



Historical Background of Islamic Law in Malaysia

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+ *Rahmatan Lil 'Alamin*

- **TAWHID:** The essence of Islam is al Tawhid. Muslim is definable by his adherence to Al Tawhid
- **Al Tawhid:** Acknowledging God as sole Creator of the universe and Equalizing all men as creatures of God.
- **MERCY:** To all the world, both believers and disbelievers.
- **UNIVERSALISM:**
 - The social order of Islam is universal, enveloping the whole of mankind.
 - Islamic social order holds Islam relevant to every era of human activity.
 - The qualities of humanness are possessed by all mankind by nature.

+ Administration of Justice

- The administration of justice is the process and structure which allows conflicts between parties to be settled by a specific body.
- History tells us that disputes arose and were disposed of at all times.
- The Holy Qur'an gave much stress on Justice in various ways.
- *“We have made you a mid-most (just) community” (2: 143)*
- *“O believers! Be establishers of Justice, Witness for God” (4: 135)*
- *“Indeed We have sent forth Our Messengers with clear messages, and We sent down them the Book and the Balance, so that men may establish Justice” (57: 25).*
- Muslims have religious duties to undertake individually and collectively active struggle to establish justice.
- Injustice triggers the decline of civilization (Ibnu Khaldun).

+ Prophet's Time

- Appointment of Saidina Ali, Muadz Bin Jabal and Unais as qadhis.
- Prophet himself head of the state and at the same time head of the judiciary
- Appeals will be referred to prophet himself.
- Cases including inheritance, matrimonial, custody, qisas and hudud.
- After expansion Prophet appointed a few assistance.
 - Ali Ibn Abi Talib and Muaz Jabal- Yaman
 - Umar Al Khattab- Medina
- There was no specific buildings and mostly conducted trials in mosque. Judges are paid through baitul mal and prophet always gave advise to them.
 - Example Itab Ibn Al Usaid the governor of Mecca was paid ten dirhams a day.

+ Period of Khulafa al Rashidun

- Saidina Abu Bakar As-siddiq.
- Head of the state and at the same time head of the judiciary
- The sources of hukm or decision are Quran and Sunnah, then gathering the companion in order to deduce ruling by way of ijma.
- If no rulings be agreed upon unanimously Abu Bakar use his own ijtihad.

+ Caliph Umar

- Saidina Umar Ibnu Khattab
- The first inventor the system of separation of powers between governor and judges.
- Governors and judges were different personnel.
- Umar gave his advise to judges verbally and through letters. Example his famous letter to Ābu Musa Āl-Ashaari.
- The court administration was improved.

+ Caliph Uthman

- Saidina Uthman Ibnu Affan
- He is the only judge in the Medina.
 - Ali Talha and Zubair were his advisors .
- Uthman delegated the power to appoints judges outside Medina to governor.
- Doctrine of delegation of powers was implemented.
- Specific Court building was built.

+ Caliph Ali

- Saidina Ali Ibnu Abi Talib
- He moved the seat of government from Medina to Kufah.
- Head of the state and judiciary.
- Introduced a municipal guard called Shurta.

+ Umayyad Period

- The caliph appointed judges in capital while judges elsewhere by the governors
- Jurisdiction of the judges including duty to supervise the execution of the punishment.
- Judges started to record their judgment in writing in order to prevent litigating parties from disputing judgment given orally.

+ Abbasid Period

- Judges were appointed based on the mazhab of the populates.
- Caliphate and judiciary were separated.
- Qadhi Qudhat (Chief Justice) was delegated with the power to appoint and dismiss judges, hear appeals and review judge's decision, administer the judicial institutions and give advise to the caliph in judicial and legal matters.
 - First Qadhi Qudhat was Abu Yusof of Hanafi school.
- Judges wore special dress, had special stamp and seal, and were assisted by sufficient number of court officials.
- Trials at Specific Court building on specified dates.
- Judges were required to record their judgment together with the grounds of judgment, details of the trials as well as evidence.
- Registration of the case before it could be brought for trial.
- Jurisdiction of the judges:- Civil and criminal cases, waqaf property, baitul mal, appoint wali, and lead wilayah al madzalim, wilayah hisbah, the police force and the armed force.

