TRACING THE DEVELOPMENT OF THE LAW FOR ESTATE ADMINISTRATION IN WEST MALAYSIA

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ABSTRACT

The Portuguese, Dutch, and British administrations for over 400 years prior to Malaysian independence greatly influenced the structure and procedures for estate administration in West Malaysia. This is evident from the provisions of the primary statute, namely, the Probate and Administration Act 1959, which are derived from the Administration of Estates Act 1925 and procedures provided in the Malaysian Rules of Court 2012, which have been adopted mainly from the Non-Contentious Probate Rules 1954 of the United Kingdom. Hence, this article seeks to trace the origins of the applicable laws to analyse the evolution and development of the law for estate administration in the Straits Settlements, Malay States and the Federation of Malaya. The discussion includes the reception of English law into the Malaysian legal system in general and in the area of estate administration and the law of succession particularly. This article adopts a doctrinal analysis by examining existing primary and secondary materials, including statutory provisions such as the Probate and Administration Act 1959, the Rules of Court 2012, the Wills Act 1959, the Small Estates (Distribution) Act 1955, the Distribution Act 1958, case laws, and other legal and non-legal literature relating to the development of estate administration in West Malaysia. This article aims to contribute significantly to the existing body of literature and information on estate administration. It is observed that foreign laws on estate administration were applied generally, and this situation persists until today, resulting in some irregularities when such laws are applied to Muslims in West Malaysia, which are not in tandem with the current needs and practicalities.

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INTRODUCTION

Malaysia was one of the Commonwealth countries that gained independence from British colonisation on 31 August 1957. Prior to that, Malaysia or Malaya (as it was then known) was under the administration of the Portuguese, Dutch and British respectively for over 400 years. Thus, the laws of those countries had applied to its subjects the administration of justice generally and estate administration particularly.

When Penang was initially ceded to the British, succession disputes involving the inhabitants of Penang, comprising of three primary ethnicities, namely the Malays, Chinese and Indians (Hindus), were resolved with the assistance of the East India Company. Upon the demise of Sultan Muhammad Jiwa of Kedah in 1778, his son, Tunku Abdullah who succeeded him, agreed to surrender Penang to the British in exchange for financial aid and the promise of British support in succession disputes.[1]

According to Raman[2] and Halim *et al.*,[3] the present laws on the administration of estates in Malaysia and Singapore originated from English Common law, Equity and Statutes. It began with the introduction and enforcement of the Charters of Justice and later, the dual-system of English law and customary law was adopted in Malaysia. The structure and procedure of estate administration initiated during the colonial period still exist in the current legal framework.

Hence, this article seeks to trace the origins of the applicable laws to analyse the evolution and development of the law for estate administration in the Straits Settlements, Malay States and the Federation of Malaya. The discussion includes the reception of English

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1 Sharifah Suhana Ahmad, *Malaysian Legal System* (Selangor: Malayan Law Journal Sdn. Bhd.; Charlottesville, Va.: Lexis Law Pub., 1999), 8.

2 G Raman, *Probate and Administration in Singapore and Malaysia* (Singapore: LexisNexis Singapore, 2012), 4.

3 Akmal Hidayah Halim et al., *The Law of Wills and Intestacy in Malaysia* (Malaysia: Department of Islamic Law & Harun M. Hashim Law Centre, 2009), 1.

laws to the Malaysian legal system in general and in the area of estate administration and the law of succession particularly.

METHODOLOGY

Due to the nature and scope of the study, this article adopts a doctrinal analysis method by examining the existing primary and secondary materials, including statutory provisions in the Probate and Administration Act 1959, the Rules of Court 2012, the Wills Act 1959, the Small Estates (Distribution) Act 1955, the Distribution Act 1958, case laws and other legal and non-legal literature relating to the development of estate administration in West Malaysia. This research explores the development of the law for estate administration in West Malaysia through online, literature and case study research. Relevant materials relating to the development of estate administration was collected from local libraries and through literature such as textbooks, articles, journals, legal encyclopedias, Halsbury's Laws of Malaysia, Case Digest, Mallal's Digest and statute annotators.

RECEPTION OF ENGLISH LAW IN THE MALAYSIAN LEGAL SYSTEM

Reception is "the introduction of English law in a foreign place, outside the jurisdiction of the United Kingdom"[4]. In this context, it refers to the early reception into Malaya through the Straits Settlements in 1807.

[4] M B Hooker, "English Law in Sumatra, Java, the Straits Settlements, Malay States, Sarawak, North Borneo and Brunei," in *The Laws of South-East Asia, Volume II: European Laws in South-East Asia, Essays on Portuguese and Spanish Laws, the Netherlands East Indies, English Law, American Law in Philippines and 'Europeanization' of Siam's Law 2*, vol. 2 (Singapore: Butterworth & Co. (Asia) Pte Ltd, 1988), 360; Michael F Rutter and Molly Cheang, *The Applicable Law in Singapore and Malaysia: A Guide to Reception, Precedent and the Sources of Law in the Republic of Singapore and the Federation of Malaysia* (Singapore: Malayan Law Journal Pte Ltd, 1989), 2.

For purposes of this discussion, the authors have classified it in two sections, namely, the Straits Settlements and the Malay States:

(i) The Straits Settlements

Before the British colonial rule began in 1824, there was no established legal system and administration of justice, and as such, the Sultans and their chiefs invariably resolved all disputes. In Malacca, during the Sultanate, Islam became the state religion; hence, the Sultanate administered the state and resolved all disputes by referring to Islamic law and Malay customary law or *adat*. At that time, Islamic law was the law of the land modified by local customs. It was evident in *Ramah v Laton*[5], which held that Muslim law is not foreign law but a part of local law and the law of the land which the Court must take judicial notice of.

