

THE INFLUENCE OF ENGLISH LAW FOR THE LOCAL: A STUDY ON THE ADMINISTRATION OF ISLAMIC LAW OF INHERITANCE IN MALAYSIA

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Abstract

Malaysia happened to be under British sovereignty for almost 150 years. Under the British influence, it was the principle of British authority to not interfere with local customs and religion subjects. Under the application of law, beliefs and customs were considered local personal matters and thus, both were administered by local laws. As for Muslim, the Islamic law was their local law as well as customary practise of which were the essence construct in various matters of their daily life. Nevertheless for the application of the law, as the court of hearing was the English court, English judges had to honour the *ecclesiastical* jurisdiction in order to interpret and comprehend the “local law”. This somehow, led to application of certain principles of English law in the local subject matters. As a result, some of the English laws were enforced to local people including Muslims, which indirectly deprived the application of Islamic law. For instance, the court allows the desire of the deceased in dividing his estates although it goes beyond one-third of the estate. The desire was contravened to the principle of bequeatable-third in which lessen the portion of the rest of heirs from their exact values. On the contrary, the application of English law in procedure of the administration of inheritance law also have benefit the Muslims which makes the process of claim smooth through probate and letter of administration. Therefore, this paper is at aim to analyze the weight of English’s law influence in Malaysian law of inheritance especially for Muslims, its sustainability and challenges from past hitherto. The discussion also intends to elaborate the progress as well as the regress of the law, by studying the statutes and cases of which was passed through years in the country, and to make remark on the status quo of the *common law* in the matter of Islamic law of inheritance in Malaysia nowadays.

The Influence of English Law for the Local: A Study on the Administration Of Islamic Law of Inheritance in Malaysia

Introduction

English law was also known as *Common Law*, which has been enforced in England since 12th Century. It was introduced in Malaya during the occupancy of British in the country. In general, *Common Law* was defined as “general law” or “the law for all” that was applied to every region under English sovereignty along with several principles and maxims extended, including to Malaya, for the benefit of local people.

Essentially, there are two elements that absorbed English law into local law, first, by codifying statutes of the same law which has been practised in England; and second, by following past judgement on the similar issues. The latter practise was recognised as the doctrine of “judicial precedence”. As a result, both factors work hand in hand in applying the principle of Common Law in the local court. In this case, substantives code and precedent findings become two essential elements which import the law in the country. The former operates as an application of static’s theory whereas the latter as a dynamic premise. In this case, the concept of law does not merely deduced from certain phrase of statutes, but was also constructed from reasons and findings of learned judge. Thus, judges play an important role in the development of Common Law through observation in particular cases. The findings of the court as well as interpretations given, will bind later cases that stand on the same point of law. As such, it established influences of English law for the local in the country.

The History of Common Law in Malaya

In early administration of colonial offices in Malaya, British government applied the “Rules of Natural Justice”. This rule was developed under common sense of justice, which tended to achieve fairness in the minimum standard of fair dealing for both parties. As the matter of fact, the principle has been established in England since 1320, whereby judges have to reach the standard of equality in the judgement. To achieve this, the practise of natural justice in

Malaya was clearly underlined through Section 16, *Instructions of Sir George Leith* dated 15th March 1800.¹ Apart from expanding the application of natural justice, the instruction also work as guidance for judges while handling local matters.

Apart from the instruction, the applications of English law were also influenced by interpretations made by judges, either in translating certain phrases, construing statutes or elaborating on particular circumstances. As learned judges were well graduated under England law, arguments and situations were perceived in the method of English's law perspectives, as well as their interpretations on scenarios and cases. In other word, their considerations always incline towards familiarity of law and procedure that have already implanted in their minds, hence resulting to the influence of English law in the local matters.

Apart from the absorbing of the English law, judges must also take notes on the aspects of customary practices and beliefs. It was a principle of *ecclesiastical's* jurisdiction that customs and beliefs of local people should be acknowledged and respected. Thus, the enforcement of English law should consider the local adherence's and their customs, to ensure the right laws are applied on them. In this case, there are laws that can be imposed to all people, irrespecting of beliefs and customs, and in meantime, there are also laws which only suitable to particular group of society. The former is law which operate for all people and any transgress of the law will put society as well as country in chaos and unstable.² While the latter referred to specific law which associated to particular beliefs and customs. The latter was more personal and focuses more on particular group, and differ from one community to another, and any transgress of the law does not affect the other community. Therefore, the latter law should be free from other interferences of any foreign laws, and are applied entirely to such community. In respect of the above scenario, *English-Dutch Treaty 1824*³ had underlined a principle of not interfering the local personal matters of which the law for the community is their local laws. The principle rule has been recognised as *ecclesiastical jurisdiction*.⁴ It was enforced in the memorandum made by Sir Stamford Raffles and Temenggong of Johore in year 1823 under the 6th *Regulation Rule* which provided:⁵

“6th. In all cases regarding the ceremonies of religion, and marriages, and the rules of inheritance, the laws and customs of the Malays will be respected, where they shall not be contrary to reason, justice or humanity. In all other cases the laws of the British authority will be enforced with due consideration to the usages and habits of the people.”

The principle of non-interference into local law was a gesture of respect to local practise, which clearly aimed to ensure reason, justice and fairness.⁶ In this case, Sir Benson Maxwell C. J. had stressed:⁷

“Mahomedan and Hindoos, their law are part of their religions, and that the Charter includes the former when it mentions the latter..... to such modifications as are necessary to prevent it from operating unjustly and oppressively on them..... it would be impossible to apply our law to Mahommedans.”

It is obvious from the above judgment that the local beliefs and customs were part and parcel of justice considerations. It also portrays that English law cannot be applied entirely, as local community also has its own rules and legislations.

¹ *I Ky. xi*. See also H. P. Clodd, *Malaya's First British Pioneer the Life of Francis Light* (London: Luzac & Co. Limited, 1948), 95; Tan Soo Chye, “A Note on Early Legislation in Penang”, *JMBRAS* XXIII (1950): 101.

