

## **Colonial Legacies: Islam and State Law in South-east Asia**

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Colonialism made a great impact on the political constitution of the countries of South-east Asia, introducing ideas of a Western-style democracy, parliamentary government and an independent judiciary in place of the autocratic rule of an absolute sovereign and his court. This, of course, was more a legacy of the colonial era than a fact at the time, but today, every country in South-east Asia arguably owes something to the West if only in terms of the idea of a nation state with geographically delineated boundaries. The extent of this debt to the West varies from country to country — in Brunei there are no political parties and the Sultan still governs by decree; Myanmar (Burma) is ruled by a military junta — but everywhere one sees evidence of Western influence in the apparatus of government. Even Thailand, which of course was never colonised, not only has a constitutional monarch, but also an elected parliament.

The way by which the modern nation states of South-east Asia came by their present systems of government varies. In the case of Malaysia and Singapore, the British colonial administration actively sought to leave behind them a parliamentary system of government closely modelled on their own, albeit without the division between upper and lower chambers. In Indonesia, the introduction of a multi-party parliamentary democracy following a unilateral declaration of independence in August 1945, was one of choice. Brunei,

which was a British protectorate from 1888 to 1984, remains a sultanate, but nevertheless has opted for a British-style judiciary and legal system.

### 7.1 Shari'ah vs. State Law

In as far as the application of Islamic law in modern South-east Asia is concerned, and in particular, the relationship of Shari'ah law to secular state legal systems, this has been very much a matter of individual state policy. In Myanmar (Burma), for example, Islam was the faith and personal law of an immigrant community, which came into being under (British) colonial auspices. However, in the half century of independence (Burma gained its independence in 1948), the policy of all Burmese governments has been to crack down on the freedoms of ethnic minorities which are seen as counter-active to the successful implementation of politico-economic programmes such as the "Burmese Way to Socialism". As a result, there has been a mass exodus of the immigrant trading community and the almost complete demise of Islam in Burma. In Southern Thailand, on the other hand, although ethnic Malay Muslims have always been a somewhat disadvantaged minority, Muslim law, though confined to family law, has remained relatively untouched. Even so, various Muslim "liberation" movements had made their appearances and there was even an attempt on the life of the King in 1977 which was ascribed to Muslim separatists.<sup>129</sup> Government policy has, therefore, concentrated upon an integration, perhaps even a forced integration, of the Muslim minority especially through education.<sup>130</sup> The result is that Muslim law, whilst

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<sup>129</sup>See *Times*, 11 October 1977.

<sup>130</sup>See Haemindra, Nantawan, 1977 and Suhrke, Astri, 1970–1971.

formally available in the Thai legal system, is almost certainly informally administered.<sup>131</sup>

In Peninsula Malaysia, Islam is the received religion of the Malay people. During the colonial era, Britain recognised both the Islamic and the indigenous element in Malay sovereignty and it is from this recognition that the contemporary state administration of Islam derives. The religion is entrenched in the State and Federal Constitutions of Malaysia and this formal recognition has made it both a constitutional issue and has also given it a direct relevance in contemporary Malaysian politics. But Malaysia is a multi-ethnic society and its constitution is a secular one with a legal system and judiciary inherited from the British. Historically, this is an interesting situation in that just as English common law was adapted to meet the needs of governing peoples of differing religions and cultures in Malaya, so too was Shari'ah law modified by the colonial experience. In this last respect, Malaysia provides an appropriate case study to illustrate the impact of non-Islamic influences (mainly Western, it must be said) on Shari'ah law in South-east Asia.

## 7.2 British Malaya

The Portuguese conquest of Malacca in 1503, though of enormous import in terms of regional geopolitics, had little direct impact on the lives of the peoples of the Malay Peninsula except those living in the immediate environs of Malacca. Nor did the replacement of the Portuguese by the Dutch in 1641, and it was not until the late eighteenth century, when the English East India Company acquired the island of Penang (Pulau Pinang), off Malaya's north-west coast, from the Rajah of Kedah that

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<sup>131</sup>There are no hard data available, and fieldwork is not possible at the moment.

Western influences first began to infiltrate traditional Malay society.