The Malacca Sultanate ended when the Portuguese occupied Malacca in 1511, followed by the Dutch in 1641 before it was eventually ceded to the British. British-rule began with the occupation of Penang in 1786 and the laws of England were introduced in the Straits Settlements vide the Regulation of 1794, known as Lord Teignmouth's Regulation.[6]

This was followed by the introduction of the Royal Charter of Justice of 1807 (hereinafter referred to as "the First Charter") in Penang, which marked the beginning of the statutory introduction of English law into the country and the most significant event in Malaysia's legal history.

(ii) The Malay States

Unlike the Straits Settlements, English law was not introduced into the Malay States by legislation. The British judges and local judges who were educated in English law adjudicated disputes in a civil court and introduced the principles of English law in matters where there was a lacuna in the local laws. There was no reception of English law in the

5 (1927) 6 FMSLR 128.

6 Roland St John Braddell, *The Law of the Straits Settlements: A Commentary* (Kuala Lumpur: Oxford University Press, 1982), 8; *Fatimah & Ors v D Logan & Ors* [1871) 1 Ky 255.

Malay States as the Charters of Justice did not apply to the Malay States and the sovereignty of the Malay Rulers remained unimpaired by treaties and agreements.[7]

RECEPTION OF ENGLISH LAW OF SUCCESSION

The English law of succession was undoubtedly the law which governed succession in the Straits Settlements. This is evident from the establishment of the Court of Judicature in Penang in 1807 which held the jurisdiction and powers of the Superior Court in England. The Court was empowered to, among others, exercise authority over the persons and estates of infants and lunatics, as well as to grant probate and letters of administration. Regulations were subsequently introduced regarding the conduct of executors and administrators, and the Court was given the power to grant these persons a commission for their troubles.[8]

In addition, section 14 of the Court of Justice Ordinance of 1878 provided as follows:

> The Supreme Court shall have the same powers of granting Probates of Wills and Testaments, and Letters of Administration to the estates of all persons leaving moveable or immoveable property in the Colony, as are vested in Her Majesty's High Court of Justice in England, subject to such modifications, to suit the several religions and customs of the native inhabitants, as have hitherto been recognised by the Court.

It was delivered by Norris R, in the case of *Moraiss and Others v De Souza*[9], that from the time of the introduction of the First Charter in 1807 up until the Indian Act XX of 1837 came into operation, the English law of Inheritance was the law of this Colony. The Act contains a preamble: "Within these Settlements, land can be lawfully bequeathed and inherited only according to the rules of English law."

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7 Hooker, English Law in Sumatra, 389.

8 Braddell, *The Law of the Straits Settlements: A Commentary, 12*.

9 (1838) 1 Ky 27.

This implies that the English law of inheritance governed only the real property of the inhabitants in the Straits Settlements.

The introduction of the English law of succession in the Straits Settlements through the First Charter can also be inferred from the decision of Benson Maxwell, R. in *Regina v Williams*[10]:

> "...The classification of property into 'real and personal', of actions or "pleas" into "real, personal and mixed", and the power given to grant Probates and Letters of administration, shew that the law of England was alone in contemplation."

In 1875, in *Jemalah v Mahomed Ali*[11], Theodore Ford, J, and in the 1887 appeal case of *Ismail b Savosah v Madinasah,*[12] the presiding judge enunciated the same rule; however, the latter overruled the former's decision. The rule was again laid down in *In Re Sinyak Rayoon*[13] and *Scully v Scully*.[14]

Subsequently, in 1889, in *Ee Hoon Soon v Chin Chay Sam & Ors*[15], Goldney J, in deciding a case involving a purported Dutch will in Malacca, held as follows:

> "it seems at the time of the making of the will and the death of the testators, Malacca was a British possession, and as immoveable property is governed by the law of the place where it is situated, the succession of this property is governed by the English law which was then in force."

Undeniably, most cases cited earlier on the reception or introduction of English laws in Malaya relate to the law of succession. The English law of succession was introduced by cases such as *Moraiss and Others v De Souza*[16], *In the Goods of William*

10 (1858) 3 Ky 16 at 26.
11 (1875) 1 Ky 386.
12 (1887) 4 Ky 311 at 315.
13 (1888) 4 Ky 331.
14 (1890) 4 Ky 602.
15 (1889) 1 SLJ 147 at 147.
16 (1838) 1 Ky 27.

Caunter[17], *In Re Chong Long's Estate*[18], *In the Goods of William Russell*[19], *In the Goods of Thomas Kekewich*[20] and others.

In the Malay states, several reported cases illustrate how trial judges referenced English law and its principles in adjudicating succession disputes. In *In Re The Will of Yap Kwan Seng, Decd*.[21], the court had to determine whether the rule against perpetuities, as a principle of English common law, should be adopted in the Federated Malay States. The learned judge, Sproule Ag CJC (as he then was), decided that the disputed trust was void *ab initio* because it infringed the rule against perpetuities and he accordingly applied the abovementioned English common law principle and stated at p. 317:

> "We have, as a matter of fact, adopted freely on these States a great mass of English rules of law and equity, civil and criminal law and procedure, either directly or derivatively. The latter might be said to a certain extent, even of our land tenure and registration. The commercial law of England is welcomed here. Our judges are interchangeable with those of the Colony..."

In his remarks, he further suggested that there should be some form of uniformity of rules and principles of law throughout the Straits Settlements and the Federated Malay States.