² Also known as “Lord Teignmouth's Regulation” - Governor-General of East-Indian Company. M. B. Hooker, “the East India Company and the Crown 1773-1858”, *Malaya Law Review* 11:1 (1969): 22; L. A. Mills, “British Malaya 1824-1867”, *JMBRAS* 1:II (1925): 45.

³ On 17th March, 1824. See “Copy Treaty Between Raffles And The Sultan Of Johore For A Settlement At Singapore, 6th Feb. 1819”, File “G/34/10, ff. 127-31”, in *G/21-40 East India Company Factory Records c1595-1858* (London: British Muzium). See also M. B. Hooker, *The East India Company*, 27.

⁴ *Ong Cheng Neo v. Yeap Cheah Neo*, *Ky.* 1 (1872): 326.

⁵ *Treaties with Native States*, (Part III: 1877), 13; H. A. O'Brien, “An Old Minute by Sir Stamford Raffles”, *Journal of the Straits Branch of the Royal Asiatic Society (JSBRAS)* 24 (1891): 9; L. A. Mills, *British Malaya 1824-1867*, *JMBRAS* 1:II (1925): 65.

⁶ *Rodyk v. Williamson*, *Ky.* 2 (1834): 9; *In Goods of Abdullah*, *Ky.* 2 (1835): 8; *Moraiss v. de Souza*, *Ky.* 1 (1838): 27; *Reg. Lawan Willans*, *Ky.* 3 (1858) 16; *Fatimah v. Logan*, *Ky.* 1(1871): 255.

⁷ *Choa Choon Neoh v. Spottiswoode*, *Ky.* 1 (1869): 216.

In inheritance, the starting point of English's law influences were resulted from the lacunae in the law of procedure, which was deficient in provision pertaining to letter of administration and probate. Based on report from Dickens J., he clearly pointed out the difficulty in trial of inheritance without gratifying the lacunae:⁸

“the law of nature give me no precepts respecting the right of disposing of property by wills and testaments, the rights of succession and inheritance, and the forms and precautions necessary to be observed in granting Probates of Wills and Letters of Administration to Intestates' effects.”

The similar difficulty had been pointed out by the other judges, such as Phillip and Robert Farguhar.⁹ For them, the local law does not provide adequate resources and guidelines in the process of administering inheritance.¹⁰

As a result, under the 1st Charter of Justice 1807, the procedure of English law which guides the forms and precautions in granting Probates of Wills and Letters of Administration were applied by the Recorder Court.¹¹ The regulations affected to all citizens and nations, irrespective their beliefs or customs.¹² The law has its retrospective effect, which covered all civil applications including before year 1807.¹³

Common Law Statutes Pertaining to Inheritance

In early days of Malaya, British government had divided the country into two different regions, Straits Settlements and Malay States. The separation of regions reflected to different jurisdiction of law, where the former acknowledged the English law as *lex-loci*, whereas the latter considered the personal law as *lex-loci*.

Straits Settlements

Having said that English law was *lex-loci* here, the application of Common Law was occurred in Straits Settlements was almost entirely. At this period, English law of inheritance was applied based on the *Indian Act XX of 1837*.¹⁴ Similarly in the application of wills, the *Wills Act XXV* was introduced and passed in 8th October 1838, later was known as *XI's Ordinance of 1902*. The origin of the act was based on the *Statut & Wm. IV and I Vic. c. 26*, and the *George IV Act 85* of which based on the law of distribution of England. The *1838 Act* was also referred in the case of *Tengah Chee Nachias versus Nacodah Merican and others*.¹⁵ Apart from the statutes, there were also precedent cases from India which were referred regularly. For instance in the matters pertaining of transferring estate, local case *In the Goods of Cauder Mohuddeen (1870)*¹⁶ and *Haleemah versus Bradford (1876)* followed the remarks which were given by Indian court.¹⁷

It is obvious that the *lex-loci* of English law took the domination of Common Law in the region. As such, the distribution of estate mimicked the English law and hence causing conflict to Muslim decree. For instance, the recognition of adopted child who was treated as equal to biological child. This is totally against the rule of Islamic law. Apart from adoption, non-Muslim heir was also recognised as legal heir for Muslim deceased. Referring to a case from Singapore High Court year 1869,¹⁸ the court had recognised non-Muslim as legal heir, contrary to the principle of parity of religion in Islamic law as a condition to inherit.¹⁹ The ground given by the court, English law

⁸ R. O. Winstedt, *Britain and Malaya 1786-1941* (London: Longmans, Green and Co., 1944), 24.

⁹ Roland St. John Braddell, *The Law of the Straits Settlements: A Commentary* (Singapore: Kelly and Walsh Ltd., 1932), 10-11.

¹⁰ After heard the case of *Palangee lawan Tye Ang* and *In the Goods of Ethergee, deceased*, *Ky.* 1 (1803): XIX.

¹¹ Act No. XXIII 1855, *An Act to Amend the Law Relating to the Administration of the Estates of Deceased Persons Charged with Money by Way of Mortgage*. H. P. Clodd, *Malaya's First British Pioneer the Life of Francis Light*, (London: Luzac & Co. Ltd., 1948), 94; L. A. Mills, *British Malaya*, 46.

¹² *Ong Cheng Neo v. Yeap Cheah Neo*, *Ky.* 1 (1875): 326.

¹³ *Kamoo v. Thomas Basset*, *Ky.* 1 (1808): 1. James Foong, *Malaysian Judiciary: A Record from 1786 to 1993* (Kuala Lumpur: MLJ Sdn. Bhd., 1994), 2; M. B. Hooker, *The Law of the Straits Settlements: A Commentary* (London: Oxford University Press, 1982), 3-14.

¹⁴ *Rodyk v. Williamson (unreported decision of 1348)* and *In the Goods of Abdullah*, *Ky.* 2 (1835): 8. M. B. Hooker, *The East India Company*, 32.

