applicable laws and the developments stated in this book stand as of 1 May 2025.

**Prof Dato' Sri Dr Ashgar Ali Ali Mohamed**

**Dr Muhamad Hassan Ahmad**

1 May 2025

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# Chapter 1

# Law and Legal Systems: An Introduction*

## 1. Introduction

**[1-1]** Law refers to the body of rules and principles governing the affairs of a community and is enforced through a set of establishments put in place which includes the police, the courts and prison systems. Law is established primarily to govern a society and to control the behaviour of its members, that is, to maintain the social order and protect persons and property from harm. A legal system refers to the framework of rules and institutions within a country that regulates the relationship between the government and its subjects and between the subjects themselves. The application of the legal system varies from country to country and is largely shaped by the unique history of a particular country. Generally, the most widespread legal systems in the world are the Civil Law, the Common Law and the Religious Law. Malaysia practices largely the Common Law System with limited application of the Islamic Legal System particularly on personal matters such as marriage, divorce, family relationships and property which are applicable only to Muslims and are enforced in the Syariah courts. Having said the above, in order to have a sound understanding of the business and commercial law in Malaysia, it is crucial at the outset to have a good grasp of the various aspects involving law and the legal systems. Hence, this chapter discusses the juristic and statutory definition of law, categories of law, the classifications of laws such as public law and private law, substantive law and procedure law, domestic law and international law, public international law and private international law among others. Further, the discussion will also feature the Islamic law enforced in Malaysia with reference to the Federal Constitution, the supreme law of the Federation as noted in article 4.



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# 2. Definition of Law

## 2.1 Juristic definition

**[1-2]** The word 'Law' is not merely referring to the laws passed by the legislative bodies but is used in the wider context which includes the juristic sense as well as the scientific contexts.[1] Law varies from one society to another and is usually influenced by several factors such as historical, religious, social, political and other differences.[2] Despite the numerous endeavours made by the prominent jurists in all times, there is no universally accepted definition of the word 'law'. This state of affair can be seen from the definitions of law propounded by some of the following prominent jurists. Thomas Aquinas defined 'law' as 'an ordinance of reason for the common good, made by someone who has care of the community, and promulgated'.[3] John Austin described 'law' as 'a rule laid for the guidance of intelligent beings by an intelligent being having power over him'.[4] Sir William Blackstone described 'law' as 'a rule of civil conduct prescribed by the supreme power in a State, commanding what is right, and prohibiting what is wrong'.[5] Benjamin Nathan Cardozo specified it as 'a principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged'.[6] For Hart, 'law' means 'is the union of primary rules (rules of conduct) and secondary rules (empowering rules)'.[7] Thomas Erskine Holland defined it as 'a general rule of external human action, enforced by a sovereign political authority'.[8] Holmes articulated 'law' as 'the prophecies of what courts will do in fact, and nothing more pretentious, are what I mean by the law'.[9] Kantorowicz viewed 'law' as 'a body of rules prescribing

1 David M Walker, *The Oxford Companion to Law* (Clarendon Press 1980) at 716–717; DLA Barker and CF Padfield, *Law* (10th edn, Butterworth-Heinemann 1998) at 1.

2 David M Walker, *The Oxford Companion to Law* (Clarendon Press 1980) at 717.

3 See 'Thomas Aquinas: Political Philosophy' https://iep.utm.edu/thomas-aquinas-political-philosophy/ accessed 17 February 2025.

4 See 'Austin's Theory of Law' https://www.noteguilty.com/notes/jurisprudence/austin-s-theory-of-law accessed 17 February 2025.

5 See 'Blackstone: Introduction to the Laws of England' https://oll.libertyfund.org/pages/blackstone-introduction-to-the-laws-of-england accessed 17 February 2025.

6 See 'Various Definitions of Law' https://www.toppr.com/guides/business-law-cs/introduction-to-law/various-definitions-of-law/ accessed 17 February 2025.

7 See 'The Concept of Law' https://en.wikipedia.org/wiki/The_Concept_of_Law accessed 17 February 2025.

8 See Dean Max Schoetz Jr, 'Law: Nature, Source and Classification' (1922) 6 Marquette Law Review 122 https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=4858&context=mulr accessed 17 February 2025.

9 Anthony D'Amato, 'A New (and Better) Interpretation of Holmes' s Prediction Theory of Law' https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1162&context=facultyworkingpapers accessed 17 February 2025.

external conduct and considered justiciable'.[10] Llewellyn remarkably said that 'what those officials do about dispute is, to my mind, the law itself'.[11] Last but not least, Salmond described 'law' as 'the body of principles recognised and applied by the state in the administration of justice'.[12]

**[1-3]** As from the above, despite the efforts being made by the various jurists of different eras in defining the word 'Law', none of these definitions suits well to cover all functions and characteristics of law. Indeed, law can never be studied alone in a society without realising its relationship with others, ie, historical events, religious thoughts, customary practices, cultural practices, moral principles, rules of equity, principles of justice, social order, political system, and economic structure, among others. Nevertheless, it does not mean that there can be no attempt to define what the word law is. Perhaps, it can be done after careful examination of all norms which are deemed to be law and its relationship with abovementioned components. In strict sense, it can generally be defined as a set of rules (religious, customary and/or promulgated by the duly authorised body) which is applicable to all members in a society and enforceable before a court of law. The ultimate purpose of the law is to render justice equally and impartially to all members of the society.[13] At this juncture, it must be noted that any definition of law will still be an exhaustible one because the alteration of law itself is subjected to the change of time and space. The word 'law' is also synonymous to act, article, ordinance, code, rule, order, enactment, regulation, statute, standard, canon, charter, decree, command, dictum, maxim, norm, principle, instruction, discipline, mandate, precedent, precept, prescription, pronouncement, rubric, tenet, convention, accord, covenant, treaty and so forth.[14]

## 2.2 Aquinas classification of law

**[1-4]** In order to draw a clear picture of the traditional classification of law, it is appropriate to discuss the four folds of law propounded by Saint Thomas Aquinas.

10 See https://www.encyclopedia.com/social-sciences/applied-and-social-sciences-magazines/kantorowicz-hermann accessed 26 March 2025.

11 Alfred L Brophy, ' "Cold Legal Points into Points of Flame": Karl Llewellyn Attacks Lynching' https://scholarship.law.ua.edu/cgi/viewcontent.cgi?article=1375&context=fac_working_papers accessed 17 February 2025.

12 See 'John Salmond's Definition of Law: A Comprehensive Analysis' https://lawbhoomi.com/john-salmonds-definition-of-law-a-comprehensive-analysis/ accessed 17 February 2025.

13 See also JJS Wharton, *The Law Lexicon, or Dictionary of Jurisprudence* (Fred B Rothman & Co 1987) at 551.

14 See also William C Burton, *Burton's Legal Thesaurus* (3rd edn, Macmillan Library Reference 1998) at 329.

### 2.2.1 External law (*lex aeterna*)

**[1-5]** This category of law refers to the Divine Intellects and Wills of God (ie, the creator and ruler of the universe) directing all things in the universe. It is eternal because God's rational guidance is not subjected to time constraint. Only God knows the totality of eternal law and all things are ruled by this law.[15] For instance, gravitation is essential to preserve living as well as non-living things on earth. It is neither invented nor arranged by any living creature in the world rather than being the Will of God which is to preserve the world with its dependents. This is an example of eternal law which has existed since time immemorial, but mankind discovered it recently. Some blessed people (also known as 'Prophets' or 'Messengers' of God), who have been able to know God in His essence, may perceive eternal law to some extent through various kinds of revelations.