A similar position was taken by the judges in Yau *Yok Seong & Anor (Minors by their guardian Ho Kew Kee @ Ho Ah Ngan) v Yau Yok Fook & Anor (Trustee of the Will of Yau Tet Shin)*[22]. In this case, the learned judges adopted the entire Evidence Ordinance of the Straits Settlements to interpret a will in the Federated Malay States. Among other provisions, section 100 of the Evidence Ordinance provided that in construing the will, the rules provided by the English courts for the interpreting English wills might be applicable. In applying this section,

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17 (1838) 2 Ky 20.
18 1843) 2 Ky Ecc 13.
19 (1813) 2 Ky 6.
20 (1813) 2 Ky 1.
21 (1924) 4 FMSLR 313.
22 (1923) 3 FMSLR 151.

the judges had taken it to mean that in construing wills, they considered themselves as sitting in the English Court, interpreting a foreign will.

In a later case in Selangor, *In Re the Estate and Effects of Thomas Albert Duffy, Decd*[23], the executor who resided in the Federated Malay States obtained a properly authenticated copy of the will and applied for its probate. Unfortunately, there was no specific provision (in the Probate and Administration Enactment 1920) for such a case as Section 5 of the Enactment only provided for letters of administration instead of a grant of probate. Thus, in accordance with English practice, the trial judge issued a probate to the executor or petitioner limited to the time when the original will was produced.

Meanwhile, *In the Matter of the Estate of Yong Nee Chai, decd*[24], Terrel JA ruled on the jurisdiction of the Supreme Court of the Federated Malay States to make representation Orders for the sons and/or beneficiaries of the deceased in the construction of the deceased's Will, as follows:

> "Unfortunately, the Civil Procedure Code makes no provision for the representation order.....and that as under section 49 (i)(a) of the Courts Enactment, the original civil jurisdiction of the Supreme Court shall consist of the same jurisdiction and authority within the F.M.S. as is now exercised in England by the Chancery and King's Bench Divisions of the High Court of Justice, this conferred upon the Court the power to make representation orders which is certainly vested in the Chancery Division of the High Court in England." (223).

Based on the above, it can be deduced that there was never any reception of English law to the Malay States, either in the Federated Malay States or the Unfederated Malay States. Rather, the judges were influenced by and introduced the principles of English law when adjudicating matters whenever there was a lacuna in the local laws and customs. There are views that the portions of laws that were later

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23 (1933) 9 FMSLR 109.
24 (1939) MLJ 222.

introduced and adopted by legislation were merely English principles and models for local laws, but never English law in its original form[25].

It can also be inferred from the decision of the judges in the case of *Haji Lateh bin Haji Salleh as Administrator of the Estate of Abdullah bin Che Nay, Decd v Tuan Man & Ors*[26] that most of our Acts are derived from various English Acts:

> "Most of the limitation periods both in India and here, as well as the rules governing the running of time in the bodies of the Enactments, are clearly taken from the various English Acts. One fundamental difference is that in India, suits out of time must be dismissed "although limitation has not been set up as a defence" whereas in this country, the English rule has been restored, and limitation must be pleaded. Speaking generally, it may be said that our law seems to be intended to follow the law in India and England, with such modifications as have been considered desirable. The backbone and marrow of our Enactment is the English law." (94)

EVOLUTION OF THE LAW FOR ADMINISTRATION OF ESTATES IN WEST MALAYSIA

The law and procedure on estate administration in West Malaysia evolved from the Straits Settlements, the Malay States and the Federation of Malaya. Remarkably, the applicable law and procedure of the Federation of Malaya reflects the present legal framework for the administration of estates in West Malaysia.

Administration of Estates in the Straits Settlements

The law on estate administration was of general application, i.e., applicable to both Muslims and non-Muslims alike, except for the distribution of a Muslim's estate.

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25 *In Re the Will of Yap Kwan Seng, Decd* (1924) 4 FMSLR 313 at 316.
26 (1926) 6 FMSLR 88.

(i) Non-Muslims (and of a General Application)

Court System

In the early 19th century, all applications or matters relating to the law of succession, also known as ecclesiastical cases, would have been filed and heard at the Court of Judicature before a Recorder. A Resident Councillor in Malacca could also grant letters of administration to an intestate's estate[27]. The grant issued by the presiding local government in 1781 and 1788 (Dutch Government) was expressly recognised by Benjamin Malkin R, according to English law in *Rodyk v Williamson*, a case which was unfortunately not reported but referred to and mentioned in In *the goods of Abdullah, deceased*[28] and *Moraiss and Others v de Souza*[29].

The Court of Judicature was abolished in 1868 and reconstituted as the Supreme Court of the Straits Settlements and it was Judges who decided on the administration of estates. Meanwhile, any appeals on the judges' decision lay directly with the King or Queen in Council (Privy Council) until the Court of Appeal was constituted in 1873.

Applicable Laws/ Legislation

In the Straits Settlements, the *lex loci* was the law of England, which had been modified by the Indian and Colonial Legislatures. Thus, the administration of estates was governed by the Indian Act XX of 1837 which dealt with transmitting personal property only (moveable) and not real property. This Act was later extended to immovable property with the passing of Indian Act XXV of 1838.[30] These Acts were later repealed and replaced by section 33 (later known as section 35) of the Conveyancing and Law of Property Ordinance 1886 which, vested all the property of the deceased, whether moveable or immovable, in the personal representatives.

Notwithstanding the establishment of one court, namely the Supreme Court, by the First Charter, the distinct roles of the Court of

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27 *Khoo Tiang Bee Et Uxor v Tan Beng Gwat* (1877) 1 Ky 413.
28 (1835) 2 Ky Ecc 1.
29 (1838) 1 Ky 27.
30 Braddell, *The Law of the Straits Settlements: A Commentary, 33*.