¹⁵ *Ky.* 4:267. Refer Section 21, the Act of 1838.

¹⁶ *Leic.* 281

¹⁷ *Leic.* 383

¹⁸ CO 273/74, Straits Settlement Jun – Dec. 1874

¹⁹ *1 Ky.* 386.

was the law for the colony since year 1826.²⁰ Ironically, the application of the law was in contrast with the approach that has been underlined during the early days of the coming of colonial to not interfering with local beliefs and practices.

Similarly in the case of wills as *In the Goods of Abdullah (1835)*,²¹ the court accepted the desire of the deceased to transfer the whole of his assets by wills, though it contravened to Islamic principle. However, the judge interpreted the desire of the deceased as lawful and goes well with the law that applied in the region. So, the will was decided to be valid and enforceable,²² regardless of the principle in Islamic law that only one-third of the estate could be distributed under the method of will.²³ The influence of English law also apparent under bigamy marriage, in which Sir Benson Maxwell in his report to British Secretary has stressed the difficulty in the implementation of Islamic law within English law of inheritance, as it was said:²⁴

“It would seem very difficult, for instance,..... to declare the eldest son of a Mahomedan not to be the heir, because his father had two wives at once, and he was the son of the second marriage. But whatever degree of accomodation might,... the foundation of the law remains the English law of inheritance.”

Based on the above discussions, it is clear that implementation of English principle was so overwhelming within the Straits Settlements. It also proved that the doctrine of *ecclesiastical* jurisdiction which was applied is so narrow. The influence of English law took place under various methods such as by substantive rule, judicial precedent or interpretation made by judges and in the law of procedure.

The first substantive law for Muslim was clearly provided in *Mohammedans Marriage Ordinance No. V/1880*.²⁵ The ordinance consists of law of marriage, divorce, inheritance and excetras. The inheritance matters were printed in part III of the Ordinance, under the title “Effect of Marriage towards Property”.²⁶ Section 27 (II) of the Ordinance guaranteed that nothing of the provisions should interfere a Muslim from transferring his property under Islamic law. However it was an irony when the law was interpreted in opposite understanding of which that a Muslim has to declare his desire to follow Islamic Law in advance, or otherwise the distribution will tag on English law.²⁷ In other word, the condition of *lex-loci* law in the Straits Settlement had recognised the basic law for the people as English law.²⁸

Therefore, the provision of English law was provided in the ordinance. It underlined that every Muslim child will inherit in equal allocation *per capita* and for grandchild *per stirpes*. The rights for spouse are also not in sync with Islamic law as well, that if there are no children, a husband will get one-third of the property. However, the husband will receive the whole estate if there is no heir at all.²⁹ In meantime, if a husband dies, wife will get one-third if there are children or next of kin, and a half if there is wife alone.³⁰ These underlined provisions strictly contravened to Muslim’s inheritance law (*al-fara'id*) as the share for husband basically is either a quarter or half, while the share for wife is either one-eighth or a quarter, with or without children.³¹ Nevertheless, the ordinance also

²⁰ Based on 3 & 4 Wm. IV c. 85 Statute

²¹ *Ky* 2 (1835): 8.

²² Ahmad Ibrahim, “Muslim Wills in Penang”, *JMCL* 6:1, (1979): 126-128.

²³ L. A. Sheridan, “Property”, ed. L. A. Sheridan, *Malaya and Singapore The Borneo Territories – The Development of Their Laws and Constitutions* (London: Stevens and Sons Limited, 1961), 354.

²⁴ *Ky*. 3:29.

²⁵ CO 274/3, Straits Settlement Acts 1877-1884; M. B. Hooker, *Islam in South-East Asia* (Leiden: E. J. Brill, 1988): 171; see also *Ordinance No. IX of 1880*, CO 274/3, Straits Settlement Acts 1877-1884, “An Ordinance to provide for the protection of the Estates and Effects of Persons Dying Intestate without Known Kin”, 268.

²⁶ Part III only consists of one section, which is Section 27, with 19 of sub-sections. CO 274/3, Straits Settlement Acts 1877-1884, 244-246.

²⁷ *Ong Cheng Neo v. Yap Kwan Seng*, *S.S.L.R. Supp.* 1 (1897): 1.

²⁸ Section 27 (XIX). CO 274/3, Straits Settlement Acts 1877-1884, 244.

²⁹ CO 274/3, Straits Settlement Acts 1877-1884, 244.

³⁰ Section 27 (IV). CO 274/3, Straits Settlement Acts 1877-1884, 244.

³¹ *Re Mutchilim*, *M.L.J* (1960): 25.

provided the phrases that are synchronize with Islamic law. For example, wives in polygamy marriage will share the share among them equally,³² and only four legal wives will inherit the property.³³

Resulting of the conflicts, the Ordinance of 1880 was amended for several times to comply with the Islamic law, such as by *Mohammedans Ammendment Ordinance* No. XXV/1908, No. 26/1920 and No. 26/1923. In the new provision, Section 27 was re-phrased to suit with the Islamic law which stated that if someone dies intestate after 1st January of 1924,³⁴ the property will be distributed according to Islamic law, unless it contravenes to customary practise. In this case, it seems that the ordinance acknowledged the customary practise at higher level in comparison to Islamic law. Thus it was no wonder that in the new ordinance, the law permits non-Muslim heir to inherit the property of Muslim deceased.³⁵ The same proviso reserved in the *Muslim Ordinance of the Law of the Straits Settlements 1926*.³⁶

In other perspective, the court has own jurisdiction and liberty in implementing the law. The influence of English law is still adhered as the court has liberty in issuing probate or administration letter to other next of kin after a husband dies, rather than a wife.³⁷ While Section 31 has provided that after a wife die, a son is a foremost candidate to receive probate or letter of administration, comparing to other heirs, for example husband, daughter, parents or siblings. Priority will be given to male over female heirs if they are at the same level of equivalence.³⁸ The Ordinance was amended again in year 1934 under the *Chapter 57 Revised Laws of the Straits Settlements 1936*, which known as *Mohammedans Ordinance 1936*. The ordinance was put effective in Penang, Malacca and Singapore until year 1959, two years after independence.³⁹