+ Ottoman Period

- Influenced by the West.
- Western legal profession started.
- Interpreter in court known as “vakil”.

+ The Advent of Islam in Malaysia

- Before the 15th Century, Islam was observed by selective community merely as personal religious practice.
- The advent of Islam in Malacca (when in 1414 Parameswara embraced Islam) had elevated the status of Islam.
- From being mere personal religious practices to a formal declaration as state religion and formal application of Islamic law.

+ Islamic transformation

- Profound influence of Islam in social, cultural, legal and political sphere.
- Cultural - The blending of Islamic Law with the Malay adat. The domination of Hindu influence in the Malay Adat was replaced by Islamic influence by way of introduction of Shariah and modification of adat law to aligne with Islam.

+ Brief History of Malaysia

- Malaya before 1957 was subjected to various foreign powers:
- Portuguese 1511 -1641 (130 years)
- Dutch 1641-1824
- British 1786-1956
- 1786: Penang was acquired by Sir Francis Light from the Sultan of Kedah
- 1800 : Province Wellesley ceded to East India Company
- 1819 : Port of Singapore founded by Raffles
- 1824 : The Anglo Dutch treaty ended the colonial competition in Malaya - territorial exchange .Malacca ceded to British in return of British ceding Sumatra to the Dutch.
- 1824: The Sultan of Johor ceded Singapore to East India Company. Singapore, Penang and Malacca became the Straits Settlement.

+ Brief History of Malaysia

- 1874-1889 : British administration was extended to Perak, Selangor, Pahang and Negeri Sembilan. British Residents began to control the affairs of the Malay states.
- 1895 : Perak, Selangor, Negeri Sembilan and Pahang were constituted as the Federated Malay States.
- 1903-1909: Kelantan, Kedah, Trengganu and Perlis known as the Unfederated Malay States witness the coming of British Advisors.
- 1946 : The nine Malay States including Malacca and Penang were amalgamated as Malayan Union.
- 1948: The Malayan Union was formally shelved and replaced by the Federation of Malaya.

+ Malacca

- Laws - The Law of Malacca & The Maritime law of Malacca importing principles of Islamic law, were promulgated and introduced during the reign of Malaccan Sultanate witnessing clear adaptation of Islamic Law in Family, Criminal, Transaction & Evidence Law.
- Risalah Hukum Kanun contains provisions on marriage and divorce, procedural laws, prohibition on riba, islamic transaction, homicide, illicit intercourse, anal relationship against the order of nature, defamation.
- Political – Islam replaced the Hindu system of devaraja (divine kingship) with the Sultanate system regarded as akin to the Caliphate.

+ Malacca Sultanate

- Sultan appointed qadis as their advisers in religious matters.
- Islam was the state religion of Malacca. Laws of Malacca and Maritime Laws of Malacca.
- Malacca Laws consists of islamic family law, criminal law, sale and evidence and etc.
- Penalties according to hukum Allah and Hukum Adat (patriarchal and matriarchal).

+ Malacca under Portuguese

- Governor had supreme command over all inhabitants
- Assisted by Ovidor (CJ), viador (mayor), the Bishop.
- Malays came under the jurisdiction of the Bendahara, Malays in Naning and Linggi were controlled by a Temenggong.

+ Malacca under Dutch

- Governor had supreme authority over all inhabitants
- Assisted by Council consisting of the Collector, Mayor. Another council is Council of Justice.
- Laws regulations were issued by the central government in Holland.
- Leave the Malays to practice their own customs and law.

+ Other Malay states

- With the downfall of the Malaccan Sultanate in 1511 to the Portugese, the legacy was continued by the UNFMS and the FMS.
- Influences of Islam profound-administration of law.
- The law of Pahang 1595, the Law of Kedah 1605, the Law of Johor 1789, 99 Laws of Perak 1878 – tailored after the Law of Malacca - imported from Islamic legal text.