### 2.2.2 Divine law (*lex divina*)

**[1-6]** Divine law is the law given by God to mankind through the scriptures revealed to the Prophets.[16] For examples, the '*Torah*' revealed to Prophet Moses (Musa) (peace be upon him); the '*Zabur*' revealed to Prophet David (Daud) (peace be upon him), the 'Gospel' (*Injil*) revealed to Prophet Jesus (Isa) (peace be upon him) and the *'Quran*' (*Tauhid*) to Prophet Muhammad (peace be upon him). This type of law is revealed to mankind in order to direct them to their eternal ends.

### 2.2.3 Natural law (*lex naturalis*)

**[1-7]** In general, mankind reacts according to reasons. Natural law is basically derived from human reasoning which is God-given. Therefore, discovering natural law can also be seen as 'man's participation in the cosmic law'.[17] People, in most cases, prefer to practice good deeds and avoid evil things as they discover this general principle of natural law through the exercise of right reasons. For example, murdering someone without just cause is not acceptable to the whole mankind. Accordingly, outlawing murder is a kind of man's reaction to the rule of natural law which is discovered by exercising of right reasoning.

**[1-8]** Human beliefs may be divided into two main categories such as 'believing in God's existence' and 'rejecting the existence of God'. Those who refuse the existence of God will not be able to acknowledge the discussion up to this point including the aforesaid two folds classification of law opined by Saint Thomas Aquinas. Thus, it is not surprising that

15 LB Curzon, *Jurisprudence* (Macdonald & Evans Ltd 1979) at 57.

16 See also LB Curzon, *Jurisprudence* (Macdonald & Evans Ltd 1979) at 58.

17 LB Curzon, *Jurisprudence* (Macdonald & Evans Ltd 1979) at 57.

secular natural law thinkers reject the fact that natural law is derived from divine wisdoms. For them, natural law is a pure product of human reasons.

### 2.2.4 Man-made law (*lex human*)

**[1-9]** According to Saint Thomas Aquinas, human law is the application of natural law that is derived from human reasoning to the particular circumstances of a state. Hence, man-made law has to be in conformity with the previous categories.[18] However, secularists reject this notion as they consider man-made law as the product of human mind. In simple terms, man-made laws basically are the laws passed by the respective legislative bodies in a state in order to administer all affairs under its jurisdiction. Thus, this type of law differs in various ways from one country to another.

## 2.3 Classification of law: national and international law

**[1-10]** In modern times, law can normally be classified into national law and international law[19] where the former can be further divided into public and private, while the latter into public international law and private international law. The above is further illustrated below.

### 2.3.1 National law

**[1-11]** National law is also known as 'municipal law' or 'domestic law'. It is a kind of law which applies in a particular state to its citizens, permanent residents and even foreign nationals within the territory jurisdiction of that state. In Malaysia, under section 22(1)(a) of the Courts of Judicature Act 1964 (Act 91), the High Court has the original criminal jurisdiction to try all offences committed: (1) within its local jurisdiction; (2) on the high seas on board any ship or on any aircraft registered in Malaysia; (3) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft; (4) by any person on the high seas where the offence is piracy by the law of nations.[20] From the above provision it can be observed that the High Court can claim jurisdiction over anyone regardless whether the offender is a citizen, permanent resident or foreign national when the crime is committed within its local jurisdiction. It can still claim jurisdiction for crimes committed outside its territory by any citizen or permanent resident if the crime occurs on the high seas on board any ship or on any aircraft. Even foreign nationals will be subjected to the jurisdiction of the High

18 LB Curzon, *Jurisprudence* (Macdonald & Evans Ltd 1979) at 58.

19 See also Louis Waller, *Derham, Maher and Waller, An Introduction to Law* (8th edn, LBC Information Services 2000) at 65–67.

20 Courts of Judicature Act 1964 (Act 91), s 22(1)(a).

Court where the offence is committed on the high seas on board any ship or on any aircraft registered in Malaysia. It can also claim jurisdiction to any person on the high seas where the offence committed is piracy under international law. Section 22(1)(b) further provides that the High Court shall have original criminal jurisdiction to try all offences under Chapter VI and Chapter VIA of the Penal Code (Act 574) and under any of the written laws specified in the Schedule to the Extra-Territorial Offences Act 1976 (Act 163) or offences under any other written law the commission of which is certified by the Attorney General to affect the security of Malaysia when these are committed by anyone on the high seas on board any ship or on any aircraft registered in Malaysia; by any citizen or any permanent resident on the high seas on board any ship, on any aircraft, in any place without and beyond the limits of Malaysia; by any person against a citizen of Malaysia; by any person against property belonging to the Government of Malaysia or the Government of any State in Malaysia located outside Malaysia, including diplomatic or consular premises of Malaysia; by any person to compel the Government of Malaysia or the Government of any State in Malaysia to do or refrain from doing any act; by any stateless person who has his habitual residence in Malaysia; by any person against or on board a fixed platform while it is located on the continental shelf of Malaysia; or by any person who after the commission of the offence is present in Malaysia.

**[1-12]** In its original civil jurisdiction under section 23(1) of the Courts of Judicature Act 1964, without prejudice to article 128 of the Federal Constitution, the High Court has the jurisdiction to try all civil proceedings where:

(1) the cause of action arose;
(2) the defendant or one of several defendants resides or has his place of business;
(3) the facts on which the proceedings are based exist or are alleged to have occurred; or
(4) any land the ownership of which is disputed is situated, within the local jurisdiction of the court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

**[1-13]** As noted earlier, national law can be divided into two main categories, ie, public law and private law. The following paragraphs discuss both categories together with some of their branches.

### (a) Public law

**[1-14]** Public law is the law governing the relationship between the state and its subjects.[21] In other words, public law is a system of law which deals

21 See also Lee Mei Pheng and Ivan Jeron Detta, *Business Law* (Oxford University Press 2009) at 11.

with the state itself, either by its own or in their relations with the individuals living inside that particular state. Therefore, it concerns with the structure of the state and the government; the duties and powers of officials; and the relationship between the state and the individuals. It relates to a person's behaviours as well as fulfilment of state-mandated obligations and is enforced by the state itself. Public law can further be classified into various branches such as constitutional law, administrative law, criminal law, revenue law and so on. Some of the public laws are briefly discussed below.

### *(i) Constitutional law*

**[1-15]** In almost all states with the exception to the United Kingdom and Israel, constitutional law is the supreme law of the land and the most essential branch of public law upon which other branches of law are based. In its general meaning the constitution simply refers to the entire body of rules whereby a state is governed. Accordingly, constitutional law lays down the structure of the state, rights of its subjects, structure of the government, structure of the legislative bodies, composition of the courts etc. It is subject to a great deal of interpretation and amendment. It covers the basic rights and liberty of the individuals and various branches of government with regards to each other and to the public at large.[22] Thus, it deals with the relationship between not only the state and the individuals but also different state's organs such as the executive, the legislative and the judiciary. In Malaysia, the Federal Constitution which consists of 15 Parts, 183 articles, and 13 Schedules is the supreme law of the Federation, and any law passed after Merdeka Day which is inconsistent with it shall be void to the extent of the inconsistency.[23] The doctrine of constitutional supremacy is ingrained in article 4(1).[24] It covers a wide range of important areas namely, constitution supremacy, fundamental human rights, federalism, citizenship, elections, roles and powers of the executive, legislature and

22 A Vijayalakshmi Venugopal, *Introduction to Law in Malaysia* (Sweet & Maxwell Asia 2001) at 25. For further reading, see Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (Hart Publishing 2012).