Probate and Court of Chancery were also recognised in the Straits Settlements under Chapter XLIII of the Civil Procedure Ordinance 1878. The said chapter provided a comprehensive procedure for the administration of estates, especially in dealing with contentious and non-contentious proceedings in granting probates or letters of administration. The Ordinance was, however, repealed by the Civil Law Ordinance of 1909.

Apart from that, grants of probate and letters of administration issued in the United Kingdom and other British possessions were recognised through the enactment of the United Kingdom and Colonial Probates Ordinance 1893. Upon resealing the same by the Supreme Court, it would have had the same effect and operation in the Colony as if the Supreme Court had granted it.

The Probate and Administration Ordinance 1934 (Cap 51), which repealed the Indian Succession Act, was enacted in relation to probate and letters of administration, and amended thrice: in 1936, 1940 and 1941. The distribution of an intestate's estate was regulated by section 4 of the Distribution Enactment 1929 (the same provision still exists in the present Distribution Act 1958). This statute, however, did not apply to people governed by the Parsee Intestate Succession Ordinance of the Straits Settlements.

The Practice and Procedure

Accordingly, the practice was that, upon the death of a person, the representative of the deceased whether named in the will (if he died testate) or as agreed by the heirs or next-of-kin[31], would file an application at the Supreme Court for the extraction of letters of representation (grant of probate or letters of administration) irrespective of whether the deceased or their heirs were Muslim or non-Muslim. In the event the deceased died without leaving any next-of-kin in the Colony, an application for letters of administration would be made by the Registrar as an Official Administrator. These letters of administration were, however, subject to revocation from the next-of-kin[32].

31 *In the goods of Khoo Chow Sew* (1872) 2 Ky 22.
32 *In the Goods of Andrew Muir Watson* (1882) 2 Ky 29.

Small Estates

The District Delegates Ordinance 1887 was enacted and introduced to the Straits Settlements to make further provisions for grants of probate and letters of administration where the estate was of small value. For such cases, District Delegates were appointed for the Judges of the Supreme Court to grant Probate and Letters of Administration to the estate of deceased persons. The conditions stipulated that the deceased's property must not exceed $500 in value, and the deceased (whether testate or intestate) was a permanent resident within the local limits or District of the Delegates at the time of death.

The petition and citation were in accordance with forms prescribed by the Civil Procedure Ordinance 1878. However. Probate or Letters of Administration could not be granted if a caveat has been entered. Upon hearing of the application by the District Delegates, all documents filed and notes of evidence had to be forwarded to the Registrar of the Supreme Court, who would then prepare and issue the grant of Probate or Letters of Administration, as the case may be, for extraction.

(ii) Muslims

The law of succession of Muslim intestates, changed three times.[33] From the First Charter until the passing of the Mohammedans Ordinance in 1880, Muslim estates were distributed according to English law. Section 33 of the 1880 Ordinance provided a provision regarding the succession of Muslim intestates. Subsequently, the Mahomedans (Amendment) Ordinance XXVI of 1924 was enacted to consolidate Ordinance V of 1880 and Ordinance XXV of 1908 to amend the law relating to Muslims. Among others, it dealt with the distribution of Muslim estates in accordance with Islamic law, save for section 27 of the 1924 Ordinance which stated that the estate of an intestate Muslim who died after 1 January 1924 should be administered and distributed according to Islamic law except in circumstances where the local custom was in force and notwithstanding the fact that any next-of-kin was not a Muslim (the latter being contrary to Islamic law).

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[33] Charles Herbert Withers Payne, "The Law of Administration of and Succession to Estates in the Straits Settlements..." (Singapore: Printers Limited, 1932), 185.

The provisions also stated that the administration of the deceased's estate was to be made by way of an application for probate or letters of administration and should be dealt with by the ordinary court, namely the Supreme Court. The procedure to be complied with was as required by the Civil Procedure Code, except for letters of administration that required additional particulars of the school of law (*mazhab*) to which the deceased belonged to.

Generally, the administration of Muslim estates was of general application and subject to the same procedure as for the non-Muslims. As such, all applications or petitions relating to the issuance or revocation of letters of administration, validity of the will or decrees declaring that the deceased had died intestate were made by the civil court judge. Therefore although a person was a Muslim and governed by his law, reported cases showed the tendency of the judge to adjudge such wills in accordance with the Wills Ordinance instead of Islamic law.[34]

Administration of Estates in the Malay States

Until the close of the 19th century, the people of the Malay States did not have any formal system for succession of property. If any disputes arose, it would be settled by the elders of the village in accordance with ancient customs. If the disputants were unsatisfied, they were more likely to resort to the *kris* (fighting) than to the Kathi.[35]

Applicable Law/Legislation

It is clear that up to 1907, the laws of property and succession in the Malay States was Malay customary law. The law prevailing in the Malay states before the British intervention was *adat Perpatih* in most areas of Negeri Sembilan and parts of Malacca and *adat*

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34 *Re Kulsome Bee, deceased* (1930) SSLR 64.

35 E N Taylor, "Malay Family Law," *Journal of the Malayan Branch of the Royal Asiatic Society* 15, no. 1 (1937): 9.

Temenggung in other parts of the Peninsula, with local variations. Most of them were unwritten.[36]

Pursuant to British intervention, the law on estate administration in the Straits Settlements also became applicable to the Malay States. The power of legislation was vested in the State Councils and the Federal Council, which consisted of representatives from the Malays and other ethnicities, that were controlled by British officers. By the 1880s, in each of the Federated Malay States, orders by the Sultan in Council (formal assent) had given way to the introduction of complex ordinances (statutes), with many copied or adapted from the Straits Settlements and Indian Legislation. Each state produced these laws in published editions respectively.[37]

The Probate and Administration Enactment 1920 applied to the Federated Malay States and vested all the deceased's property, without distinction as to whether moveable or immovable, in his personal representative. Whereas the Unfederated Malay States had their own comprehensive piece of legislation on the administration of estates, for instance, the Terengganu Probate and Administration Enactment and Kedah Administration of Estates Enactment 1337.