Apart from the judicial precedent and substantive law, the process of getting evidence and its binding to the court is another issue of influence factor. Courts have jurisdiction to consult for evidences and explanations, either from an experts, such as Muslim scholars, or from the book, such as the Koran and traditions.⁴⁰ Even though the verifications are not tie judges, the given evidences have assisted judges in comprehending the case in proper manner.⁴¹ It was stipulated in the *Ordinance of 1926*,⁴² that judges have liberty in referring to any Koran translation, Book of *Mahomedan Law*,⁴³ *Minhaj et-Talibin*,⁴⁴ and *A Digest of Mahomedan Law*.⁴⁵ In year 1934, another reference was added entitled, *Anglo-Muhammadan Law*.⁴⁶ These evidences will aid judges in their verdicts as were stressed in *Syed Ibrahim bin Omar al-Sagoff lawan Attorney General (1948)*,⁴⁷ in which to ensure justice and fairness towards local community.

Notwithstanding that the consultation for evidences and amended statutes have already been taking place, the influence of judicial precedent still affects recent cases. For instance, the judgement and principle that was made

³² Section 8 (v) Ordinance No. 101 (Court) according to Ordinance No. XXX year 1907 and Ordinance No. XI year 1910 and No. 26 year 1921; CO 274/3, Straits Settlement Acts 1877-1884, 241; Rolland Braddell, *The Law of the Straits Settlement*, 89.

³³ Section 27 (V), Ordinance V/1880. P. Balan and Rafiah Salim, "Akta Pembahagian 1958", *JMCL* II (1984): 180.

³⁴ Part III of the Ordinance.

³⁵ Section 27 (V), Ordinance V/1880; Section 2, Ordinance No. 26 (Mahomedans) Amendment Ordinance, 1923. CO 274/17 - Straits Settlements, Act 1923. Ahmad Ibrahim, *Mendekati Sejarah Undang-undang di Malaysia dan Singapura*, trans. Muhammad Bukhari Abd. Hamid (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1995), 41.

³⁶ Section 27, Ordinance No. 26/1926, *Cap. 57 of the Law of Straits Settlements 1936*.

³⁷ Section 30, and 31 Ordinance No. 26.

³⁸ Original provision is Section 27 (IX), *Ordinance V. of 1880*.

³⁹ Zaini Nasoha, *Pentadbiran Undang-undang Islam di Malaysia Sebelum dan Menjelang Merdeka* (Kuala Lumpur: Utusan Publications and Distributors Sdn. Bhd., 2004), 42-46.

⁴⁰ *Tijah v. Mat Ali*, *Ky.* 4 (1886): 124.

⁴¹ *Teh Rasim v. Neman* (Perak Supreme Court No. 232/1919), *Haji Ramah v. Alpha and Others* (Selangor Civil Suit No. 54/1924), *Wan Mahatan v. Hj. Abdul Samat* (Ipoh Civil Appeal No. 27/1925), *Rasinah v. Said* (Commissioner of Lands Appeal No. 26/1926).

⁴² Section 29 (1) Amendment Ordinance No. 26 (Mahomedans)

⁴³ Editor by Syed Ameer Ali.

⁴⁴ Editor by al-Nawawi from Shafi'i's doctrine which was translated by Howard.

⁴⁵ Editor by Neil B. E. Baillie which contribute to Shi'i's teaching. Section 2, Ordinance No. 26 (Mahomedans) Amendment Ordinance, 1923. CO 274/17 - Straits Settlements, Act 1923.

⁴⁶ Section 5, the Amendment Ordinance of No. 35. Roland Knyvet Wilson, *Anglo-Muhammadan Law: A Digest* (London: W. Thacker, 1912).

⁴⁷ *M.L.J* (1948): 155.

*In the Goods of Abdullah (1835)*⁴⁸ remain binding the later cases until 1990th, as elaborated *In the Estate of Shaikh Mohamed bin Abdul Rahman bin Hasim (1974)*.⁴⁹ The influence was due to the enforcement of the *Civil Laws Act 1956*, as well as the implementation of the *Muslim Law Enactment 1959*, in which both statutes still recognised the application of English law principle.⁵⁰ In fact for Malacca and Penang, the *Muslim Ordinance 1936 (Chapter 57)* is still put into force,⁵¹ including Part I and III which consist the provisions of wills and inheritance.⁵² The provisions have only been repealed in year 1991 for Malacca,⁵³ and in year 1993 for Penang.⁵⁴ It shows that even after 34 years of independence,⁵⁵ the principle *In the Goods of Abdullah (1835)* are still followed and giving its influence.⁵⁶

Malay States

In the Malay states, the sovereignty of Malay Sultanate was respected as well as the application of local law. Thus, the law of the land is the Islamic law and customary practises. The application of English law has to be acclimatized with the local practise, by giving extra consideration on communities' tradition.⁵⁷ As a result, personal law was respected and English law was applied only in the matter of administrative law, provided it does not interfere with personal beliefs.⁵⁸ All those parameters were in line with the *Treaty of Pangkor 1874* as well as *Treaty of Federation 1895*, in which the local beliefs and practices should be valued.⁵⁹

Therefore for Muslims, Islamic law was their *lex loci*, which should be applied exclusively in their personal matters. In meantime, the role of Muslim scholar as an expert in the law was mostly involved in the trial.⁶⁰ As in the matter of inheritance, the roles of Muslim scholar or kathi were to determine the legal heir as well as to ascertain the share of them under the law,⁶¹ as clearly elaborated in *Re Haji Pais, decd. (1928)*.⁶² Apart from these, kathi also had to give evidences on any provision which related to Muslim's personal law, such as, on the issue of ownership, distribution of property after divorce, endowments, wills and gifts.⁶³ However, the evidence was only reserved in the scope of "advising" rather than as "witnessing", in which the former did not bind courts to follow.⁶⁴ More to the

⁴⁸ Ky. 2: 8.

