MEANING OF SOURCES OF LAW

- Commonly refers to:
  - **Historical sources:** indicating the factors that have been influential in the development of the law but by themselves not recognised as law – religious practices, local custom, beliefs, opinion of jurist.
  - **Places where the law can be found:** statutes, law reports, textbooks, decisions of court.
  - **Legal sources:** legal rules that make up the law – written and unwritten.
WRITTEN LAW

- Law embodied in:
  - The Federal and State Constitution.
  - Legislation enacted by the Parliament and State Assemblies under power conferred on them by the respective constitution: 14 states + Federal Territories.
  - Subsidiary or delegated legislation made by persons or bodies under powers conferred on them by Acts of Parliament or Enactment of State Assemblies.
  - Ordinances made by YDPA during emergency.
• **Constitution**: the supreme law of the land – Article 4(1).

• **Legislation**: Acts, Enactment, Ordinance – the most important source of Malaysia law, the most convenient and expeditious method of dealing with social and economic issues. Officially gazetted and published.

• **Subsidiary/delegated legislation**: can be found in the Government gazette – not easily accessible to the public and even if available, it is difficult to keep abreast of changes.
Examples of subsidiary legislation:

- Akta Kawalan Harga 1946
- Perintah Kawalan Harga (Penandaan Harga oleh Penjual Runcit) 1993
- Perintah Kawalan Harga (Pelabelan oleh Pengilang, Pengimpot, Pengeluar atau Penjual Borong) 1980.
UNWRITTEN LAW

- Principles of English law applicable to local circumstances.
- Judicial decisions of the superior courts.
- Judicial decisions of supersede superior courts.
- Local customs which have been accepted as law by the court.
Law or *syariah* according to Islam refers to “commands, prohibitions, guidance and principles that God has addressed to mankind pertaining too their conduct in this world and in the next”.

Devine law derives from 2 basic sources: Al Qur’an and Practices of the Prophet Muhammad (pBUH). Further supplemented by *ijma’* (consensus of opinion among jurist), *qiyas* (analogical deduction), *masalih al mursalah* (public interest), *istishab* (legal presumption), *sadd ad dharai* (blocking the ways), *‘urf* (custom).
OBJECTIVES OF ISLAMIC LAW

1. Preservation of religion.
2. Preservation of soul and life.
3. Preservation of dignity and *nasab (geneology).*
5. Preservation of property.
DISTINCTION BETWEEN ISLAMIC LAW AND MAN MADE LAW

- Distinction can be made in these aspects:
  1. Source, authority and validity.
  2. Perpetuity.
  3. Ethical norms of good and bad, right and wrong, virtue and vice.
  4. Obedience of law.
  5. Sanction.
<table>
<thead>
<tr>
<th><strong>SYARIAH</strong></th>
<th><strong>MAN MADE LAW</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>and Sunnah.</td>
<td>4. Other motives.</td>
</tr>
<tr>
<td>3. Perpetual and universal.</td>
<td>5. Sanction in this world only.</td>
</tr>
<tr>
<td>4. Obedience: beliefs in Islam.</td>
<td>6. Society/human determines what is good</td>
</tr>
<tr>
<td>5. Sanction in this world and</td>
<td>and bad, right and wrong according to the</td>
</tr>
<tr>
<td>the next.</td>
<td>theory of utilitarianism.</td>
</tr>
<tr>
<td>6. Has own ethical norms of</td>
<td></td>
</tr>
<tr>
<td>good and bad, right and wrong.</td>
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</tbody>
</table>
A major source of Malaysian law but it is applicable only to Muslims regardless of race.

Administered by separate system of syariah courts at state levels and in the federal Territories.

Islam is not just a religion but also a way of life.

Islamic law began in Malaysia when the Melaka Ruler embraced Islam in 1414.

Undang-undang was the model for laws in Johor, Pahang and Kedah.
Majella al Ahkam al Adliyyah (Turkish civil law) and Ahkam Syar’iyyah (Qanun Qadri Pasha, Mesir) from Hanafi Mazhab were translated and applied as state law in Johor.

Johor Constitution and Terengganu Constitution were examples of Islamic law.

Pangkor Treaty (1874): separated Islamic public law and private law.

Islamic public law was taken over by English law.

Islamic law was only used in personal matters – marriage, divorce, some property issues.
In other words, during European colonial rule, the status of Islam decline to a stage where it was only applied by way of exception as personal law.

Syariah from its original status as the prevailing law was reduced to that of personal and was limited to family law and some aspects of the religion.

Straits Settlement: Mohammedan Marriage Ordinance 1880.
In Sabah and Sarawak (British Borneo) much of the native laws were written in administration handbooks which include syariah.

There were no separate syariah courts as existed in Malay peninsula.

In practical terms, syariah was administered as part of native law.
• **Article 3 of the Federal Constitution (FC):** “Islam is the religion of the Federation, but other religions may be practised in peace and harmony in any part of the Federation.”

• **Article 11(4):** “State law and in respect of the Federal Territory, federal law may control or restrict the propagation of any religious doctrine among persons professing the religion of Islam.”