Court System

A Supreme Court was set up in the Federated Malay States headed by a Chief Judicial Commissioner assisted by several Judicial Commissioners.[38] Judges in the Straits Settlements were seconded there, and senior magistrates were appointed to try all cases except cases involving Malay customs and religion. The decisions were subject to appeal to the Residents in Council. Meanwhile, many Unfederated Malay States had their own High Court.[39] After the British intervention, magistrates were appointed by the British to administer

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36 Zanur Zakaria and Taylor Griffiths Curt, "The Legal System of Malaysia," in *ASEAN Legal Systems* (Singapore: Butterworths Asian, 1995), 81–84.

37 Hooker, "English Law in Sumatra, 391.

38 James Foong, *The Malaysian Judiciary: A Record from 1786 to 1993*, (Kuala Lumpur: Malayan Law Journal Sdn Bhd, 1994).

39 Foong, *The Malaysian Judiciary: A Record from 1786 to 1993, 73*.

justice in those states. Eventually, the local High Court judges were replaced by English officials who were legally qualified and trained.[40]

The Practice and Procedure

The application for grants of administration or determination of any issue arising in the law of succession generally or upon the will of the deceased or for leave to sell the deceased's interest in the deceased's estate were filed by way of an originating summons. In addition, some formal transmission proceedings became necessary to establish the Mukim register. In the old land enactment, a Collector was given extraordinary powers or jurisdiction to hear or determine claims to succeed in the Mukim registered land. The Court had no power to interfere in the decision of the Collector except on final appeal. Alongside, the Supreme Court would only entertain claims to the land registry.

Upon passing of the Land Code of 1926, the abovementioned provision was omitted and replaced by a new chapter in the Probate and Administration Enactment 1920. Through the application, a Collector was conferred with comprehensive jurisdiction to distribute any estate up to $3000 in value, including land, chattel, money and securities. The Collector was also given the power to appoint an administrator.

Small Estates

It is also to be noted that in 1923, the Small Estates Distribution Bill was introduced into the Federal Council of the Federated Malay States and later referred to a Select Committee, which was rejected because the Committee did not consider any legislation necessary. The concept of small estates' distribution originated in section 37A of the Federated Malay States Land Enactment of 1911, which gave the Collector of Land and Revenue powers of summary distribution over the land of any deceased persons if the value of the land did not exceed one thousand ringgit in value. Later, an amendment was made to the Probate and Administration Act in 1926 to introduce an additional chapter that dealt with summary proceedings of small estates. The

[40] Foong, *The Malaysian Judiciary: A Record from 1786 to 1993, 26*.

Collector of Land Revenue was given exclusive jurisdiction to grant administration and distribution orders for estates valued below $3000 and when any part of the estate consists of land or immovable property. to the

Administration of Estates in the Federation of Malaya

The Federation of Malaya Independence Act 1957 was an Act of Parliament in the United Kingdom which provided for and connected to the establishment of the Federation of Malaya as an independent sovereign country within the Commonwealth. Pursuant thereto, it was for the Federal government to legislate on probate and administration matters for Muslims and non-Muslims alike as provided in List 1 (Federal List) of the Ninth Schedule of the Federal Constitution. Thus, there was no longer a distinction between the Straits Settlements and the Malay States.

The general rule of Article 74(1) of the Federal Constitution gives the Federal Parliament powers to make laws with respect to any of the matters listed in the Federal List or the Concurrent List, namely the First and the Third of the Ninth Schedule. The Federal List include matters relating to succession, both testate and intestate, probate and letters of administration, which do not include Islamic personal law relating to gift or succession, both testate and intestate. Therefore, probate and administration are matters listed in the Federal List and governed by statutes of general application such as the Probate and Administration Act 1959, Rules of Court 2012, Small Estates (Distribution) Act 1955 and Public Trust Corporation Act 1995.

Applicable Law/ Legislation

In 1959, a bill was tabled to amend and consolidate legislations relating to the grants of Probate and Letters of Administration known as the Probate and Administration Act 1959. The proposed bill generally followed the provisions of the Probate and Administration Ordinance (Cap 51) of the Straits Settlements and included specific provisions contained in similar legislation in the United Kingdom, i.e. the Administration of Estate Act 1925. It was initially governed by the Probate and Administration Act 1920, which was applied in the Federated Malay States and incorporated the official Administration

Enactment 1905 as Chapter III, which allows the resealing of Probate and Letters of Administration grants made in the Colony, United Kingdom or any other British possession.

Before the Probate and Administration Act 1959, the Distribution Act 1958 was enacted in relation to intestate estate distribution. The Act is based on the English Statute of Distribution 1670 (later replaced with the Administration of Estates Act 1925) and provides a comprehensive statutory framework for the devolution of moveable and immovable property of a deceased person who dies intestate. However, it does not apply to persons professing the religion of Islam and to any estate subject to distribution governed by Parsee Intestate.[41] The Distribution Act 1958 came into force on 1 May 1958 (in West Malaysia), was revised in 1983, and assumed the title of the Distribution Act 1958. Subsequently, amendments were made to the Act in 1975 and 1997.