⁴⁹ *M.L.J* 1 (1974): 184.

⁵⁰ Malacca No. 1 year 1959; Penang No. 3 year 1959

⁵¹ *Cap. 57 of the 1936 Edition of the Laws of the Straits Settlements*

⁵² The provision of Section 171 (2), Malacca and Section 172 (2), Penang

⁵³ Section 78, The Administration of Islamic Law Enactment of Malacca No. 5 year 1991, which repealed Part X, Enactment No. 1 year 1959 which applied the past *Chapter 57*.

⁵⁴ Section 110, The Administration of Islamic Law Enactment of Penang No. 7 year 1993, which repealed Part X, The Administration of Islamic Law Enactment of No. 3 year 1959.

⁵⁵ Ahmad Ibrahim, "Muslim Wills in Penang", *JMCL* 6:1 (1979): 130; Abdul Monir Yaacob, "Syariah dan Common Law di Malaysia", *Jurnal IKIM* 2: 1 (1994): 124.

⁵⁶ Ky. 2: 8.

⁵⁷ P. Balan and Rafiah Salim, *Akta pembahagian 1958*, 181; M. B. Hooker, *Islam in South-East-Asia* (Leiden: E. J. Brill, 1988), 170.

⁵⁸ R. H. Hickling, *Malaysia Law* (Kuala Lumpur: Professional (Law) Book Publisher, 1987), 10; R. W. G. Maxwell dan W. S. Gibson, *Treaties and Engagement Affecting the Malay State and Borneo* (London: James Foong, 1924), 25.

⁵⁹ Clause IV, *the Treaty of Federation of 1895*.

⁶⁰ *Teh Rasim v. Neman (1919)* Perak Supreme Court No. 232/1919.

⁶¹ CO 716/1, Kedah and Perlis Annual Report 1905-1920

⁶² Kuala Pilah Distribution Suit No. 32/1928

⁶³ Tahun 1907. See CO 273/302-Perak Enactment No. 18 of 1904, "The Datoh Panglima Kinta's Intestate Estate Enactment 1904", FMS Despatch No. 32530, Document No. 422, p. 497; Perak Government Gazette No. 7, v. XVIII, March 10, 1905, CO 467/16; J. M. Gullick, "William Maxwell and the Study of Malay Society", *JMBRAS* 64: 2 (1991): 8.

⁶⁴ *Teh Rasim v. Neman (1919)*, Perak Supreme Court No. 232; Another example which consulting the kathi in cases of inheritance, *Haji Ramah lawan Alpha & Others (Selangor Civil Suit No. 54/1924)*, *Wan Mahatan lawan Hj. Abdul Samat (Ipoh Civil Appeal No. 27/1925)*, *Rasimah lawan Said (Commissioner of Lands Appeal No. 26/1926)*, *Re Noorijah (Selangor Civil Appeal No. 44/1934)*.

point, there was also provision for the court to consult State in Council in the matter of religion and customs,⁶⁵ as provided in Section 2, *Muhammadan Law and Malay Custom (Determination) Enactment 1930*.⁶⁶ The Council was led by the Sultan and such advices should bind the court.

However, based on past practice, there were problems occurred in determining the exact term for “local law”. There were two possibilities in terminology, either Islamic law or customary practice. In fact, the meaning differed depending on issue of the problem and source of such particular issues. Thus, case has to be engaged on the right source of jurisprudence. Conflicts would arise if the wrong source of law is referred. For instance, in the case *Matusin bin Simbi versus Kawang binti Abdullah (1953)*,⁶⁷ Williams C. J. have interpreted the term of *racial law* which would be enforced on Malay Brunei as an Islamic law. The decision was based on the provision in Section 14, *North Borneo Procedure Ordinance 1926*.⁶⁸ However, it was provided that the *racial law* should not contradict to other provisions that were enforced in the state. Unfortunately, the principle of Islamic law was not in sync with the provision in Section 7, *North Borneo Civil Law Ordinance 1938*⁶⁹ which accepted adoption as biological children and considered the adopted child as legitimate heirs. Williams C. J. said in his judgement:⁷⁰

“By section 7 of the Civil Law Ordinance, No. 2 of 1938, adopted children are to be treated as legitimate offspring. Under the Hukum Shara’h adopted children take nothing on intestacy but, in my opinion, in this case the Hukum Shara’h must be applied subject to the law relating to adoption in North Borneo.”

As a result, the court decided that the adoption of children in this case, of which consisting of two sons and a girl were to get residuary of the estate (*asabah*), while the wife of the deceased obtained one-eighth of the shares, calculating that there were children with the deceased.⁷¹ The case portrayed an example in the customary law, that when a contradictory occurred between Islamic law and customs, the colonial court always prefers to follow customary practice rather than Islamic law. Meanwhile in a case of customary tenure, the perception of an English judge pertaining to the issue was clearly elaborated in *Shafii versus Lijah (1949)* as below:⁷²

“It seems to me clear and I accept the evidence of Lijah accordingly, that the deceased Abdul Majid acquired this property for the benefit of his widow and adopted daughters. He did not contemplate the administration of his estate in accordance with the inheritance scales contained in Shafii Mohammedan Law. He intended some form of local customary law to apply, although he was probably quite vague as to detail or principles. Therefore ... I distinguish the two Adats and rule that the Adat Temenggong should apply.”

It is obvious that under the Common Law, the court was highly reflecting on the intention of the deceased. Although the personal law was a subject matter, the desire of the person was still taken into consideration of the court and hence, favoured the customary practice. The similar approach was decided in the case of *Re Tiambi (1904)*,⁷³ when the court determined that the debt of the deceased which took place during his bachelorhood or widowhood shall be put on the shoulder of his maternal kindred as per matrilineal law ruling.