+ Pahang and Terengganu

- The Pahang Digest compiled for Sultan Abdul al-Ghafur Muhaiyuddin Shah (1592-1614) in its introduction states that Pahang was Dar al-Islam whereby 42 of its 68 articles were based on the Shariah.
- The Constitution of Terengganu 1911- Chapter 51, state religion- no other be made official.
- The Terengganu Law of Court 1885: established the Shariah Courts in the State.

+ Johor

- The Constitution of Johor 1895 – Art VII all times religion of state-head of state.
- Majallat al-Ahkam & Majalah Ahkam Johore.
- The Constitution of Johore 1895 in respect of oath, disqualification, penalties for royal family members.
- Therefore clear application of Islamic Law in the malay states was not confined to personal law/family law per se but covered other aspects as well.

+ Islam is Law of the Land

- **Tan Sri Ahmad Ibrahim** – the law applicable to the Malay States before the colonisation era is Islamic Law modified by Malay Custom.
- In the Malay States, although Islamic Law was recognised as law of the land, the English judges and counsels did not expound and develop its practice.
- **R.J Wilkinson** said :
- “There can be no doubt that Muslim law would have ended by becoming the law of Malaya had not British Law stepped in to check it.”
- Contention supported by decision of English Judges – Islamic law was not foreign law, but local law apart from the malay adat.

+ Cases

- **Shaik Abdul Latif & Ors. V Shaik Elias Bux** (1915) 1 FMSLR 204 “ Before the first treaties the population of the states consisted almost solely of Mohamedan Malays with a large industrial and mining community in thye midst. The only law at the time applicable to the Malays was Mohamedan modified by local custom.”

- **Ramah v. Laton** (1927)FMSLR 128 Thorn J. said:

“Muslim law is not foreign law but local law; it is the law of the land, and the local law is a matter of which the court must take judicial notice. The court must propound the law.”

Tengku Jaafar & Anor v The State of Pahang (1987) 2 MLJ 74 the Supreme Court endorsed that the land law applicable in Pahang prior to introduction of the Torrens system, was Islamic law based on the Shafie School of thought.

+ Che Omar Che Soh v Public Prosecutor (1988) 2MLJ 55

- Salleh Abas in the case of Che Omar Che Soh v Public Prosecutor (1988) 2MLJ 55

“ Before the British came to Malaya.. The Sultans in each of their respective states were the heads not only of the religion of Islam but also as the political leaders in their states, which were Islamic in the true sense of the words, because.. The law applicable... was Muslim law. Under such law the Sultan was regarded as God’s vicegerent...”

+ Sabah and Sarawak

- As for Sabah & Sarawak, before the British influence, the law applicable to both states was basically native customary laws of the various indigenous community.
- Islam and Islamic law were treated as native custom.

+ Malaya under the British Rule

- British influence most of the legal system in Malaysia. 1807- First Charter of Justice 1826- Second Charter of Justice The effect is Islamic law had lost its significant and was only applied in the area of Islamic family law.
- In 1937 Civil law enactment was enacted and introduced to FMS and extended to SS. All civil cases were subjected to the English law.
- Mohammedan Marriage Ordinance 1880 was promulgated in which it regulated the muslim marriage and divorce for straits settlements until the Administration of Muslim Law Enactments were introduced to cover all Malaya. The ordinance provides inter alia Governor appointed the Qadhi. Appeals heard by the Governor. The governor will appoint mufti to assist registrar in Islamic law matters.

+ Islamic law under British Rule

- Malaya – previously subjected to various foreign powers.
- Except for the British, these foreign powers adopted a non-interference approach in their administration resulting non significant changes.
- Change in approach by British - major impact to the law of this country.
- British Interference in traditional legal system began in Penang 1786, Malacca and Singapore in 1824. 1826 - Straits Settlements.