This was in 1786 and before long Penang became a flourishing entrepôt. But it was not quite the perfect location, being a little too far to the north to take full advantage of the maritime trade between East and West — in those days, before the building of the Suez Canal, the preferred route to China from Europe was through the Sunda Straits that divide Sumatra from Java. Then in 1819, Stamford Raffles established a second trading post on the island of Singapore at the southernmost tip of the Malay Peninsula. Strategically located on both the sea route between India and China as well as between China and Europe, and blessed with a fine natural harbour, Singapore soon became the region's principal commercial centre. Britain acquired Malacca from the Dutch in 1824 and thereafter the three major ports of the Strait of Malacca collectively became known as the Straits Settlements. After the dissolution of East India Company by the British Government in 1858, the Straits Settlements were administered by the India Office before becoming a crown colony in their own right in 1867.

At that time, the whole of the Malay Peninsula (Malacca excepted) was governed by Malay sultans who were frequently at war with one another. This was a largely agrarian society; rivers formed the principal highways and most of the Peninsula was still virgin rainforest, unexplored even by the Malays themselves. By the middle of the nineteenth century, Chinese immigrants — who were being driven to emigrate by increasing poverty and instability in their homeland — began settling in large numbers on the west coast of the Malay Peninsula where they cooperated with local Malay rulers to mine tin. The Chinese organised themselves into clan-based communities whilst forming alliances with rival Malay chiefs, and this soon led to an endemic state of petty warfare

and lawlessness as different Chinese factions competed for the control of mineral resources.

British investors were also attracted to Malaya's potential mineral wealth, but they were concerned about the anarchic state of Malay politics. For a long time the British Government was unwilling to become involved in the affairs of the sultans, but in the end the colonial authorities capitulated to the demands of the mercantile community of the Straits Settlements and on 20 January 1874, a treaty was signed on the west coast island of Pangkor between the British and Sultan Abdullah of Perak, formalising British involvement in the political affairs of the state in the form of a "resident", who was there ostensibly to advise the sultan, but in fact acted as plenipotentiary of the British.

Initial British intervention into Malayan internal affairs was insensitive and heavy-handed — the first British resident to Perak, James W. W. Birch, was murdered by Malays outraged at his autocratic and unseemly behaviour — but the British refined their act, appointed more able representatives, and gradually the resident system was taken up by other Malay states. In 1896, Sir Frank Swettenham was appointed as the first resident-general of a Malay Federation comprising Perak, Selangor, Negeri Sembilan and Pahang, with Kuala Lumpur as the capital. By 1909 the British had pressured Siam into transferring sovereignty over the northern Malay states of Kedah, Trengganu, Kelantan and Perlis; Johor was compelled to accept a British resident in 1914. These sultanates remained outside the federation and were called the Unfederated Malay States. Britain had now achieved formal or informal colonial control over nine sultanates, but it pledged not to interfere in matters of religion, customs, and the symbolic political role of the sultans. The various states kept their separate identities but were increasingly integrated to create British Malaya.

### 7.3 The Introduction of English Common Law to Malaya

“Wherever an Englishman goes, he carries with him as much of English law and liberty as the situation will allow”. So wrote the distinguished Singapore barrister, Sir Roland St John Braddell, in 1921. “When a Settlement is made by British subjects of country that is unoccupied or without settled institutions”, he continued, “such newly settled country is to be governed by the law of England, but only so far as the law is of general and not merely local policy and modified in its application so as to suit the needs of the Settlement”.<sup>132</sup> However, in the case of Penang and Singapore it was argued that since the islands were part of the territory of Muslim sovereigns — the Rajah of Kedah and the Sultan of Johor respectively — the law of the land should therefore be “Muhammadan law”, that is to say Shari’ah law. Naturally, this did not really suit the British, especially as from an early point in the development of both Penang and Singapore, the population had been a largely Chinese one, but it was not until 1872 that the issue was settled in favour of English common law by a ruling of the Privy Council of England.

### 7.4 Out of India

The British may have been responsible for the introduction of English common law to the Malay Peninsula, but from the outset, this was not quite the same institution as one would have found back in the England at that time. In the essentials, yes, but it was English common law which had been modified by the experience of India.

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<sup>132</sup>Cited in Hooker, M. B., *Islamic Law in South-East Asia*, 1984, p. 160.