23 Federal Constitution, art 4(1).

24 See *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759 (FC). See also *Superintendent of Land and Survey Department Kuching-Divisional Office & Anor v Ratnawati bt Hasbi Mohamad Suleiman* [2020] 2 MLJ 553 (FC) where it was noted that 'Ours, as pointed out earlier, is a system which epitomises Constitutional supremacy over Parliamentary supremacy'. Again, in *Teng Chang Khim (Pengerusi Jawatankuasa Pilihan Khas Mengenai Keupayaan, Kebertanggungjawaban dan Ketelusan dan Pengerusi Jawatankuasa Hak dan Kebebasan Dewan Undangan Negeri Selangor) & Ors v Dato' Raja Ideris bin Raja Ahmad & Ors* [2014] MLJU 260 (FC), 'We have not lost sight of the fact that the doctrine of the supremacy of Parliament does not apply in Malaysia and that in Malaysia the Constitution is supreme'. See also *Rovin Joty a/l Kodeeswaran v Lembaga Pencegahan Jenayah & Ors and other appeals* [2021] 2 MLJ 822 (FC).

the judiciary, public services and public servants, Attorney-General, special powers against subversion and emergency powers, constitutional interpretation and constitutional amendments. It is noteworthy that constitutional supremacy does not mean that the constitution is rigid and immutable. In *Phang Chin Hock v Public Prosecutor*,[25] the Federal Court had succinctly stated that the constitution is not 'carved in granite' which is unchangeable. Rather, it is a 'living document' which is 'reviewable from time to time'.[26] Meanwhile, each state has its own constitution which must be in line with the auspice of the Federal Constitution.[27]

### *(ii) Administrative law*

**[1-16]** Administrative law is a body of law that describes the functions and powers of the government and its branches. It defines the powers of administrative agencies and regulates bureaucratic managerial procedures.[28] The administrative law must be in line with the natural justice,[29] and it has to be rational, transparent as well as efficient. The very purpose of administrative law is to exercise the functions and powers of the government effectively within the legal boundary and protect the citizens against the abuse of power by the government authorities. In this regard, Sir William Wade said that a state needs to have a huge administrative apparatus in order to take care of its citizens in all aspects such as education, jobs, medical services, houses, pensions and so on. Moreover, there must be a sensible control over its operations. It must be kept under political control of the parliament and legal control of the court.[30] Thus,

25 *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70, [1979] 1 LNS 67 (FC).

26 As Suffian LP in *Phang Chin Hock's* case stated:

> If it is correct that amendments made to the Constitution are valid only if consistent with its existing provisions, then clearly no change whatsoever may be made to the Constitution; in other words, Article 159 is superfluous, for the Constitution cannot be changed or altered in any way, as if it has been carved in granite. If our Constitution makers had intended that their successors should not in any way alter their handiwork, it would have been perfectly easy for them to so provide; but nowhere in the Constitution does it appear that that was their intention, even if they had been so unrealistic as to harbour such intention. On the contrary apart from Article 159, there are many provisions showing that they realized that the Constitution should be a living document intended to be workable between the partners that constitute the Malayan (later Malaysian) policy, a living document that is reviewable from time to time in the light of experience and, if need be, amended.

27 Federal Constitution, art 71.

28 A Vijayalakshmi Venugopal, *Introduction to Law in Malaysia* (Sweet & Maxwell Asia 2001) at 19–20.

29 Lord Esher in *Voinet v Barrett* (1885) 55 LJQB 39 (CA, Eng) at 41 defined natural justice as 'the natural sense of what is right and wrong'.

30 William Wade, *Administrative Law* (6th edn, Oxford University Press 1988) at 4–6.

administrative law is subject to judicial review and the court must play a vital role in making sure that the government authorities do not abuse their powers over the citizens. Professor MP Jain also explained that the primary objective of the administrative law is to protect the citizens in the country against the abuse of power by the government.[31]

### *(iii) Criminal law*

**[1-17]** Criminal law is also part of public law as a crime is regarded as an unlawful conduct against the state as well as the society. In general, the criminal law plays a vital role not only in maintaining peace, stability and security of a State but also in prohibiting acts or omissions that inflict harms to a person's life, body, mind, property and reputation by prescribing appropriate punishments for those conducts.[32] A crime is an offence which is committed by an individual, a group or a corporate body against the state.[33] Criminal conducts can further be categorised into four sub-categories, such as crimes against a person (homicide, kidnapping, sex offences, assault and battery); crimes against property (theft, robbery, burglary, arson and trespass); crimes against the public health or decency (drug offences, abortion, bribery, gambling, prostitution, and disorderly conduct); and crimes against the government (treason and official misconducts).[34] Criminal law basically defines various criminal conducts that are prohibited by the state because such conducts harm, endanger or threaten the safety as well as the welfare of the public. The law prescribes penalties to be imposed upon offenders. Generally, there are two elements of a crime, namely, '*actus reus*' (wrongful conduct) and '*mens rea*' (guilty mind). These terms come from a Latin maxim '*actus non facit reum nisi mens sit rea*' which means that an act is illegal only when a person commits it with a guilty mind.[35]

**[1-18]** The criminal law is enforced by the state as the duty of the State includes ensuring security by maintaining law and order in the society. In a simple criminal proceeding, a person who is accused of committing an offence will be placed under the custody of police. Then, the proceeding is initiated and conducted by a representative of the state. In Malaysia, the Attorney General is also the Public Prosecutor who will initiate proceedings

31 MP Jain, *Administrative Law of Malaysia and Singapore* (3rd edn, LexisNexis 1997) at 7–8.

32 See also Vincent Chiao, 'What is the Criminal Law for?' (2016) 35(2) Law and Philosophy at 137–163.

33 See also Lee Mei Pheng and Ivan Jeron Detta, *Business Law* (Oxford University Press 2009) at 11.

34 Katherine A Currier and Thomas E Eimermann, *The Study of Law: A Critical Thinking Approach* (2nd edn, Aspen Publishers 2009) at 42.

35 See also Louis Waller, *Derham, Maher and Waller, An Introduction to Law* (8th edn, LBC Information Services 2000) at 77.

against the accused person. Article 145(3) of the Federal Constitution amplifies the powers of the Attorney General as follows: 'The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinues any proceedings for an offence, other than proceedings before a Syariah Court, a native court or court-martial'. A prosecution is instituted when an accused is called upon to plead to a charge.[36] The power to institute criminal proceedings includes the power to prefer a less serious charge when the evidence discloses a graver offence. Such power also allows the Attorney General not to prefer charges at all. A person appears before the court to defend the accusation against him/her is called the 'defendant' or 'accused person'. The prosecutor has to prove 'beyond a reasonable doubt' in order to convict a person of a crime that he/she is being accused of.[37] Only when the court decides that the defendant is guilty, he/she may be punished by one or more of a variety of punishments ranging from fine, whipping, released on probation, short term imprisonment, life imprisonment or even death. If the accused person is not found guilty of committing any offence as the prosecutor fails to prove the guilt of the accused beyond the reasonable doubt, he/she will be acquitted without being subjected to any form of punishment.[38] Punishment is the key in enforcing criminal law as it penalises the offenders and poses threat to would-be offenders through the criminal justice system.[39] There are five well-known purposes of punishments as follows:

(1) retribution;
(2) incapacitation (incarceration);
(3) restoration (restitution);
(4) deterrence; and
(5) rehabilitation.[40]

**(b) Private law**

**[1-19]** Private law is a body of law that deals with the rights and duties between and among the private individuals. It regulates the relationship between one citizen and another. When a private law is violated, the victim (who is harmed or whose property is damaged) can sue the wrongdoer

36 See *Perumal v Public Prosecutor* [1970] 2 MLJ 265 (FC).

37 Katherine A Currier and Thomas E Eimermann, *The Study of Law: A Critical Thinking Approach* (2nd edn, Aspen Publishers 2009) at 40.

38 Muhamad Hassan Ahmad and Ashgar Ali Ali Mohamed, 'Legal Theory and Concept of Law' in Ashgar Ali Ali Mohamed (ed), *Malaysian Legal System* (CLJ Publication 2020) at 49.