• It is clear that while the non-Muslims are free to practice their religion they may not propagate their religions to Muslims.
The central administration and a separate legal system for Islamic law are legacies of colonial rule.

The establishment of hierarchy of courts brought together the doctrine of judicial precedent – trademark of the English common law.

The administration of Islamic law is increasingly formalized along the lines of the civil courts.

Articles 121(1A) FC: absolute jurisdiction of syariah courts in matters pertaining to Islam/Muslims.
The power to administer Islamic law is primarily that of the states and Federation but limits such law to family and personal law and such criminal law as a the federal law provides.

**Example:** the punishment of offences by the Syariah Courts is limited to Muslims and in respect of offences as conferred by federal Law – Muslim Court (Criminal Jurisdiction) Act 1965 (Amended 1988).
ENGLISH LAW

- Received in Malaysia either expressly or by implication.
  - **Expressly:** Section 3(1) Civil Law Act 1956 where the court is required to apply ‘in West Malaysia or any part thereof...the common law of England and the rules of equity as administered in England on the 7th April 1956.’
  - **Impliedly:** when the court interpret an instruction to decide cases according ‘to justice and right’ – implying the reception of English law.
<table>
<thead>
<tr>
<th>YEAR</th>
<th>STATUTES</th>
<th>INTRODUCTION OF ENGLISH LAW</th>
</tr>
</thead>
<tbody>
<tr>
<td>1807</td>
<td>First Charter of Justice</td>
<td>Penang</td>
</tr>
<tr>
<td>1826</td>
<td>Second Charter of Justice</td>
<td>Straits Settlement</td>
</tr>
<tr>
<td>1928</td>
<td>Sarawak Ordinance</td>
<td>Sarawak</td>
</tr>
<tr>
<td>1937</td>
<td>Civil Law Enactment</td>
<td>Federated Malay States</td>
</tr>
<tr>
<td>1938</td>
<td>Civil Law Ordinance</td>
<td>Sabah</td>
</tr>
<tr>
<td>1949</td>
<td>Application of Laws Ordinances</td>
<td>Sarawak  - 12/12/49</td>
</tr>
<tr>
<td>1951</td>
<td>Application of Laws Ordinances</td>
<td>Sabah - 1/12/51</td>
</tr>
<tr>
<td>1956</td>
<td>Civil law Act 1956</td>
<td>Federation of Malaya (including Penang and Melaka) - 7/4/56</td>
</tr>
<tr>
<td>1972</td>
<td>Civil Law Act 1956 (Revised 1972)</td>
<td>Malaysia</td>
</tr>
</tbody>
</table>
The application of English law is conditional:

- Only applied in the absence of local statutes covering the same matter.
- Only that part of English law that is suited to local circumstances.
Malays in Peninsula Malaysia are governed by adat, Islamic law and the general law applicable to the general population.

Before 1911 in Sabah and 1978 in Sarawak, Islamic law and Malay customary law were administered together as part of ‘native custom’ by a system of native Court with limited jurisdiction.
The importance of adat in Malay society is embodied in the saying: ‘kecil dikandung ibu, besar dikandung adat, mati dikandung tanah’ and ‘biar mati anak, jangan mati adat’.

Adat is not homogeneous.

Adat is largely unwritten.

The techniques and rules of evidence of the civil courts are often used to determine the adat, particularly in Peninsula Malaysia which does not have a Native Court system.
European writers classified adat into Adat Temenggong and Adat Perpateh – loose classification.

**Adat Temenggong**: describes a variety of adat based on the patriarchal system.

**Adat Perpateh**: Distinct traditional practiced among the Malays in Negeri Sembilan and Naning in Melaka based on matriarchal system.
**ADAT THAT HAS BEEN GIVEN STATUTORY RECOGNITION**

<table>
<thead>
<tr>
<th>Harta sepencarian (carian laki-bini in adat perpatih):</th>
<th>property jointly acquired by a couple during marriage.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Carian bujang:</td>
<td>property acquired by either husband or wife before marriage which maybe harta dapatan (ancestral property brought to the marriage by the wife and which revert to her on divorce) or harta pembawa (inherited non-ancestral property brought to the marriage by the husband which revert to him on divorce).</td>
</tr>
</tbody>
</table>
Adat laws in Sabah and Sarawak comprise of Malay customary law, native customary law applicable to non-Malay native, in Sarawak, Chinese c

The Malay customary laws were previously administered by the Native Court but now under the Islamic Council and Syariah Courts.

The currently in force Iban customary laws are those compiled and published under the Native Customs (Declaration) Ordinance 1996.
Adat laws in Sabah can be found in Wooley’s Code prepared in 1930s - compilation of various adat of the Tuaran, Dusun, Murut, Kwijau and Timogums.

Chinese and Hindu customary laws are in decline – resulted from the enactment of law Reform (Marriage & Divorce) Act 1976 (LRA).