⁶⁵ Section 4, Enactment No. 4 year 1930 and *Chapter 196*; Ahmad Ibrahim, “Towards an Islamic Law for Muslims in Malaysia”, *JCML* 12 (1985): 43.

⁶⁶ Enactment No. 4 year 1930; *Chapter 196, the Laws of the Federated Malay States 1935*.

⁶⁷ (1953) *S.C.R. 106*, *Fail Mahkamah Rayuan No. 4/1953*.

⁶⁸ No 1 of 1926

⁶⁹ No. 2/1938. M. B. Hooker, *The Personal Laws of Malaysia An Introduction* (Kuala Lumpur: Oxford University Press, 1976), 48-49, 51, 120; Ahmad Ibrahim, “The Administration of Muslim Law in South-East Asia”, *Malaya Law Review* 13:1 (1971): 157.

⁷⁰ Ahmad Ibrahim, *Inaugural Braddell Memorial Lecture: Towards A History of Law in Malaysia and Singapore* (Singapore: Stamford College Press (P) Ltd, 1970), 84.

⁷¹ Ahmad Ibrahim, “The Status of Muslim Women in Family Law in Malaysia and Brunei”, *Malaya Law Review* 6:2 (1964): 362.

⁷² *M.L.J* 15: 65

⁷³ *Innes* (1904): 285; James McCabe Reay, *A Digest of Reported Cases 1897-1925* (Kuala Lumpur: FMS Government Press, 1929): 82.

Based on practices, it was apparent that most of the application of customary laws occurred in the matter of customary tenure. The Islamic law only applied on non-customary land. The scenario is analogous to that the law always follow the land, rather than the people's faith. The situation can be seen in the case of *Indun versus Haji Ismail and Others* (1937), which is said;⁷⁴

“the only land which can now descend according to custom is customary land coming within the *Customary Tenure Enactment* (Cap. 125). As regards Malays the *Muhammadan* law governs the distribution of non-customary land.”

The recognition of customary law above was an outcome of the written law (*Chapter 125*) which stressed on the application of customary ruling. As a consequence, customary tenure⁷⁵ in Negeri Sembilan,⁷⁶ Malacca⁷⁷ and Sabah⁷⁸ is still on enforced till these days.⁷⁹ In addition, the application of customary law were also acknowledged by the *National Land Code 1965*⁸⁰ and *Probate and Administration Act 1959*⁸¹ which read together with Part Three (III) of the *Small Estates (Distribution) Ordinance 1955* (Act 98).⁸² The application of these statutes were obviously utilized in the case of *Dato' Menteri Othman bin Baginda & Anor versus Dato' Ombi Syed Alwi bin Syed Idrus (1981)*⁸³ and *Tijah bte Hassin versus Pentadbir Tanah Daerah Alor Gajah & Anor (1994)*.⁸⁴ In a nutshell, it seems that the application of customary tenure always deprive the Islamic law.

Actually, the foundation of English law was established through the *Civil Law Enactments of 1937*. It was provided that, English law as enforced in England in 1937 shall be applied to local, in cases where no specific legislation has been enacted.⁸⁵ The *Civil Law Enactments of 1937* was extended to Unfederated Malay States in 1951 and five years later, the jurisdiction was practiced in the Federation of Malay States through *Civil Law Ordinance of 1956*. Sabah and Sarawak accepted the ordinance in 1971 of which was expanded to the states under the *Civil Law Act 1956*. Based on the *1956 Act* as well, the applications of English law have been enforced to the whole country, as per the law in England on 7th April 1956.

Apart from the influence of English law, there are some other lands in which under the conditional holding that were not in line with Islamic law. For example, the *Group Settlement Act 1960*⁸⁶ which has been underlined on a special regulation that limit the ownership of the land. Section 14, of the said Act (Amendment 2002)⁸⁷ has provided that the rural area lands have to be alienated and hold together by not more than two owners. Consequently, some of the deceased's heirs could not inherit the land as stated in the Islamic law if the numbers constitute more than two heirs. The provision is clearly defeating the rights of the other heirs in inheriting the land. To overcome the situation, the legal heirs have to reach consensus to appoint two of them as their nominees who will work as a manager for the benefit of all. At the end of the case, the profit from the land will be distributed according to their share in *al-fara'id* with consideration of giving extra disbursement to the appointed manager.

On the other hand, lands which are neither under the *Group Settlement Act 1960* nor the *Customary Tenure Enactments 1960*, are following the rule stipulated in Islamic law. In fact, Islamic law was considered as the law of

⁷⁴ H. C. Willan, *Supplement to the Digest of Repeated Cases* (Kuala Lumpur: FMS Government Press, 1941), 27.

⁷⁵ *In the Estate of [Dato Ngiang] Kulup Kidal, In Re Tiambi binti Ma'amin*. R. O. Winstedt, “Negri Sembilan The History, Polity and Beliefs of Nine States”, *J.M.B.R.A.S.* XII: III (1934): 74.

⁷⁶ *The Customary Tenure Enactment 1909, Negri Sembilan* (Cap. 215).

⁷⁷ Ss. 11, *the Malacca Lands Customary Rights Ordinance of 1886* (Cap. 125). L. A. Mills, *British Malaya*, 99-114.

⁷⁸ Amity Doolittle, “Colliding Discourse: Western Land Laws and Native Customary Rights in North Borneo 1881-1918”, *Journal of Southeast Asian Studies* 34:1 (2003): 106-115.

⁷⁹ *Customary Tenure Enactment (Cap. 215)* as well as *the Customary Tenure Enactment (Lenggongan Land) 1960*. See also *Indun v. Haji Ismail and Others (1937)*, Case No. 764, H. C. Willan, *Supplement to the Digest of Repeated Cases* (Kuala Lumpur: FMS Government Press, 1941), 89.

⁸⁰ Section 4 (2)(a), *National Land Code 1965*.