It is interesting to note that the Wills Act of 1959 resulted from the consolidation of laws relating to, derived and obtained from the Wills Ordinance of the Straits Settlements and the Wills Enactment of the Federated Malay States. It adopted the provisions of the former Ordinance, the same as the Wills Act 1837 of the United Kingdom, and aimed to provide a uniform law concerning wills throughout the Federation of Malaya. Thus, any wills made in the Straits Settlements and the Federated Malay States prior to the date of coming into effect of the Wills Act 1959 would not have been affected. Hence, it is evident that the provisions of the Wills Ordinance regarding testamentary disposition was intended to be applied equally to Muslims, as in the case of *In the Goods of Abdullah*[42] and *Kader Bee & Anor v Kader Mustan & Ors*[43]. However, later cases such as *Abdul Rahim v Abdul Hameed & Anor*[44], *Katchi Fatimah v Mohamed Ibrahim*[45], *In Re The Will of M. Mohamed Haniffa, Deceased. Abdul Jabbar v M. Mohamed*

41 Azhani Arshad, *The Annotated Statutes of Malaysia: Distribution Act 1958. of 196* (Selangor: LexisNexis Sdn Bhd, 2022).
42 (1835) 2 Ky Ecc 1.
43 (1878) Ky 432.
44 (1983) 2 MLJ 78.
45 (1962) MLJ 374.

Abubacker[46], *Siti v Mohamed Nor*[47], *Saeda binti Abubakar & Ors v Haji Abdul Rahman bin Haji Mohamed Yusup & Ors*[48], showed that a Muslim may dispose of his property by way of a will only in accordance with and subject to the school of law which he professed. This is also consistent with section 2(2) of the Wills Act 1959, which states that the Act shall not apply to Muslims.

The Public Trust Corporation Act 1995 was later enacted to amend laws relating to the Public Trustee and Official Administrator to provide for the vesting of property, rights and liabilities of the Public Trustee and Official Administrator in a company (or corporation as it was defined) and to regulate the exercise of functions and powers by the company. This Act repealed the Public Trust Act of 1950.

The Practice and Procedure

The procedures for the grants of representation evolved from the Civil Procedure Code of the Straits Settlements, the Rules of the Supreme Court 1957, Order 71 (non-contentious) and Order 72 (contentious) of the Rules of the High Court 1980 as well as Order 41 of the Subordinate Court Rules 1980 which came into force on 1 June 1980 and eventually the later provisions were provided in the Rules of Court 2012.

The former Rules of the High Court 1980 were derived from the United Kingdom Rules of the Supreme Court 1965; the provisions of Order 71 were taken mainly from the Non-Contentious Probate Rules 1954 of the United Kingdom, which originated from Chapter XLIII of the Civil Procedures Ordinance 1878.

The procedure for estate administration as outlined in the Rules of Court 2012 (previously known as the Rules of High Court 1980), covers everything from the application for a grant of representation to the process of distributing the estate or its proceeds to the beneficiaries. Meanwhile, the process by the Estates Distribution Office (previously known as the Small Estate Distribution Division/Unit) commences with a petition for a distribution order and continues until the

46 (1940) MLJ 286.
47 (1928) 6 FMSLR 135.
48 (1918) 2 FMSLR 352.

distribution of the estate, namely by direct transmission or grant of letters of administration or order for sale (however, the latter has since been deleted by the Small Estates (Distribution) (Amendment) Regulation 2024 (PU(A) 194/2024)[49]. The administration of estates by Amanah Raya Berhad, on the other hand, covers four of its main roles, namely, as trustee, personal representative, summary administrator of the deceased's moveable property and administrator of any undistributed funds.

Small Estates

The Small Estates (Distribution) Bill 1955 was redrafted and adopted by the Legislative Council on 2 June 1955. This provision applied to estates valued at no more than $ 5,000 and where land formed part of the small estate. Therefore, the powers or jurisdiction given to the Collector of Land Revenue in administering small estates excluded those estates consisting solely of moveable property which did not apply to the Straits Settlements. However, in cases where the deceased left behind an estate comprising of property in the Federated Malay States and the Straits Settlements, the courts would have dealt with the estate comprehensively.

Notwithstanding the above, there are specific provisions of the Small Estates (Distribution) Act 1955 that apply to specific States, namely Part III to Negeri Sembilan, Part IV to Sabah and Section 34 to Malacca and Penang. It is also worth noting that the small estate's value was increased to RM10,000 by the Small Estates (Distribution) Amendment Ordinance 1959. Later, the value was again increased to RM25,000 by the Small Estates (Distribution) (Amendment and Extension) Act 1972 when the Ordinance was revised and re-enacted as the Small Estates (Distribution) Act 1955 (Revised 1972). With the Small Estates (Distribution) (Amendment) Act 1977, the value was replaced with RM50,000.[50] The word 'fifty' was subsequently amended to 'three hundred' by the Small Estates (Distribution) (Amendment) Act 1982, which was later amended by the Small Estates (Distribution) (Amendment) Act 1988 and 2009, which again increased the amount to six hundred thousand ringgit and two million ringgit respectively.

[49] Wef 15 July 2024/

[50] Balan, 1977.

The latest amendment being the Small Estates (Distribution) (Amendment) Act 2022 (Act A1643), which took effect on 15 July 2023, now sets the estate value at five million ringgit.

Part IV of the Small Estates (Distribution) Act 1955, a special provision relating to the state of Sabah, was inserted by the Small Estates (Distribution) (Amendment and Extension) Act 1972 (Act A127), which took effect on 23 June 1972 and repealed the Administration of Native and Small Estates Ordinance (Cap 1, Vol. 1) 1941 but it is not yet in force. Hence, the Ordinance is still applicable in cases of native estates until such a date to be specified by the Minister, such as in *Ensui Gudul @ Godol v Suin @ Abdul Samad bin Dongkiris & Ors*[51], *Jumaiah bt Maruan @ Marwan v Hong Yee Mei & Other Appeals*[52], *Goh Beng Li @ Angeline binti Umpu v Goh Beng Chu @ Mariana binti Umpu*[53].