+ Application of English law

- Penang 1786 -1807 preserving public order.
- Application of law – English law
- Application of local custom continued.
- Administration- Village chiefs-minor cases, upkeep registry of marriages, birth, property transactions within respective community.
- Other cases referred to English Magistrates.
- 1807 First Charter of Justice.
- **Kamoo v. Basset** (1808) 1Ky.1 1807 Charter of Justice introduced Penang to the English laws in England as at 1807 in so far as it is suitable to the conditions and circumstances of the local community.

+ English Court

- Third Charter 1855 - No new English laws but restructuring administration of the court of law.
- Establishment of Shariah Court or specific Islamic administrative body? None.
- Addressing issues of hukum syarak was directed to the English court.
- English law applied, setting aside Islamic law.

+ Cases

- **In the Goods Of Abdullah** (1835) 2 Ky. Ec.8 Malkin J - the transfer property wholly by way of will by a muslim is valid in accordance to English law eventhough contrary to hukum syarak.
- **Fatimah & Ors v. Logan & Ors** (1871) 1 Ky. 255 Hackett J – the introduction of the 1807 Charter of Justice simultaneously made English law as law of the land in Penang.
- **Ong Cheng Neo v. Yeap Cheah Neo & Ors** (1872) 1 Ky.326 again upheld that the law to be applied in Penang is English Law irrespective whether Penang was a territory ceded or settled by the EIC.

+ Family and Estate Matters

- 1823 Memorandum between Sultan of Johore, Dato' Temenggong & Raffles - matters pertaining to religious rites, marriage, inheritance, law and malay adat was respected in so far as it does not defy with natural justice and humanity.
- Magistrates appointed among British traders to handle civil and criminal cases.

+ Cases

- Introduction of English laws by virtue of the First and Second Charter did not however erase in total recognition towards the local system.
- **Sahrip v Mitchell & Anor** (1870) Leic.466 Benson Maxwell J gave judgment in favor of the Plaintiff contending the rightful land occupation based on the Malay Adat laws of Malacca against the Registry method imposed by the British.
- **Ramah binti Taat v. Laton binti Malim Sutan** (1927) 6 FMSLR 128 – Islamic law is not foreign law but local law.



- The British intervention began in Perak and Selangor in 1874, Pahang in 1888, Negeri Sembilan 1889 through treaties/ consultations.
- Administrative limitations - were required to act on the advice of the British Residents/Advisers in all matters except in respect of religious matters and Malay custom.
- eg. Pangkor Treaty 1874 - Sultan Perak agreed to accept a British resident whose advise must be asked and acted upon in all matters other than those touching Islamic religion and malay custom.



- Through the office of Residents and Advisers a system of administration of Justice headed by British judges was introduced - bring in English legal principles.
- Statutes enacted - impose formally English Law.
- A separate system of courts introduced to apply law based on EL.
- British admin separated religion from the state, islamic law reduced to merely personal law of the muslims.
- Status of Shariah Courts?



- Shariah Court was made Subordinate to the Civil Court in the federal system.
- Appeals from decision of Shariah Courts?
 - Heard by English judges or officers.
- Syariah Cts - placed within the state jurisdiction
- Jurisdiction limited basically to Muslims personal and matrimonial matters only.



- Office of Muftis maintained.
- In some states such as Selangor, Perak, Negeri Sembilan was established during the intervention.
- Muftis continued as religious advisers to the rulers, issuing fatwas and assisting the Syariah Courts.
- Assisting civil courts in determining matters of Islamic law.
- Civil courts presided by English Judges who are independent in their judgment.

+ IMPACT OF COLONISATION

- The British colonization, the introduction of Royal Charters of Justice in the Straits Settlements together acts of intervention in the Malay States slowly down sized Islamic law to spheres of Islamic family and personal law.
- English law gradually replaced Islamic law as governing law to be applied as far as the religious manners and customs would permit.
- The British imposed English law in 2 ways the civil court system and legislation.