The LRA abolished polygamous marriages among Chinese and Hindus and imposed a system of compulsory registration of marriage and provided irretrievable breakdown of marriage as the main ground for divorce.
JUDICIAL DECISION

- An important element of the English Common Law system.
- **The term Common law refers to:**
  - Non-statutory law evolved through judicial decisions.
  - The general rules made common to the whole of the country as distinct from local customs.
  - The law developed in the Common law courts of England as opposed to law developed by the Court of Chancery (equity).
Equity was introduced in the 14th century by the Chancery Court to fill in the gap/loopholes of Common law.

Has distinct principles of justice - moral element, fill in the gaps/lacunae in common law.

In 16th century Common law conflicted with equity.

Litigants preferred to go to the Court of Chancery than to Common law courts – a more suitable and just decision, flexible and simple procedure.
Judicature Acts 1873-75: new judicial system was established in England.

Specify that in the event where equity is in conflict with common law – equity will prevail.

All court has similar jurisdiction and standard: common law and equity.

Examples of principles of equity: principles of trust, mortgage, rescission of contract on the grounds of misrepresentation and undue influence.
In making decision, judges do not decide arbitrarily - bound to follow precedent which is a judgment or decision of a court of law cited as an authority for the legal principle embodied in its decision.

The practice of following the precedent is known as *stare decisis* (to stand by the decided things) - binding precedent.

Failure to follow binding precedent - the decision will be legally wrong and likely to be reverse in appeal. If no appeal - overruled in a later case.
The essence of precedent is like cases should be treated alike, assuming that the facts of the cases are sufficiently similar.

If there is no existing law (especially in tort/civil wrongs) to apply to the facts in dispute, the doctrine permits judges of superiors courts to establish new legal principle which become original precedents - *Donoghue v Stevenson [1932] AC 562.*
### RATIO DECIDENDI vs. OBITER DICTA

<table>
<thead>
<tr>
<th>RATIO DECIDENDI</th>
<th>OBITER DICTA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal principles in a judicial decision</td>
<td>Judge’s statement/opinion in a case</td>
</tr>
<tr>
<td>Grounds for decision</td>
<td>Based on immaterial fact of the case</td>
</tr>
<tr>
<td>Has a binding effect on the lower courts</td>
<td>Dissenting judgment – persuasive in nature</td>
</tr>
</tbody>
</table>
CLASSIFICATION OF LAWS

NATIONAL LAW

PUBLIC LAW

CONSTITUTION
ADMINISTRATION
CRIMINAL

PRIVATE LAW

CONTRACT, TORT, PROPERTY, INHERITANCE, TRUST, FAMILY
CLASSIFICATION OF LAWS

INTERNATIONAL LAW

PUBLIC INTERNATIONAL LAW

PRIVATE INTERNATIONAL LAW (CONFLICT OF LAW)
**SUBSTANTIVE vs. PROCEDURAL**

- **Substantive laws** consists of rights, duties and prohibition administered by courts - which behavior are to be allowed and which are prohibited - e.g. Penal Code.

- **Procedural laws** are rules concerning just how substantive laws are to be administered, enforced, changed and used in the mediation of disputes – e.g. Criminal procedure Code.
PUBLIC LAW vs. PRIVATE LAW

- **Public law** is concerned with the structure of government, the duties and power of officials and the relationship between the individual and the state - e.g: constitutional law, administrative law, regulation of public utilities, criminal law and procedure and law relating to proprietary powers of the state and its political subdivisions.

- **Private law** is concerned with both substantive and procedural rules governing relationships between individuals - e.g. the law of torts, contracts, property, wills, inheritance, marriage, divorce, adoption.
CIVIL LAW vs. CRIMINAL LAW

- **Civil law** refers to private laws – violation of civil statutes, private wrongs, may seek redress from court for the harm suffered/experienced.
- Redress in the form of money compensation (damages).
- **Criminal law** concerned with the definition of crime and the prosecution and penal treatment of offenders regarded as offences against the state or the people.
- It is a public wrong - it is the state not the harmed individual that takes action against the offender.
- Concept of punishment.
CIVIL LAW vs. COMMON LAW

- In this context, **civil law** refers to legal systems whose development was greatly influenced by Roman law - a collection of codes compiled, e.g. France.
- Statutes enacted by Parliament.
- **Common law** refers to the English legal system based on precedents set by judges to decide a case.
NATIONAL vs. INTERNATIONAL LAW

- **National law** refers to the laws which are recognized and applicable in a state - state/municipal law.
- Divided into 2: public and private.
- **International law** refers to laws/regulation resulted from convention signed/agreed upon by countries of the world.
- Purpose: to resolve international dispute.
- Enforced by the International Court of Justice in The Hague.
- **Public international law** - the law which is used to resolve conflict between 2 different countries.

- **Private international law** - the national law of a country that is used to resolve conflict between 2 different nationalities. Also known as conflict of law.
CONCLUSION

- Law can be derived from various sources.
- Malaysian laws are largely influenced by the English law and Islamic law.
- The application of English law throughout Malaysia is conditional.
- Law can be classified in many ways: according to purpose, punishment, nature etc.