51 (2011) 3 MLJ 498 (HC)/
52 (2014) *6 MLJ 428* (CA)/
53 (2018) MLJU 977 (CA).

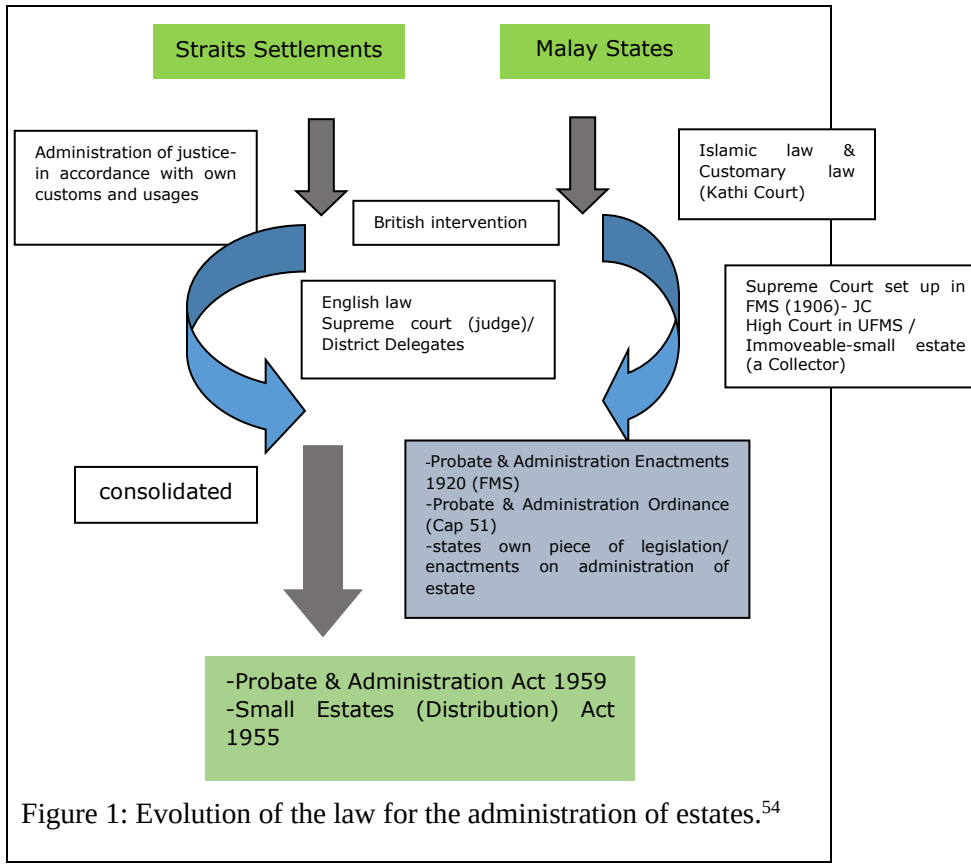

Figure 1: Evolution of the law for the administration of estates.[54]

CURRENT LEGAL FRAMEWORK FOR ESTATE ADMINISTRATION IN WEST MALAYSIA

Generally, there are four administrative bodies or institutions involved in the administration of a deceased's estate in West Malaysia. They are: the High Court, the Estate Distribution Office (previously known as the Small Estates Distribution Division) under the Department of the

[54] Authors' construction.

Director General of Lands and Mines, the Public Trust Corporation or Amanah Raya Berhad and the Syariah Court.

Applicable Law/ Legislation

The main provisions to grant letters of representation are now found in the Probate and Administration Act 1959, while the procedures for obtaining them are set out in Order 71 of the Rules of Court 2012. Other statutes that govern the law and procedure for estate administration in West Malaysia are the Courts of Judicature Act 1964, Small Estates (Distribution) Act 1955, Distribution Act 1958, Wills Act 1959 and Public Trust Corporation Act 1995. For Muslim estates, state laws; specifically the Administration of Islamic Law statutes and the Muslim Wills statutes (as the case may be) continue to apply. Selangor via the Muslim Wills (Selangor) Enactment 1999 was the first state in Malaysia to enact legislation on Islamic wills, followed by Negeri Sembilan, Malacca and four other states. The aim is to provide provisions for Muslim wills and related matters. It came into force on 16 June 2000 and applies only to Muslims in the State of Selangor. Supplementary to the Statutes, the Muslim Wills Management (Selangor) Rules 2008 was enacted effective 19 June 2008.

The Small Estates (Distribution) (Amendment) Act 2022 (Act A1643), which came into force on 15 July 2024, amended the interpretation of "small estate" and the definition of "property." For a small estate, the estate of a deceased person now may include immovable or movable property, and the total value of the estate shall not exceed five million ringgit. The amendment also empowers the Estate Distribution Officer of a State to distribute and administer the deceased's estate within the Small Estates (Distribution) Act 1955. To address the difficulties beneficiaries or petitioners face in obtaining information on the deceased's estate and liabilities for estate administration, section 8C was introduced to allow the Estate Distribution Officer to grant letters of administration *pendente lite* (in Form FA) to obtain information from relevant parties pending the issuance of a distribution order.