⁸¹ Section 10 (iv) *Enactment Customary Tenure (Pemegang Adat) 1926* (Bab 215) and (*Adat Lenggongan*) 1960.

⁸² No. 34 year 1955.

⁸³ *M.L.J.* 1 (1981): 29; Sharifah Zaleha Syed Hassan and Sven Cederroth, *Managing Marital Disputes in Malaysia – Islamic Mediators and Conflict Resolution in the Syariah Courts* (Surrey, UK: Curzon, 1997), 46

⁸⁴ *M.L.J.* 3 (1994): 424. McAllister, Carol Lynn, “Matriliny, Islam and Capitalism: Combined and Uneven Development in the Lives of Negeri Sembilan Women”, *Ph.D Thesis* (University of Pittsburgh, 1987), 2, 7, 132.

⁸⁵ Section 3

⁸⁶ Act No. 13 year 1960 (G.S.A).

⁸⁷ Section 14 (2) , *Group Settlement Act 1960* (Act 530) (Amended 2002).

the land in most of the Malay States,⁸⁸ and the supremacy of the law was recognized in Johor,⁸⁹ Kedah,⁹⁰ Kelantan,⁹¹ Pahang,⁹² Selangor⁹³ and Terengganu.⁹⁴ The same approach applied in the matter of personal status which does not involve lands thus the application of Islamic law was followed entirely. For instance, the enforceable wills are applied within one-third of estate as decided in *Shaik Abdul Latiff versus Shaik Elias Bux (1915)*. Thus, wills that give preference on certain heir as well as wills that disburse on the whole estate were considered invalid and unenforceable, except the other heirs gave their consent as was decided in *Siti versus Mohamed Nor (1928)*.⁹⁵ Moreover, any illegal condition for the application of wills was also void as decided in *Saeda binti Abu Bakar & Anor versus Haji Abdul Rahman bin Haji Mohd. Yusup & Anor (1922)*.⁹⁶ In the case of nomination, a nominee stands as a trustee for the benefit of the other heirs,⁹⁷ rather than took the estate as his own. In this situation of which personal status is not including customary or conditional tenure, the application of Islamic law was applied exclusively and following the persons' faith.

Jurisdiction in Administration of Inheritance

Since colonial period, civil courts hold jurisdiction in the administration of inheritance, either to Muslim or non-Muslim. The authority engaged in issuing probate and letter of administration which has been provided in *List I (Federal List), of Ninth Schedule of Federal Constitution*.⁹⁸ The power was put on detail in the *Administration and Probate Act 1959*⁹⁹ and the *Distribution Act (Small Estate) 1955*.¹⁰⁰ In fact, the provision was an extended clause from colonial administration period, such as the *Courts Enactment 1918*¹⁰¹ and the *Administration and Probate Enactment 1920*.¹⁰² Therefore, the development of law in the administration of personal status from earlier period to present has remained unchanged hitherto. The civil courts hold the power of hearing, while shariah courts cling to determine legal heirs as well as to ascertain their share under Islamic law as the prior practices.

In the scenario of where the estates that consist of lands with amount below than two million Ringgits, the jurisdictions are determined as a small estate case. In this regards, the Collector of Land Revenue have jurisdiction in issuing an order of distribution. The flow of administration process at this point was based on past practices, as clearly illustrated in minute from Perak Council on 28th February 1879:¹⁰³

“The party claiming the right of transfer or succession shall attend at the Collector’s office either in person or by his constituted agent and shall make application for registering the mutation, producing the original lease, certificate, or permit.”

The jurisdiction then was underlined in the *Small Estates (Distribution) Ordinance 1955*.¹⁰⁴ The ordinance permits legal heirs to decide the method of distribution either by following *al-faraid* or by making consensus on certain calculation.¹⁰⁵ If there are conflicts or problems, the Collector has an authority to consult authorities pertaining to

⁸⁸ *Shaik Abdul Latiff v. Shaik Elias Bux, F.M.S.L.R* 1 (1915): 204, 214.

⁸⁹ Phase 6, “Memorandum by Sir Stamford Raffles (No. 7) 7th June 1823”, *Johore Treaties etc. 1818-1915*.

⁹⁰ *Administration of Estates Enactment 1319* (1899)(No. 1); Section 10 (ii), 31 and 59, Enactment No. 6 year 1337 (1917); Section 3 (1A.)(a), year 1345 (1927)

⁹¹ Applied *al-fara'id* as in the Case of *Re Hajjah Safiah (1911)*. Case No. 248/29 (6 Zulkaedah, 1329H/1911M) and No. 250 (7 Zuhijjah, 1329H/1911M).

⁹² *Official Administrator v. Magari Mohihiko, F.M.S.L.R. (1940): 170.*

⁹³ *Ramah v. Laton, F.M.S.L.R. 6 (1927): 128.*

⁹⁴ In the case *Estate of Haji Hassan (deceased) Kemaman (1935)*, No. 641/1935, under file *British Adviser Trengganu* at National Archive, Malaysia

⁹⁵ *6 FMSLR 135*. Abdul Monir Yaacob, “Wasiat: Konsep dan Pelaksanaan”, *Jurnal IKIM* 2:2 (1994): 117-118.

⁹⁶ *F.M.S.L.R. 1: 352.*

⁹⁷ *Re Ismail bin Rentah, decd., F.M.S.L.R. (1939): 230; M.L.J. (1940): 98.*

⁹⁸ Item 4 Paragraph (e)

⁹⁹ Act 97

¹⁰⁰ Act 98

¹⁰¹ Section 49 (iii)(b), Enactment No. 14 year 1918

¹⁰² Section 2, Enactment No. 4 year 1920

¹⁰³ Section 29, General Regulations, Perak, 1879.