39 Slades & Parsons, 'What Is the Main Objective of criminal law?,' https://www.slades parsons.com.au/what-is-main-objective-criminal-law/ accessed 17 February 2025.

40 Muhamad Hassan Ahmad and Ashgar Ali Ali Mohamed, 'Legal Theory and Concept of Law' in Ashgar Ali Ali Mohamed (ed), *Malaysian Legal System* (CLJ Publication 2020) at 49.

in a civil court. Usually, the offenders are penalised monetarily and thus it enables the injured party to recover the losses.[41] There are many different areas of law which fall under the heading of private law such as law of contracts, law of tort (civil wrong), labour law, family law, trust law, commercial law and so on. Some of these laws are discussed below.

### *(i) Law of contracts*

**[1-20]** Contracts are entered into by the parties to give legal effect to their promises. Private dealings are not enforceable before a court of law without a binding contract between the disputants. In concluding a contract, the following essential elements must be present, ie, offer from one party; acceptance from another party to that specific offer; consideration from both parties; intention to create legal relation with regard to their promises in the agreement; certainty of the subject matter; and legal capacity of both parties to enter into a contract. Apart from fulfilling the aforesaid requirements, a contract has to be concluded on the basis of free consent of the parties.[42] The consent is considered to be free when it is not caused by coercion, undue influence, fraud, misrepresentation and/or mistake.[43] A contract is voidable at the option of the party whose consent to an agreement in the contract is given by one or more of the abovementioned elements.[44] A contract is void *ab initio* where the subject matter or consideration of the contract is forbidden by law; likely to defeat any law; fraudulent; involves injury to the person or property of another; or the court regards it as immoral or opposed to public policy.[45]

**[1-21]** A contract can be discharged by performance of the obligations under the contract, frustration of the subject matter or by a breach of the contract. When there is a breach, the party at breach can be sued by the other party in seeking remedy before a court of law. Only the parties to the contract can acquire the rights and incur liabilities under it.[46] A third party has no right to sue a wrongdoer for the breach of contract. There are several remedies available to the injured party in case of a breach of contract, namely: rescission, restitution, damages, specific performance, injunction, *Anton Piller* order and *quantum meruit*.[47]

41 See also Lee Mei Pheng and Ivan Jeron Detta, *Business Law* (Oxford University Press 2009) at 11–12.

42 Contracts Act 1950 (Act 136), ss 10, 15, 16, 17, 18 and 21.

43 Contracts Act 1950, s 14.

44 Contracts Act 1950, s 19.

45 Contracts Act 1950, s 24.

46 *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 (HL). See also Lee Mei Pheng and Ivan Jeron Detta, *Business Law* (Oxford University Press 2009) at 157.

47 See also Lee Mei Pheng and Ivan Jeron Detta, *Business Law* (Oxford University Press 2009) at 202–203.

### *(ii) Law of trust*

**[1-22]** A trust is an equitable obligation that binds a person (trustee) to deal with a property over which he has control (trust property) for the benefits of persons (beneficiaries or *cestui que trust*) of whom he himself may be one and any one whom may enforce the obligation.[48] Basically, parties involved in a trust relationship are:

(1) settlor/testator (the creator of the trust);
(2) trustee (the person who is under the obligation to hold the trust property for the benefit of the beneficiary. It is also possible for a trustee to be one of the beneficiaries under the same trust); and
(3) beneficiary (the person who is entitled to the enjoyment of the trust property). A trust has the following characteristics:
    (a) the assets constitute a separate fund and are not a part of the trustee's own estate;
    (b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;
    (c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.[49]

**[1-23]** Therefore, in a trust relationship, the legal ownership over the trust property is vested with the trustee whereas the beneficiary has the right to enjoy that property as the equitable owner. Trust can generally be classified by method of creation and types of beneficiaries. There are four modes of creation of trust namely:

(1) express trust (this type is made by the express intention of the settlor to create a trust);
(2) resulting trust (under this type, a settlor has set up a trust wherein the beneficial interest results or returns to him);
(3) constructive trust (this type is imposed by the court in response to fraudulent or unconscionable conducts); and
(4) statutory trust (this type of trust is created under the statutes).[50]

Based on the type of the beneficiaries, trust can further be classified as private trusts (trusts that are set up to benefit a single individual or a class

48 Arthur Underhill, *The Law Relating to Trusts and Trustees* (7th edn, Butterworth & Co 1912) at 1.

49 The Convention on the Law Applicable to Trusts and on their Recognition 1985, art 2.

50 Wan Azlan Ahmad and Paul Linus Andrews, *Equity and Trusts in Malaysia* (Sweet & Maxwell Asia 2005) at 8, 21, 57 and 83.

of specified people)[51] and public trusts (trusts that are intended to benefit the public at large or at least a section of it, ie, charitable trusts).[52]

### *(iii) Law of torts*

**[1-24]** The word 'tort' is derived from the Latin term '*tortum*', which means 'twisted', 'wrong' or 'crooked'.[53] In simple term, a 'tort is a wrongdoing' or a civil wrong. Law of torts is 'a body of rules relating to private civil wrongs'.[54] Tortious liability arises from the breach of a legal duty which results in damage to a person or property.[55] In other words, a tort is a civil wrong which is committed either intentionally or negligently against a private person, including other legal entities other than the state. Tortious liabilities may arise through trespass to a person, trespass to land, or trespass to property.[56] The law of torts covers numerous types of private civil wrongdoings such as assault, battery, defamation, trespass to land and negligence, among others. Each tort has its own name, such as conversion, negligence, trespass, false imprisonment, passing-off, tortious conspiracy, and many more. It is estimated to have more than 70 torts recognised by common law jurisdictions and each of those torts protects different personal interests.[57] The law of torts protects a variety of private interests such as 'the protection of bodily integrity, psychiatric well-being, economic interests, property interests, reputation, privacy and commercial interests'. The injured party can sue the wrongdoer for infringing his/her legal rights.[58] When the tort is proven to have occurred, the court may award remedies to the injured party such as monetary damages, injunctions and some other specific remedies.[59] There are two essential elements to be considered in a tort suit. The plaintiff 's damage must have been caused due to the defendant's act or omission and the damage must not be too remote. The remoteness of damage is determined on the basis of the fact

51 Wan Azlan Ahmad and Paul Linus Andrews, *Equity and Trusts in Malaysia* (Sweet & Maxwell Asia 2005) at 21–39.

52 Wan Azlan Ahmad and Paul Linus Andrews, *Equity and Trusts in Malaysia* (Sweet & Maxwell Asia 2005) at 103–137.

53 Basil S Markesinis, 'Tort,' Britannica, https://www.britannica.com/topic/tort accessed 17 February 2025.

54 'An Introduction to Tort Law,' at 1, https://lawschool.ie/wp-content/uploads/2016/10/tortpdf.pdf accessed 17 February 2025.

55 John Hodgson and John Lewthwaite, *Tort Law Textbook* (2nd edn, Oxford University Press 2007) at 1–48.

56 Ashgar Ali Ali Mohamed and Muhamad Hassan Ahmad, 'Law: Definition, Classifications and Functions' in Ashgar Ali Ali Mohamed and Muhamad Hassan Ahmad (eds), *Malaysian Legal System* (3rd edn, CLJ Publication 2023) at 12–13.

57 Peter Cane, *The Anatomy of Tort Law* (Bloomsbury Publishing 1997) at 3.

58 Mohamed and Ahmad (n 56) at 12–13.

59 'An Introduction to Tort Law,' at 1 https://lawschool.ie/wp-content/uploads/2016/10/tortpdf.pdf accessed 17 February 2025.

that whether the damage is caused as a result of the direct consequence of such act or omission.[60]

### 2.3.2 International law

**[1-25]** International law which sets the rules and principles governing the relations and conduct of sovereign states with each other, as well as with individuals and international organisations, can be divided into two major branches, ie, 'public international law' and 'private international law'.