By the time the island of Penang was acquired from the Rajah of Kedah in 1786, the East India Company had already been established in India for over one hundred years and the principles of the Honourable Company's legal policy in respect of the territories and peoples under its jurisdiction there had been codified in an Act of Settlement of 1781. This proclaimed:

English law is the law of general application, subject to the religions, manners and cultures of the natives, provided these exceptions are not repugnant to justice, equity and good conscience.<sup>133</sup>

Even a cursory reading of this passage indicates its very restrictive nature and the judicial precedent developed throughout the nineteenth and twentieth centuries confirms this. "Religions, manners and customs" came to be defined as family law and charitable trusts, and even within this narrow definition certain practices, valid in religion, were either restricted or forbidden under the "justice, equity and good conscience provision" (e.g. child marriage and aspects of charitable trusts). In most other respects, English common law was to be upheld as the law of the land, which of course greatly restricted the traditional scope of Shari'ah law.

But quite apart from restricting the application of Shari'ah law there were an even more fundamental changes occurring, namely the re-formulation of Shari'ah in terms of English legal processes. Those principles of Shari'ah that were permitted to exist now became described in precedent and their validity and meaning was decided in terms of English legal reasoning. English judicial method absorbed the few principles of Shari'ah permitted to continue and the nineteenth century a new hybrid legal system had begun to emerge, namely

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<sup>133</sup>Hooker, M. B., "Introduction: Islamic law in South-east Asia", *Australian Journal of Asian Law*, Vol. 4, No. 3, 2002, 213 and 217.

“Anglo-Muhammadan”, or “Anglo-Muslim” law. (NB much the same thing was to happen in the case of “Anglo-Hindu”, “Burmese-Buddhist”, “Anglo-Chinese”, and “Malay-*adat* laws in South and South-east Asia during the colonial era”.)

One important consequence was the long-term impact of the English doctrine of precedent. If one wished to know what “Islamic” law was in British India, or subsequently in British Malaya, then one simply looked to the precedent; it was certainly not necessary to refer to the classical Arabic texts. In some instances, court decisions that were actually contrary to Muslim law became authoritative and one can even find cases from the highest level which actually rejected classical Arabic rulings because acceptance would have meant overturning existing local precedent. Other changes were also taking place. For example, Islamic rules of evidence came to be increasingly ignored and marginalised. At the same time, the absence of high-quality training in Islamic law for British judicial personnel impeded recourse to the principles of that law. What this meant was that the twin maxims of “justice and right” and “justice, equality and good conscience”, which originally were devised to fill lacunae in the existing legal framework, were all too frequently used to mask judicial ignorance of Muslim law, thus leading to further application, not only of English law, but also of Roman law and other legal prescriptions.<sup>134</sup> Lastly, the use of English as the court language of a hierarchical general court structure and subsequently of law reporting in the Indian justice system inevitably tended to favour decisions made in accordance with English law rather than local legal precepts.

As this British-formulated legislation, tailor-made for the subcontinent, rather than English law itself, gained in prominence, more and more areas of law were taken outside the

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<sup>134</sup>Pearl and Menski, *Muslim Family Law*, 1998, p. 35.

ambit of “justice, equity and good conscience” and the scope for the application of that maxim, though never totally closed, was greatly curtailed. On the other hand, the scope for the application of Muslim law was gradually reduced, too, so that, ultimately mainly matters of family law, including succession law, came to comprise the South Asian Muslim personal law as it is known today. By 1900, a classically trained Islamic jurist would have been at a complete loss with this Anglo-Muslim law. Conversely, a common lawyer with no knowledge of Islam could have been perfectly comfortable.

### 7.5 Muslim Law in Malaysia

During the colonial era, when the Malay Peninsula was under British rule, Muslim law (Shari’ah) developed in a rather piecemeal fashion, state-by-state. In terms of the treaties and agreements, the Malay States were sovereign States and English law was not formally introduced as in the Straits Settlements (Malacca, Penang and Singapore). Instead, the law applying in any Malay State at the time when it became subject to British protection, remained in force subject only to legislative amendment. Naturally a good deal of English law came in by way of adoption of Indian or Straits legislation and, in addition, an extensive reception was also accomplished by judges in an effort to fill the gaps in the laws of each State. It was not, however, until 1937, when the Civil Law Enactment of that year came into force, that the Federated Malay States had English common law and rules of equity formally introduced en bloc. This Enactment was extended to the other States in 1951 and the matter is now governed by section 3 of the Civil Law Ordinance of 1956 as amended. In short, the formative period in the development of modern Muslim personal law in the Malaya Peninsula was thus a period of rather extensive legal uncertainty, and there was a variation of practice from State

to State; Muslim law was generally accepted as a general law and this continued up to the Second World War.<sup>135</sup> From 1948, States granted jurisdiction over application and legislation of Shari'ah from 1952 to 1978 and new laws promulgated in 11 Muslim-majority States of Malaysia and Sabah (generally entitled Administration of Islamic/Muslim Law Enactments) covered the official determination of Islamic law, explanation of substantive law, and jurisdiction of Shari'ah courts. New laws relating to personal law were enacted in most States between 1983 and 1987.<sup>136</sup>

There is the existence of a three-tier system: at the bottom, the indigenous *adat*, which is as old as time itself and a kind of pan-archipelago cultural base, overlaid by Shari'ah law, with International law on top. This implies that in some areas of the law, a three-way tug of war between conflicting legal systems and requirements may be present.