¹⁰⁴ Section 4, No. 34 year 1955

¹⁰⁵ Section 15 (1)

Islamic law of inheritance and Malay customs.¹⁰⁶ All the decisions that were attained before the court were recorded and binding upon them. Therefore, in *Re Mamat bin Dat San & Anor; Mek Som versus Awang Senik (1972)*,¹⁰⁷ the Federal Appeal Court decided that the order of distribution by the Collector was valid and legal, even though involving inheritance to non legal heir. The decision was attained following the consent of all heirs and thus, it was legally binding them.

Meanwhile pertaining to administration of normal estate which consisting of more than two million Ringgits, the jurisdiction lies on the high court to issue letter of administration and probate.¹⁰⁸ However, the jurisdiction does not affect personal law issues as provided in Section 25 under Part VII of the *Civil Law Act 1956*¹⁰⁹ of which that the application of Islamic law and customs were guaranteed. However, conflict arises in *Re Man bin Minhat (1965)*,¹¹⁰ when the high court had decided that a nomination was actually a gift, and holds the right to take the property. It was against with Islamic principle that a nomination merely stands as a representative of the other heirs, whose responsibility is to distribute the estates under Islamic law. However under judicial precedent principle, the principle of the case was to bind later cases such as in *Re Bahadun bin Haji Hassan (1974)*¹¹¹ and *Wan Naimah versus Wan Mohamad Nawawi (1974)*.¹¹² It is obvious that the decision is against the Islamic principle as discussed before, as well as the ruling by the Fatwa Committee under National Council for Islamic Affair 1973.¹¹³

The jurisdiction of civil court in the matter of inheritance also includes the declaration of death for Muslims. Based on Section 108, the *Evidence Act 1950* (amended 1971), Small Estate Unit only accept the declaration of death issued under the high court. To be more in-depth, one is considered dead under the law who is under situations which is likely to be declared as dead, after disappearing without any information or details in more than 7 years. The similar provision has been found in the *Shariah Court Enactment*, but the jurisdiction of the Shariah court is only restricted under marital issues such as marriage, divorce and custody.¹¹⁴ Thus, it was not the jurisdictions of Shariah court as per portrayed by the *Latifah Mat Zin versus Rosmawati Sharibun & Anor (2007)*, which is said that,¹¹⁵

However, from the judgment, we do not know whether the contradictory claims over the disputed shares concern the question of gift inter vivos or 'hibah' or on some other non-syariah legal ground eg, under companies' law. If it was the former, then Syariah Court should have decided whether there was a 'hibah' in accordance with Islamic law of those disputed shares and then proceed to determine the shares of the beneficiaries, respectively, according to 'Fara'id'. If it was the latter, of course the Syariah Court should not embark on civil law to determine the question whether those disputed shares were part of the estate of the deceased or not. That is a matter for the civil Court.

Thus, the operations of shariah court are truly based on written law, in this case, referring to provisions of federal constitution in List 2, of the Ninth Schedule of Federal Constitution (states list). No jurisdiction should be carried outside of the underlining proviso even though involving personal matter, as decided in the *Syarikat Syed Kechik Holdings Sdn. Bhd, Puan Sri Sharifah Zarah binti Syed Kecik Al-Bukhary, Sharifah Munira binti Syed Kechik versus Syed Gamal Bin Syed Kechik Al-Bukhary (2010)*.¹¹⁶ Based on this argument, it is obvious that the application of personal law in Malaysia still following past practise, which recognises the legacy of colonial administration.

Conclusions

At the beginning, the acceptance of English law in the early days of Malaya was clearly intended to facilitate the administration of law, in the manner of justice and order. Thus, as English laws were imported to Malaya, the stand

¹⁰⁶ Section 4; Section 19 (1)(a), the Small Estates (Distribution) Ordinance 1955, the Small Estates (Distribution) (Amendment and Extension) Act, 1972. Mahmud bin Mat, "Land Subdivision and Fragmentation", *Intisari* 1:2 (n.d.): 12-16.

¹⁰⁷ *M.L.J.* 1: 59.

¹⁰⁸ Section 8 (v) Ordinance No. 101 (Court); CO 274/3, Straits Settlement Acts 1877-1884, p. 241

¹⁰⁹ Act 67

¹¹⁰ *M.L.J.* (1965): 1

¹¹¹ *M.L.J.* (1974): 14

¹¹² *M.L.J.* (1974): 41

¹¹³ Md. Yazid Ahmad and Iknor Azli Ibrahim, "Amalan Penamaan Harta Orang Islam di Malaysia: Satu Tinjauan Ringkas menurut Syariah Islamiah", *Jurnal Pengajian Umum* 3 (n.d.): 66.

¹¹⁴ Section 53, Family Law Act (Wilayah Persekutuan) 1984 and Rules 1987, Section 50, Family Law Enactment Terengganu 1985, and Section 41, Family Law Enactment Kelantan 1983.

¹¹⁵ *C.L.J.* 5: 253.

¹¹⁶ In Mahkamah Tinggi Kuala Lumpur (Bahagian Komersial), Suit No. D24-NCC 2-80-2009.

of the law has obviously underlined to not interfering with personal matters, such as local beliefs and customs. The intention is found in statutes as well as through agreements among the authority. However, during the application of the law as well as its implementation by means of English's principles, judicial precedents, interpretations and jurisdictions, have all influenced the local laws to mix with those of English flavours. As a result, it established an English-imposed law to local personal status.

In other perspective, the influence of English law till nowadays was a result of remnant of the past provision in the current law. As we know, an enforcement of laws was depending on written order. Without the provision, the law cannot be established as well as be enforced by the authority. Thus, as the past regulation was remained unchanged, the application of the past law, in this case English's law, is still followed. In this case, the jurisdiction in issuing letter of administration and probate of the high court has been maintained as well as in hearing cases of inheritance. Meanwhile, the jurisdiction of the shariah court has remained at the same level since past days. Thus, some efforts have to be put ahead in order to expand the shariah court jurisdiction as well as to uplift the boundary in giving interpretation in Islamic subject matter, even though it was not underlined under statutes nowadays.

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