#### (a) Public international law

**[1-26]** Public international law is defined by numerous jurists in various ways. JG Starke defines 'International law' as 'that body of law which is composed for its greater part of the principles and rules of conduct which states feel themselves bound to observe, and therefore, do commonly observe in their relations with each other'.[61] Therefore, it is also known as 'law of nations', 'law among nations' and 'inter-state law'.[62] Nonetheless, this classical definition is not enough to encompass newly emerging subjects of international law such as inter-governmental organisations, non-governmental organisations, multi-national corporations and, in some cases, even private individuals. Oppenheim includes the aforesaid subjects of international law in defining it. According to him, 'International law is the body of rules which are legally binding on states in their intercourse with each other. These rules are primarily those which govern the relations of states, but states are not the only subjects of international law. International organisations and, to some extent, also individuals may be subjects of rights conferred and duties imposed by international law'.[63]

**[1-27]** Despites some weaknesses of international law, states do observe it due to internal motivations and external pressures. There are peaceful means and coercive means to enforce international law. The enforcement measure is determined depending on the seriousness of the violation.[64] The sources of international law can be found mainly in article 38(1) of the Statute of the International Court of Justice, ie, international conventions,

60 John Hodgson and John Lewthwaite, *Tort Law Textbook* (2nd edn, Oxford University Press 2007) at 49–80.

61 J Craig Barker, 'Mechanisms to Create and Support Conventions, Treaties, and Other Responses' (Eolss Publishers 2014) https://www.eolss.net/sample-chapters/c14/e1-44-01.pdf accessed 17 February 2025.

62 Abdul Ghafur Hamid @ Khin Maung Sein, *Public International Law: A Practical Approach* (3rd edn, Sweet & Maxwell Asia 2011) at 1.

63 See also Abdul Ghafur Hamid @ Khin Maung Sein, *Public International Law: A Practical Approach* (3rd edn, Sweet & Maxwell Asia 2011) at 1–2.

64 See also Abdul Ghafur Hamid @ Khin Maung Sein, *Public International Law: A Practical Approach* (3rd edn, Sweet & Maxwell Asia 2011) at 6–12.

international custom, the general principles of law recognised by civilised nations, judicial decisions and the teachings of the most highly qualified publicists.[65] There are several branches of public international law such as law of treaties, law of the sea, international criminal law, international humanitarian law, international human rights law and so forth.

### (b) Private international law

**[1-28]** Private international law is a body of rules, principles and policies that deal with cases before a domestic court which has any connection with a foreign country. In other words, it is part of the internal law of a state, and it comes into operation whenever the court faces a dispute with the presence of a 'foreign element'.[66] The 'foreign element' may be a foreign person; a contract made or to be performed in a foreign country; a marriage contract between people from different countries or concluded in foreign country; a moveable or immoveable property which are situated in a foreign country or belong to a foreigner; a tortious act committed in a foreign country; or any other circumstances or performance between two or more parties from different countries.[67] For example, a case before a court in Malaysia may involve a person who lives in Australia or an event that occurred in Indonesia.

**[1-29]** Private international law is not concerned with relations of states, but with disputes of persons arising out of their marriages, contracts, wills, torts and other private law matters. Thus, it has been recognised as an aspect of municipal law. It is different from public international law because it only concerns private parties from different countries. This branch of law was previously known as 'conflict of laws' since different countries have distinct law and there can be conflict where more than one law is applicable to the case. Later, it is named as 'private international law' which is broadly used because the facts or parties to disputes are related to one or more foreign countries.[68]

**[1-30]** Private international law concerns with three main issues such as jurisdiction, choice of law and recognition as well as enforcement of foreign judgments. This branch of law determines the jurisdiction of the court

65 See also Abdul Ghafur Hamid @ Khin Maung Sein, *Public International Law: A Practical Approach* (3rd edn, Sweet & Maxwell Asia 2011) at 21–45.

66 See PM North and JJ Fawcett, *Cheshire and North's Private International Law* (12th edn, Butterworth & Co Ltd 1992) at 3–8; Lawrence Collins (ed), *Dicey and Morris on the Conflicts of Laws* (11th edn, Steven & Sons Limited 1987) at 3–6; JHC Morris, *The Conflicts of Laws* (2nd edn, Steven & Sons Ltd 1980) at 3–5.

67 PM North and JJ Fawcett, *Cheshire and North's Private International Law* (12th edn, Butterworth & Co Ltd 1992) at 3–8.

68 David Mcclean and Kisch Beevers, *The Conflict of Laws* (Sweet & Maxwell 2009) at 4–5.

which has to adjudicate the dispute and the applicable law to the dispute. Therefore, when a court deals with a case involving a foreign element, it is vital to examine first whether the court has jurisdiction over the dispute. In cases where the court establishes jurisdiction, then it has to decide further which law should be the applicable law to the dispute whether it will decide the case in accordance with the law of the forum or in line with the law of a foreign country with which the case has connections.[69] It is, thus, still possible for a court to have jurisdiction to resolve the dispute even though the applicable law would be a foreign system of law.[70] When the claimant obtains a judgement in a foreign country, the next issue is whether such judgment can be recognised or enforced in the respective country.[71] For example, a Malaysian claimant obtains a judgment from a Malaysian court against an Indonesian defendant for a breach of contract and he wishes to enforce it in Indonesia. The rule of private international law is applicable here to determine the question whether the Indonesian court will recognise the judgment of Malaysian court, or the claimant will have to bring a fresh proceeding before the Indonesian court.

## 2.4 Substantive law and procedural law

**[1-31]** Law can also be divided into substantive law and procedural law. These two divisions are interconnected with each other. The former defines the rules that abides the society while the latter establishes the framework for the proper enforcement of the former.

### 2.4.1 Substantive law

**[1-32]** Substantive law is the substance and content of the law itself. This type of law basically defines legal rights and obligation of persons within the society towards one another.[72] It also sets down certain conducts to be illegal in the society. Substantive law comprises both criminal and civil law. Some of the subject of the public and private laws in a particular country as discussed above falls under the subject of substantive law. For example, the criminal law which defines crimes and prescribes

69 Kyaw Hla Win @ Md Hassan Ahmed, 'The Application of Choice of Law and Choice of Forum Clauses to Islamic Banking and Financial Cross Border Transactions: A Critical Analysis' (International Conference on Islamic Banking & Finance: Cross Border Practices, Kuala Lumpur, June 2010) at 3.

70 JHC Morris, *The Conflicts of Laws* (2nd edn, Steven & Sons Ltd 1980) at 3–5.

71 Aznan Hassan and Kyaw Hla Win @ Md Hassan Ahmed, 'The Application of Choice of Law and Choice of Forum Clauses to Islamic Banking and Financial Cross Border Transactions' (2012) 6(11) Australian Journal of Basic and Applied Sciences 370 at 377.

72 DLA Barker and CF Padfield, *Law* (10th edn, Butterworth-Heinemann 1998) at 4.

punishments is a rule of substantive law. In the same vein, the law of contracts which sets out rights and duties of the parties to a contract is also a rule of substantive law.