## 7.6 Conflict between Muslim Law and English Common Law

The English Common Law does not take into consideration the customs and Shari'ah law as stated in the Quran. Thus for Muslims, it is lacking in guiding their way of life in the religious path. With the separation of courts for the English legal system and the Shari'ah system, there is room for inconsistency and if so, a decision has to be made as to which system supersedes the other, according to circumstances.

The Shari'ah, which is at the heart of Islam, can be nothing other than exclusive and though Islam does acknowledge a legal consequence to such ascriptions as "Christian" or "Jew",

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<sup>135</sup>See Hooker, M. B., *Islamic Law in South-East Asia*, 1984, p. 135.

<sup>136</sup>*Malaysia Legal Profile*, Emory Law School (<http://www.law.emory.edu/IFL/legal/malaysia.htm>), 17 June 2004.

or *kitabiyya* (person belonging to different religion, not Islam), for some purposes, this is a personal and limited recognition. Another problem is the emphasis in the Shari'ah on a personal relationship with Allah rather than via institutionalised religious structures. This is perhaps both the strength and weakness of Islam — a strength in the religious sense of providing an immediacy of communication and contact between man and God, and a weakness in the lack of a developed theory of law in relation to political authority. In particular, Islam has found difficulty in coming to terms with the idea of the “State” as developed in Western Europe and exported to the Muslim lands. The main focus of tension here, so far as the present analysis is concerned, has been the question of the validity of the law as practised in English courts in situations where there is a conflict with Muslim law.

According to Hooker, this is the most fundamental aspect of conflicts; in essence it asks: how does one ascertain the proper law to decide a conflict of principle between the tenets of Islam and the laws of the State? The main issue in attempting to answer this question is that neither Islam, nor secular legal systems, of themselves provide an answer. Each must insist on its own application, because each is exclusive, so that the answer to the question is at least partly, if not wholly, a policy matter. That being said, it should be noted that policy choices commonly take legal guises, sometimes quite technically complex ones.<sup>137</sup>

## 7.7 Maria Hertogh: A Case in Point

These general comments bring one to the celebrated Maria Hertogh case in Singapore in 1950 which perfectly illustrates

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<sup>137</sup>See Hooker, M. B., 1984, *op cit*, p. 119.

all the issues just outlined. The background here is as follows: Maria Hertogh was a Dutch Eurasian girl who had been separated from her parents when they were interned in Java during the Japanese occupation and was cared for and brought up as a Muslim by a servant of her parents. Her father traced her whereabouts after the war and attempted to regain custody of his daughter. Although he succeeded in an action brought before the Singapore High Court, there was a complication in that the girl, though only aged fifteen at that time, was already married to a Muslim man. The Court was asked to decide on the validity of the marriage. In fact, it was found that the girl was a Muslim. It was decided, however, both at first instance and on appeal, that the marriage was invalid and a variety of different reasons were put forward, at both levels, to justify this decision. All jurisdictions started from the fundamental private international law (conflicts of law) principle that capacity to marry is determined by the law of the domicile at the time of marriage. In the case of a minor her domicile was that of the father, in this instance the Netherlands. According to this law, a girl had no capacity to marry at the age of fifteen unless certain permissions had been obtained. Naturally these permissions had not been obtained and the marriage was thus declared invalid. The Court's decision resulted in three days of violent rioting by certain elements of Singapore's Muslim community which left eighteen dead and 173 injured.