- Administration of justice by English judges trained in English law who applied English legal principle to solve disputes.
- Imposition through legislations - The Civil Ordinance 1878 for the Straits Settlements, The Civil Law Enactment 1937 for FMS AND Civil Law (Extension) Ordinance 1951 for UMFS
- This was replaced by the Civil Law Ordinance 1956 which applied to all the eleven states of the Federation of Malaya.



- The law continued after independence and was extended to Sabah & Sarawak through the Civil Law Act 1956 (revised 1972) after the formation of Malaysia.
- All these provided the importation of English Common Law and rules of equity into the local legal system.
- Other legislations - the Penal Code (Act 574), Evidence Act 1950 (Act 56) and the Contracts Act 1950 (Act 136) – import from Indian legislation.

+ APPLICATION OF ENGLISH LAWS IN SABAH & SARAWAK

- In the Borneo States, the earliest contact with English law began with the installation of James Brooke in 1841 as the Rajah Of Sarawak.
- Under the said private colonial rule, he introduced segments of the English system of justice which was familiar to him and at the same time retained native customs as far as practicable.
- When Borneo came under British protectorates in 1888 the principles of English law had been adopted by way of direct legislation and judicial decisions and Islam remained as personal law.

+ Islamic law in Sabah & Sarawak

- In Sabah and Sarawak, Islamic legal history is somewhat different.
- Islamic law was only a component of a variety of native laws and had always remained a system of personal law.

+ Sarawak

- Islamic law in Sarawak developed from three sources:
- The basic written law in the Undang-undang Mahkamah Melayu (Laws of the Malay Court). It is a code of Malay Adat law, the first of its kind in Malaysia. Drafted in 1915 and applicable to muslim malays.
- Since 1955 it has been classified as subsidiary legislation and enforced by the courts by authority of Native Law Ordinance (Cap 51).The Code comprises 65 sections. The Islamic elements is evident in some provisions, but minimal. The code is not a code of Islamic law but local malay laws.



- Legislation referred to as “orders” which concerned Muslims also gave effect to local custom rather than principles of Islamic law. The earliest surviving order was of 1893 on marriage. It was designed to restrict marriage between orang dagang (strangers) and Sarawak women.
- That order was followed by order of 1898 regarding the registration of muslim marriage and divorce. Both orders were consolidated by the Mohamedan Marriage Ordinance 1946.

+ Sarawak

- The most significant legislation was Majlis Agama Islam (Incorporation) order 1954 which established Majlis Islam for Sarawak having the main function of giving advice to the government on Islam and malay custom, the issuing of fatwa on rrligious matters and Malay Customary law and Malay Adat.
- Islamic law administered as part of malay adat law was enforced by the Native Courts until the establishment of the Syariah Courts in 1978 under the Majlis Islam (Incorporation) (Ammendment) Ordinance 1978.

+ SABAH

As in Sarawak, Islamic law in Sabah is found in:

- Law text
- Legislation
- Judicial decisions
- A law text known as Undang-undang Mahkamah Adat Orang Islam, a collection of Islamic law and customary rules codified and accepted by a Conference of Native Chiefs in 1936 (Ammedment in 1941) was intended as a guide for the Native Courts in cases concerning muslims.

+ Sabah

- Compared with Sarawak Undang-undang Mahkamah Melayu, Undang-undang Mahkamah Adat Orang Islam adhered more closely to the Shariah.
- A number of Ordinances were made commencing 1914.
- Under a revised Administration of Muslim Law Enactment, Syariah Courts were established.
- However not many judicial decisions on Islamic law in Sabah during the British administration. There were little distinction between Islamic Law and Native Law.

+ References

- Mohamad Muslehuddin, *“Judicial System of Islam Its Origin and Development”*, Islamic Publications Private Ltd, Lahore Pakistan 1991.
- Farid Sufian Shuaib, Tajul Aris Ahmad Bustami & Mohd Hisham Mohd Kamal, *Administration of Islamic Law in Malaysia Text and Materials*, 2001, MLJ.
- Ahmad Abdul Muniem Al-Bahai, *Tarikh Al Qada fil Islam*.