### 2.4.2 Procedural law

**[1-33]** In contrast with substantive law, procedural law concerns with mechanics of the legal process rather than with the substance and content of the law itself. Sometimes, it is also known as adjudicative law as it deals with the body of rules that govern the manner in which a legal proceeding must be carried out before the courts.[73] This rule of law spells out the procedures to be adhered to by the law enforcement bodies in arresting, interrogating and trying an accused person.[74] Thus, it is crucial for the law enforcement bodies to follow the respective procedural law in dealing with cases. Some examples of procedural laws include criminal procedure, civil procedure and the law of evidence.[75] Take for example the commission of a criminal offence, the victim of an alleged crime may lodge a police report in accordance with the Criminal Procedure Code (Act 593). Section 107 of the Criminal Procedure Code provides that a police officer is duty-bound to receive any information in relation to any offence committed anywhere in Malaysia. Upon receiving the information regarding an alleged offence, the police would then conduct an investigation in accordance with the procedures laid down in the Criminal Procedure Code. The investigation papers will then be submitted to the Attorney General's chambers.[76] The investigating officer is required to submit the investigating report setting forth, inter alia, the names of the parties, the nature of the information, and the names of the persons who appear to be acquainted with the circumstances of the case. The Attorney General will then determine whether to institute and conduct criminal proceedings and prosecutions.

73 See also Bryan A Garner (ed), *Black's Law Dictionary* (9th edn, Thomson Reuters 2009) at 963.

74 See also Mary McMahon, 'What Is Substantive Law?' Wise Geek https://www.mylawquestions.com/what-is-substantive-law.htm#comments accessed 17 February 2025.

75 See also Wan Arfah Hamzah, *A First Look at the Malaysian Legal System* (Oxford Fajar Sdn Bhd 2009) at 305–365.

76 The Attorney General and the Public Prosecutor is one and the same person. Thus, the Attorney General is the alter ego of the Public Prosecutor and vice versa. Criminal Procedure Code (Act 593), s 376(1) provides that the Attorney-General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecution and proceeding under the code. Interpretation Acts 1948 and 1967 (Act 388), s 3 provides the following definition. 'Public Prosecutor' means the Attorney General, and includes (within the scope of his authority) a Deputy Public Prosecutor appointed under any written law relating to criminal procedure and a person authorised by any such law to act as or exercise all or any of the powers of the Public Prosecutor or a Deputy Public Prosecutor.

Criminal proceeding is usually commenced with a charge being read and explained to the accused, and if there is none, one shall be framed, otherwise, the criminal proceeding against the suspect cannot take place.[77] The prosecution will begin the case by adducing convincing evidence to establish a prima facie case against the accused. 'Prima facie' is Latin term which meaning 'on its face' or 'at first look'. What constitute a prima facie case as being made out against the accused is discussed in section 173(h) of the Criminal Procedure Code. A prima facie case is made out where there is sufficient credible evidence establishing each essential ingredient of the offence for a supposition of guilt.[78] Where at the close of prosecution's case, the prosecution failed to prove their case beyond reasonable doubt, the court will be acquitted and discharged the accused from the charge without calling for his defence.

**[1-34]** In a civil dispute, parties are required to file pleadings and other originating documents. Pleadings comprises of the statement of claim, statement of defence, and reply. The above documents should contain concise statements of all material facts on which the parties rely on for the purposes of establishing a claim or defence. The material facts must be as brief as the nature of the case allows. The pleading and other originating documents filed in court must be served on the other party either by personal or substitute service. Once the appropriate documents have been filed and served on the disputing parties, a case management meeting will be fixed by the court to give such directions to the parties as to the future conduct of the action in order to ensure just, expeditious and economical disposal of the action. During the case management, parties to the action have to appear in person or be represented by counsel and the judge will give such directions as are necessary for the speedy and expeditious disposal of the dispute. The proper hearing of the case will be held on the assigned dates in open court with the public and the press allowed entry. It is for the plaintiff to prove his case on the balance of probability with the right given to the defendant to rebut the allegations made against him by the plaintiff. Upon hearing all concerned parties and the evidence presented, the court will make a decision based on the evidence collected. Any parties who are unhappy or dissatisfied with the decision of the trial court may file an appeal against the said decision in the superior courts. Decisions from the Magistrates' Court and Sessions Court goes on appeal to the High Court. An appeal to the Court of Appeal would be against the decision of the High Court exercising original jurisdiction or appellate or revisionary jurisdiction in respect of any matter decided by the Sessions Court.[79] If the appeal is against the decision of the Magistrates' court, an appeal to the

77 See the Criminal Procedure Code (Act 593), ss 173(a), (b) and 178.

78 See *Public Prosecutor v Chin Yoke* [1940] 1 MLJ 47.

79 See the Courts of Judicature Act 1964, s 50.

Court of Appeal may lie from the decision of the High Court exercising appellate or revisionary jurisdiction but shall be restricted on question of law which has arisen in the course of appeal or revision.[80] The Federal Court hears appeals from the Court of Appeal, which has been heard and decided by the High Court exercising original jurisdiction.[81] An appeal can lie to the Federal Court only with the leave from the Federal Court.[82] The procedure governing appeals to the above-mentioned superior courts is contained in the rules of the respective courts.[83]

**[1-35]** It is also noteworthy that at the trial, be it a criminal or civil matter, the parties may decide on the evidence that shall be introduced to support their case or claim. Evidence suggests anything that manifests the truth. It is a means upon which the judge depends to seek the truth and dispense justice. Evidence is admitted enabling the court to come to a proper decision. Cases must be decided on the evidence and the evidence must be relevant and admissible. Without evidence, a court will not be able to deliver a just decision. The law that regulates the admissibility of evidence and the mode of its production in courts is the Evidence Act 1950 (Act 56).[84] The Act determines, inter alia, the admissibility of evidence in terms of relevancy and proof. It ensures that the evidence tendered in court is the best evidence and those that are reliable.[85] The Act also provides that it is the quality and not the quantity of the evidence that is of utmost consideration.[86] Further, the Act ensures that the evidence adduced in court is limited to the scope of material and relevant facts, and this will certainly save time and avoid raising issues that are too remote or irrelevant. Evidence relating to similar facts, character, hearsay, and opinion are examples of evidence that are generally excluded for the mentioned reasons.[87] The manner in which witnesses shall be produced and examined is governed by section 135 of the Evidence Act 1950. While the order of

80 See the Courts of Judicature Act 1964, s 50(2).

81 See the Courts of Judicature Act 1964, s 87(1).

82 See the Courts of Judicature Act 1964, s 96(a).

83 See the Rules of Court 2012 (PU(A) 205/2012); Rules of the Court of Appeal 1994 (PU(A) 524/1994); and Rules of the Federal Court 1995 (PU(A) 376/1995).

84 Evidence Act 1950 (Act 56) came into force on 23 May 1950 in West Malaysia and on 1 November 1971 in East Malaysia.

85 The law of evidence determines the admissibility of the evidence in court. Evidence Act 1950, s 136 provides that the court shall admit evidence if it thinks that the fact, if proved, would be relevant, and not otherwise. Admissibility therefore is subject to relevancy and proof.

86 Evidence Act 1950, s 134 provides that no particular number of witnesses shall in any case be required for the proof of any fact. The above is aptly described by the following maxim 'evidence has to be weighed and not counted'.

87 See *The Annotated Statutes of Malaysia: Evidence Act 1950 (Act 56) (Revised - 1971)* (Malayan Law Journal 2002).

examinations and direction of re-examination is governed by section 138 of the Evidence Act 1950.

## 2.5 Criminal law and civil law

**[1-36]** Law can also be categorised as criminal law and civil law. It is essential to differentiate criminal law from civil as a single wrongful conduct may incur both criminal and civil liability to a wrongdoer. For instance, when a car driver hits and injures a person by driving recklessly, the state can prosecute him for his dangerous driving and the victim can sue him in seeking remedy for the damages. The criminal suit would decide his criminal liability and the civil suit would determine his civil liability.[88]

### 2.5.1 Criminal law

**[1-37]** Criminal law (also known as 'penal law') encompasses the statutes and rules enacted by the legislators dealing with any criminal activity that causes harm to the general public. It defines acts which are considered to be wrongdoings against the state as these are deemed to be harmful to the community as a whole. Examples of criminal cases are theft, robbery, kidnapping, rape, assault, murder, drug trafficking and so on. Criminal law also includes criminal procedures which deal with charging, trying, sentencing and imprisoning the accused convicted of crimes. It is typically enforced by the state through a prosecutor who initiates the criminal suit. As noted earlier, to convict the accused, the case must be proved against the accused beyond all reasonable doubt.[89] Proof of beyond reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt, the other refers the evidential burden on the accused to raise a reasonable doubt. These burdens could only be fully discharged at the end of the whole case when the defence has closed its case. Therefore, a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon a consideration of all the evidence adduced.