This is the sort of reasoning, based on an orthodox interpretation of the law in a situation where there was serious conflict of legal principles, that was criticised as being mechanical and unsuitable to the needs of a multi-ethnic society, such as Singapore, in which a variety of religious and racial groups live side by side and as we have seen, resulted in violent political confrontation between Muslims and the State authorities. From the Muslim point of view, the judgement

was an unwarranted interference in what was a perfectly valid arrangement under Muslim law — after all, the Court had also found as a fact that the girl was “Muslim”. This impasse could have been avoided by placing the social implications of a decision before the technical constraints of laws which are not designed to deal with the implications of *internal* conflicts involving personal laws. Such a solution may, however, be thought slightly too radical in that it tends to dispose of a major principle of common law conflicts of laws, viz. that domicile determines the right to decide the application of a personal law.

One of the judgements in the Hertogh case, however, consisted of an ingenious attempt to find a way round the criticisms just made, whilst simultaneously giving effect to English conflicts of laws principles. Justice J. Brown began from the proposition that because the girl was Muslim and the marriage was valid according to Muslim law, it was the latter which must determine validity. He then found that Muslim law required validity to be judged by the law of the place of contracting; this was taken to be a reference to English law and, by extension, to the English conflicts of laws. This view rests upon an equation of contracts of marriage with all other contracts under Muslim law. In the event, the domicile rule prevailed, despite the fact that dependent domicile — in this case the Netherlands — had nothing to do with the concept of one’s home nor with the relevant religion.<sup>138</sup>

Countless other instances could be given of conflicts arising out of differences between English law and Shari’ah law in former British colonies, but they would do no more than underscore the point that has already been made by the Maria Hertogh case, namely that at a general level, the two

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<sup>138</sup>Hooker, M. B., 1984, op cit, p. 120.

systems of law are all too often incompatible making conflict inevitable and indeed endemic. The situation is complicated still further by the possibility of conflict between statutory laws and legal precedents as well as the private international law aspect.

## 7.8 Post-Independence

In 1957, the newly independent Malaya opted for a continuation of the existing British legal system, but the recent history of Islamic legal administration in Malaysia has been one of a continuing development towards a more direct and exact implementation of Islamic precepts. In the colonial era, the legal administration was primarily concerned to implement only those precepts that were immediately required so as to avoid offending the religious sensitivities of the Malay peoples. In effect this limited Islamic law to "Muslim family law" and the latter was further restricted in some places and for some subjects by local customary law or *adat*.

Since Malaysian independence, however, there has been a move towards a more complete and comprehensive expression of Islamic legalism. The legislature and the Religious Courts have been an important element in this, as has the creation of the State Religious Departments. A significant move was the formation of the National Council for Islamic Affairs in 1968, which later was incorporated as Religious Affairs Division of the Prime Minister's Department in February 1974. From its inception the Council had a Fatwa Committee whose function was to make rulings for the Conference of Rulers. The membership consisted of the Mufti (an attorney in Islamic law) of each State plus a Muslim appointed by the Conference from among the officers of the (secular) Judicial and Legal Service. The Council also had a number of ad hoc committees which

dealt, *inter alia*, with reviews of the polygamy and divorce laws, the Muslim calendar and the Shari'ah Courts. The Council has also sponsored the publication of a series of translations of *hadith*, a first volume of which (*Mukaddimah Mastika Hadith Rasulullah*) has been published. The Council also provided training courses for Muslim missionaries and lectures to State officers on religion.

No doubt, these developments can be seen as a reflection of a desire to demonstrate independence from the colonial past. At the same time, though, as this brief historical overview clearly demonstrates, despite the fact that the common South-east Asian Islamic experience of the past century and a half has been one of subjection to secular forces, Islam, as a religion, is more than the sum of individual experiences, hence present-day demands, which are usually expressed politically, for an increase in the "Islamic" as opposed to secular content of law.

Nevertheless, despite these measures, there still remains an inherent conflict between state law and Muslim law in contemporary Malaysia — the lasting legacy of the formative influence English common law on Malaysia's legal system. To a large extent this situation is unavoidable given that Malaysia's secular constitution and multi-ethnic population militates against the adoption of Shari'ah as the state law. In this last respect it is interesting to note that although recent years have seen the more heavily Islamicised states within Malaysia — notably Trengganu and Kelantan — agitating for the adoption of Shari'ah law, the crushing defeat of the principal Islamist parties in the 2004 general elections seems to indicate that the majority of modern Muslim Malaysians would prefer to continue with the present legal system despite the inevitable tensions and contradictions between English common law and Shari'ah. All the same, there can be no doubt that the

gradual move towards a more complete and comprehensive expression of Islamic legalism since independence has helped to pave the way for the implementation of Islamic banking over the past twenty-five years as we shall see in the next chapter.