The Practice and Procedure

The current legal framework provides that if an intestate estate's value exceeds five million ringgit, it falls under the jurisdiction of the High Court to administer it. For an intestate estate with a total value not exceeding five million ringgit, the Estate Distribution Officer of the Estate Distribution Office has jurisdiction to administer the estate. If an estate consists solely of moveable property and is valued at less than six hundred thousand ringgit, it will be administered by the Public Trust Corporation known as Amanah Raya Berhad by the issuance of a Declaration or Direction, as the case may be. The determination of Islamic law of succession and the issuance of a *faraid* certificate fall under the jurisdiction of the respective state's Syariah Court.

Orders 71 and 72 of the Rules of Court 2012 set out the procedural rules for applying for a Grant of Probate and Letters of Administration for a deceased person's estate at the High Court. Order 71 relates to non-contentious probate proceedings, while Order 72 relates to contentious probate matters. The High Court process for the administration of estates include the application for letters of representation right to the distribution of the estate or its proceeds to the beneficiaries. Meanwhile, the Estate Distribution Office handles estate administration from the petition for the distribution order to the final distribution of the estate, either through direct transmission, distribution order in Form E or grant of letters of administration in Form F. The administration of estates by Amanah Raya Berhad, on the other hand, covers four of its leading roles; trustee, personal representative, summary administrator of the deceased's moveable property and administrator of any undistributed funds. Meanwhile, the Syariah Court is only responsible for issuing the inheritance certificate or *faraid* certificate and determining substantive laws which govern a deceased Muslim's estate, such as the division of or claims to jointly-acquired property, wills, gifts made while in a state of deathbed illness (*marad-al mawt*) and *inter vivos* gifts. A *faraid* certificate is required to establish the distribution order that is issued subsequently by the High Court, Estate Distribution Office or Amanah Raya Berhad, as the case may be.

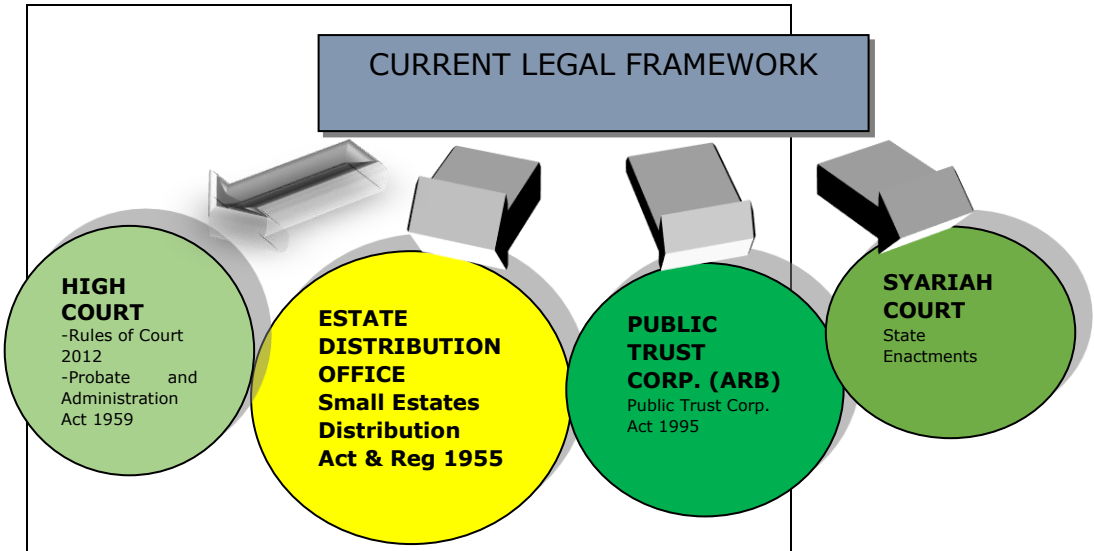

Figure 2: Current Legal Framework. [55]

CONCLUSION AND SUGGESTIONS

Based on the discussion above, it is evident that Malaysia's law of succession evolved from English succession laws, introduced through the Charters of Justice into the Straits Settlements. The discussion has also highlighted that the Probate and Administration Act 1959 was adopted from the Administration of Estates Act 1925, and its procedures have largely been derived from the Non-Contentious Probate Rules 1954 of the United Kingdom. The former evolved or originated from the Indian Act XX of 1837, while the latter originated from Chapter XLIII of the Civil Procedures Ordinance 1878. Both were English laws that were initially introduced in the Straits Settlements vide the Royal Charters of Justice and such laws were later extended to the Malay States through their respective legislations.

[55] Authors' construction.

Since the model of the law on estate administration in West Malaysia originated from English law or common law, this article has shown that its structure and procedures closely resemble those of the common law. Hence, after more than 60 years of independence, the need for reform has become evident given Malaysia's pluralist society. Ibrahim[56] strongly suggests that the Malaysian courts apply our laws by prioritising the local conditions and its people, thus establishing and developing our very own Malaysian Common Law. Similarly, Wan Ahmad[57] states that perhaps the most fitting term to describe the legal evolution and development of this Malaysian Common Law is "malaysianisation."

It can also be established that the multiple sets of laws and administrative bodies or jurisdictions involved in estate administration in West Malaysia, namely, the High Court, Estate Distribution Office, Amanah Raya Berhad and the Syariah Court, among others, has led to confusion among the public and stakeholders involved in the process of estate administration regarding the different roles and functions of those bodies and agencies. Thus, in order to simplify and expedite the administration process while achieving uniformity in laws and procedures for estate administration, it is suggested that a single body or a one-stop agency be established to handle estate administration in West Malaysia.

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56 Ahmad Ibrahim, "Towards A Malaysian Common Law?," *Malayan Law Journal* 2 (1989): 49.

57 Wan Azhar Wan Ahmad, "Malaysian Common Law," The Star, 2007, https://www.ikim.gov.my/index.php/2007/09/18/malaysian-common-law/.