**[1-38]** Where the court finds the accused is guilty of the offence for which he was charged, the court will assess appropriate sentence which includes death penalty, imprisonment, whipping and fine. The death penalty punishment is reserved for the commission of the most hideous or dreadful crimes such as murder, violent extremist incidents resulting in death, trafficking in dangerous drugs, possession or control of any firearm, ammunition, or explosives without lawful authority. Imprisonment is a

88 Abdul Majid bin Nabi Baksh and Krishnan Arjunan, *Business Law in Malaysia* (LexisNexis 2005) at 4.

89 See *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 (FC).

common form of punishment meted out by the courts and the offender which is intended to inflict retributive punishment or as an individual or general deterrent. Whipping punishment is inflicted on male offenders for the commission of serious offences such as rape, incest, violence, theft, robbery,[90] kidnapping, extortion, trafficking in firearms,[91] manufacturing arms or ammunition[92] and drug trafficking,[93] among others. It is also inflicted for less serious offences such as illegal immigration,[94] bribery and criminal breach of trust. Lastly, the term 'fine' is defined to include any fine, pecuniary penalty, forfeiture or compensation adjudged upon any conviction of any crime or offence, or for the breach of any law for the time being in force.[95] A First Class Magistrate's Court may ordinarily impose a maximum fine of RM10,000, unless there are exceptional circumstances where the court may impose the maximum specified for a particular offence, or unless a specific statute provides otherwise.[96] While the Sessions Court and the High Court may impose any amount of fine allowed by the law.[97]

**[1-39]** As stated earlier, sentence is imposed based on the four main aims namely, retribution, deterrence, prevention or incapacitation and rehabilitation. The retributive aim of sentencing seeks to retaliate against the wrongdoer for the offence he has committed. The aim of deterrence is to deter the accused and others inclined to commit offences of that

90 The offence under s 392 of the Penal Code (Act 574) carries a punishment of imprisonment which may extend to 14 years, and the offender shall also be liable to fine or to whipping. While Penal Code, s 397 provides for a mandatory punishment of whipping.

91 Firearms (Increased Penalties) Act 1971 (Act 37), s 7.

92 Arms Act 1960 (Act 206), s 14.

93 Any person who contravenes any of the s 39B(1) provision shall be guilty of an offence against this Act and shall be punished on conviction with death or imprisonment for life and shall, if he is not sentenced to death, be punished with whipping of not less than twelve strokes.

94 In *Tun Naing Oo v Public Prosecutor* [2009] 5 MLJ 680 (HC), the applicant, a refugee from Myanmar who was registered with the United Nations High Commissioner For Refugees, was sentenced by the Sessions Court for an offence under the Immigration Act 1959/1963 (Act 155), s 6(1)(c) to 100 days' imprisonment with effect from the date of arrest and two strokes of whipping. The applicant applied to the High Court for revision in respect of the sentence of whipping. The High Court allowed the application where it stated that a sentence of two strokes of whipping was manifestly excessive since there was no evidence that the applicant committed a crime of violence or brutality at the time that he was arrested. There was no doubt that he was present in Malaysia illegally but he was not carrying out any violent act; he was merely selling computer accessories to a customer, a very benign activity.

95 See the Criminal Procedure Code, s 2(1).

96 See the Subordinate Courts Act 1948 (Act 92), s 87.

97 See the Subordinate Courts Act 1948, s 64 and the Courts of Judicature Act 1964, s 22(2).

type. The preventive or incapacitative aim of sentencing seeks to deal with offenders in such a way as to prevent them or make them incapable of offending for substantial periods of time. The rehabilitative approach to sentencing proclaims that the principal rationale of sentencing is to achieve the rehabilitation of the offender. This aim of sentencing regards offenders as those who are in need of help and support and utilises sentences other than imprisonment where the circumstances permit.[98] In assessing an appropriate sentence, public interest must supersede other considerations. Public interest demands that law and order must be maintained at all times. A sentence that is too lenient may well have the effect of sending a message to the public that it is worth committing an offence because if caught, a lenient sentence will be imposed on the offender.[99] The public would lose confidence in the courts if a lenient sentence is meted out for serious offence.[100]

### 2.5.2 Civil law

**[1-40]** Civil law predominantly concerns with the disputes between private individuals or negligent conducts which cause harm to others. A civil suit is usually filed by one party against another to enforce his/her legal rights. For example, a party to a contract may file a suit before the court in order to determine respective legal rights against one another if there is any dispute which arises out of the said contract. Besides, an injured party in an accident may also file a lawsuit before the court in order to seek legal remedy if the accident is caused by the negligent act of another person. The party who initiates the legal action before the court is called the 'plaintiff' or 'applicant', whereas the party who is being sued is named as the 'defendant' or 'respondent'. The standard of proof placed on the plaintiff is less onerous in that he need not prove beyond reasonable doubt but is required to prove on the balance of probabilities. In *Ratna Ammal v Tan Chow Soo*,[101] Pike CJ (Borneo) stated: 'When one speaks of a court having to be satisfied on a balance of probability one means that the higher degree of probability favours the conclusion since, if the probabilities were equally balanced, the court would not have been satisfied on a balance of probability'. The degree of probability here simply means that the evidence tenders establishes in favour of its existence or something is probable

98 See *Leken @ Delem ak Gerik (M) v Public Prosecutor* [2007] 3 MLJ 730 (HC); *Public Prosecutor v Kamaruzaman bin Mahmud & Anor* [2007] 1 MLJ 750 (HC).

99 See *Public Prosecutor v PE Hong Yong* [2009] 7 CLJ 9.

100 For the guiding principle in ascertaining appropriate sentence for the commission of a crime, see *Public Prosecutor v Toha bin M Yusuf & Ors* [2006] 4 MLJ 63 (HC); *Mohd Zandere bin Arifin v Public Prosecutor* [2006] 5 MLJ 685 (HC).

101 *Ratna Ammal v Tan Chow Soo* [1967] 1 MLJ 296 (FC).

or more likely than not.[102] In a civil suit, parties may appoint lawyers to represent the case before the court. Thus, the state has no role in civil proceedings unless the government itself files the suit or is being sued. The court may dismiss a case if it is found that there is no cause of action. When the civil suit is successful, the defendant shall be ordered to pay damages.

## 2.6 Islamic law or *Shariah*

**[1-41]** It is worthwhile noting that the Federal Constitution places Islam in a special position[103] where article 3 of the Federal Constitution provides that Islam is the religion of the Federation but other religions may be practiced in peace and harmony in any part of the Federation. The Ruler of the State is the head of the religion of Islam in their respective States and the Yang di-Pertuan Agong[104] as the head of the religion of Islam in his own State; the Federal Territories of Kuala Lumpur, Putrajaya and Labuan; and the States of Malacca, Penang, Sabah as well as Sarawak.[105] It is an offence to act in contempt of religious authority or defy, disobey or dispute the orders or directions of the Ruler of the States or Yang di-Pertuan Agong as the Head of the religion of Islam where if convicted can be subject to a fine not exceeding RM3000 or to imprisonment for a term not exceeding two years or to both.[106] The status of Islam in the context of article 3 of the Federal Constitution is only in relation to rituals and ceremonies as held by the Supreme Court in *Che Omar bin Che Soh v Public Prosecutor*[107] and

102 See 'Proof On Balance Of Probabilities' https://www.disabilitylaw.ca/about/proof-on-balance-of-probabilities accessed 17 February 2025.

103 See *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793 (SC).

104 The Yang di-Pertuan Agong is elected by the Conference of Rulers for a term of five years: see the Federal Constitution, art 32, but he may, at any time, resign his office by writing under his hand addressed to the Conference of Rulers or be removed from office by the Conference of Rulers. The Federal Constitution, art 41 provides that the Yang di-Pertuan Agong is the Supreme Head of the Federation and the Supreme Commander of the Armed Forces of the Federation and pursuant to art 40, he must act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet, except as otherwise provided for by the Federal Constitution. The Cabinet is headed by the Prime Minister and is collectively responsible to Parliament.

105 Malaysia is a federation and is divided into thirteen states—Perlis, Kedah, Penang, Kelantan, Terengganu, Perak, Selangor, Negeri Sembilan, Malacca, Johor, Pahang, Sarawak and Sabah—and three Federal Territories—Kuala Lumpur, Labuan and Putrajaya. The Federal Territory of Kuala Lumpur was excluded from the boundaries of the State of Selangor vide the Constitution (Amendment) (No 2) Act 1973 (Act A206); the Federal Territory of Labuan was excluded from the boundaries of the State of Sabah vide the Constitution (Amendment) (No 2) Act 1984 (Act A585) and the Federal Territory of Putrajaya was excluded from the boundaries of the State of Selangor vide the Constitution (Amendment) Act 2001 (Act A1095).

106 Syariah Criminal Offences (Federal Territories) Act 1997 (Act 559), s 9.

107 *Che Omar bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55 (SC).

*Fatimah Sihi & Ors v Meor Atiqulrahman Ishak & Ors.*[108] It was further reiterated by the previous leadership of Malaysia including the Malaysia's first Prime Minister, Tunku Abdul Rahman.[109] However, Islamic law which is a system of law based on divine will of Allah (*swt*) that was revealed to the Prophet Muhammad (*saw*) over a period of 23 years beginning in 610 AD, had been omitted from the definition of 'law' in article 160(2) of the Federal Constitution. Be that as it may, the Federal Constitution grants the respective State Legislative Assembly[110] to enact Islamic law on personal and family law of persons professing the religion of Islam.

**[1-42]** List II of Schedule 9 grants the respective State Legislative Assembly[111] and in respect of the Federal Territories, the Federal Parliament, to enact 'Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; *Wakafs* and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; *Zakat*, *Fitrah* and *Baitulmal* or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organisation and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom'.[112] As from the above, the state legislatures

108 *Fatimah Sihi & Ors v Meor Atiqulrahman Ishak & Ors* [2005] 2 CLJ 255 (CA).

109 In the Federal Legislative Council Debates, 1 May 1958, the first Prime Minister Tunku Abdul Rahman stated: 'I would like to make it clear that this country is not an Islamic State as it is generally understood, we merely provide that Islam shall be the official religion of the State'.

110 Article 74(2) of the Federal Constitution provides that 'without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List'.

111 Article 74(2) of the Federal Constitution provides that 'without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List'.

112 Federal Constitution, Sch 9, State List (List II) para 1.

are 'restricted from regulating the practice of the religion of Islam in the original form'.[113] In *Yong Fuat Meng v Chin Yoon Kew*,[114] Hamid Sultan Abu Backer JC stated: 'Schedule 9, is very limited in scope and condoning its breach will be unconstitutional and will create much imbalance to the rights of the public as well as administration of justice as a whole, as has been evidenced by case laws'.

**[1-43]** The above may be illustrated with reference to the case of *Nik Elin Zurina bt Nik Abdul Rashid & Anor v Kerajaan Negeri Kelantan*[115] where the Federal Court through a majority decision of eight to one Federal Court judges[116] declared that the 16 provisions of the Kelantan Syariah Criminal Code (I) Enactment 2019, namely, sections 11, 13, 14, 16, 17, 30, 31, 34, 36, 37(1)(b), 39, 40, 41, 42, 43, 44, 45, 47 and/or 48 as invalid, and hence null and void. The reason was that the Legislature of the State of Kelantan had no power to make those provisions which squarely falls within the jurisdiction of the Parliament to enact criminal law. This decision of the court did not come as a surprise as the decision of this case was similar to the Federal Court's earlier decision in *Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor*,[117] a case that deals with the legislative jurisdiction of the Federal Legislature and State Legislative Assembly where the preclusion clause, 'except in regard to matters included in the Federal List', in the State List of Schedule 9 of the Federal Constitution was the key issue of this case. In this case, a local Muslim man was charged in the Selangor Syariah High Court under section 28 of the Syariah Criminal Offences (Selangor) Enactment 1995 for attempted to commit carnal intercourse against the order of nature with other men in a house in Bandar Baru Bangi. This section makes it a Syariah offence for any Muslim performing 'sexual intercourse against the order of nature with any man, woman or animal,' with the punishment being a maximum fine of RM5,000 or a maximum three-year jail term or a maximum whipping of six strokes or any combination. The Federal Court in declaring section 28 as inconsistent with the Federal Constitution and is therefore void held, inter alia, that enacting of criminal law falls within the competency of the federal Parliament under List I of Schedule 9, and therefore, the state legislatures were unable to make law on those matters, even if no such federal law had

113 Per Hamid Sultan Abu Backer JC in *Yong Fuat Meng v Chin Yoon Kew* [2008] 5 MLJ 226 (HC) at 250.

114 *Yong Fuat Meng v Chin Yoon Kew* [2008] 5 MLJ 226 (HC).

115 *Nik Elin Zurina bt Nik Abdul Rashid & Anor v Kerajaan Negeri Kelantan* [2024] 2 MLJ 150 (FC).

116 Tengku Maimun binti Tuan Mat CJ, Abang Iskandar bin Abang Hashim, PCA Mohamad Zabidin bin Mohd Diah, CJM Abdul Rahman bin Sebli, CJSS Nallini Pathmanathan, Mary Lim Thiam Suan, Harmindar Singh Dhaliwal, Nordin bin Hassan, Abu Bakar bin Jais.

117 *Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 323 (FC).

been enacted. It is observed from the above two Federal Court's decision, it primarily close the door to *hudud* and *qisas* implementation in Malaysia. Some of the *hadd* offences such as *zina* (unlawful sexual intercourse), theft, *qazaf* (false accusation of *zina*), drinking intoxicants, *hirabah* (highway robbery), *baghy* (rebellion) and *riddah* (apostasy) as well as *qisas* offences namely, voluntary killing, involuntary killing, intentional physical injury or maiming and unintentional physical injury or maiming, among others are already covered by Penal Code.

## 3. Conclusion

**[1-44]** The Malaysian laws comprise of the written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation. Written law includes the Federal Constitution, the States Constitutions, Acts of Parliament, Ordinances and Enactments of the State Legislative Assembly, and any subsidiary legislation made pursuant to the above instruments. At the federal level, written laws are enacted by the Parliament and at the State level, the State Legislative Assembly. The common law here refers to the English common law which in addition to the rules of equity and English statutes of general application are made applicable in Malaysia pursuant to sections 3 and 5 of the Civil Law Act 1956 (Act 67). This is apart from the customary law of the local inhabitants whose application is limited to personal matters such as family matters and inheritance has to a large extent been abrogated by statutes. Although Islamic law is not included within the definition of law in article 160(2) of the Federal Constitution, it is nevertheless recognised in relation to personal and family matters affecting the Muslims pursuant to Schedule 9 of the Constitution. Aside from the above, this chapter had explained the classifications of laws such as public law and private law, substantive law and procedure law, domestic law and international law, public international law and private international law among others.

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