

# **The Development of Islamic Legal Thoughts in Twentieth Century Malaysia: An Assessment of Crosscultural Links With Special Reference to the Ottoman's *Majallat al-Ahkām al-'Adliyyah***

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## **Abstrak**

*Malaysia pernah diduduki oleh beberapa kuasa penjajah dari Portugis, Belanda, Inggeris dan Jepun. Begitu juga dalam perkembangannya disulami dengan pelbagai agama dan budaya. Justeru, artikel ini cuba menjelaskan rujukan khusus kepada Majalah al-Ahkām al-'Adliyyah yang telah diperkenalkan semasa kerajaan 'Uthmaniyyah di Turki. Ia juga cuba melihat sejauhmana majalah ini mempengaruhi kodifikasi undang-undang Islam, lebih-lebih lagi di Negeri Johor.*

## **Introduction**

Legal development in the Malaya was given impetus and influenced by the waves of cultural expansion, from the spread of Hinduism and Islam which shaped indigenous custom to the effect of Western political cominance which came with the ascendancy of the Portugese, the Dutch and finally the British. All these events have left behind a residue of legal traditions, the whole of which has grown into a composite legal thoughts displaying areas of both unity and diversity.<sup>1</sup>

This subject has been a focus of thorough and comprehensive research by legal historians and sociologists in this century. The treatment has been quite wide ranging. On one hand we came across brief introductions to the early development of laws in the kingdom of Malacca,<sup>2</sup> Malay customary law<sup>3</sup> and later becoming more specific to the influence of Islamic law.<sup>4</sup> This paper is aimed at assessment of these cross-cultural

links and focusing on the inter-*madhhab* relationship, demonstrated by the extent of the *Majallat al-Aḥkām al-‘Adliyyah* of the Ottoman [hereinafter called the *Majallah*], being absorbed in the twentieth century Malaysian Islam which is a stronghold of the Shāfi’ī school. The contact with the Western powers and the spread of Western legal thoughts and its impact on the Islamic dominance will be surveyed.

“Legal thoughts” in the context of this paper is referring to the jurisprudence and legal theory. It is not a treatment of practical legal development. Having said that, certain aspects of the legal history will be discussed, in order to survey the way various legal thoughts are interacting with the Malay customary legal traditions.

### **Islamization of the Malay Archipelago**

The scholars have repeatedly emphasizing that the advent of Islam and the subsequent spread of Islamic learning in the Malay world have brought about a major cultural transformation in the region. Professor Muhammad Naquib al-‘Attas explains that Islamization in the Malay Archipelago underwent three stages, firstly the stage of nominal conversion [1200-1400], secondly the stage of conversion of the spirit resulting in the influence of philosophical mysticism [1400-1700] and thirdly continuation and accomplishment of the second stage coinciding with the coming of the West. Such an experience had resulted in “revolutionizing the Malay-Indonesian world-view, turning it away from a crumbling world of mythology to the world of intelligence, reason and order”.<sup>5</sup> It is also responsible of “revolutionizing the Malay-Indonesian *weltanschauung* effecting its transformation from an aesthetic to a scientific one”.

Prof. al-‘Attas further remarked:

*“... the coming of Islam seen from the perspective of modern times that is, seen from the perspective of our present time when we can look back into the effects of historical processes which are found to have radically changed the lives and worlds of men, and discern their causes and specific and general influences, was the most momentous event in the history of the Archipelago”*<sup>6</sup>

The adoption of Islam has had profound effects on the Malays. It not only brought them new religious thoughts, but enlarge their contact with other people, strengthening their Islamic solidarity with the rest of the Islamic world and sanctioned many of their basic social and economic codes.<sup>7</sup> Furthermore, the increasing contact between Islam and Malaya has led to the gradual infiltration of the classical law of Islam and its legal notion into the Peninsula.<sup>8</sup> The earlier trend of treating the subject of Islamization of the region in strictly historical terms, with attention being concentrated on the dates and places of arrival of Islam. However, more recently, general and speculative on the process and meaning of Islamization.

### **The Malacca Legal Experiences**

By the fourteenth century, Islam had been brought and spread in Malaya. Malacca became a Muslim Kingdom under Sultan Iskandar Shah and his successors, and by the end of the fifteenth century he had become a power of great importance in the Malay world. The rise and the establishment of Malacca marks the end of the political control and cultural influence of the Malay peninsula by the Hindu and Buddhist powers. As Islam itself came to this region through various streams - from Arabia, India or China - the Malay society's perception on legal matters were influenced by the thoughts and trends from all the Muslim world.<sup>9</sup>

The law followed in Malacca was the Muslim law which had absorbed such parts of the Malay customary law as were compatible with Islam. Some ideas of the laws in force may be obtained from the digests of law, some of which have come down to us, although how far and to what extent the law contained in these digests were applied may be questioned. Ahmad Ibrahim observed that the digests contain traces of Malay indigenous law, but mixed with relics of Hindu law and overlaid with Muslim law. The sources of laws in Malacca are, namely *Undang-undang Melaka* or *Risalat Hukum Kanun and Undang-undang Laut* (Digest of Maritime Law).<sup>10</sup> Despite the cursory evidence of the actual legal practice and the extent of Islamic law being applied, the influence of Islamic legal thoughts and jurisprudence, is to a great extent established. Yusof Hashim, a local historian, suggested that "there was tremendous impact on the Malacca legal system when Islamic influence penetrated Malay society".<sup>11</sup>

Liaw Yock Fang's thorough examination of the Malacca law proved this to be a reality. Though the prevailing law is customary law, any divergence from Islamic law was deemed worthy of notice. Therefore, in many places in the digest that, after mentioning the penalty according to custom, also mention a variety of penalties according to the law of God.<sup>12</sup> Various Islamic legal terms prevalent in legal manuals like *muḥṣan* (a married illicit sexual offender), *fuḍūlī* (unauthorized agent), *khiyār* (the option of rescission), *ṣulḥ* (amicable settlement) and others.<sup>13</sup> He also testifies that the sections of Muslim law in the manuscripts he edited "demonstrates clearly that Muslim law was once widely practiced in the country".<sup>14</sup> As far as the classical legal compilations which served as the source for the Malacca law, Liaw Yock Fang inferred that, it may be of Abu Shuja' *al-Taqrīb* or its commentary *Fatḥ al-Qarīb* by Ibn al-Qāsim al-Ghazzī or *Hāshiyah 'alā al-Fatḥ al-Qarīb* by Ibrāhīm al-Bājūrī.

Such an influence does not confine to Malacca only. As the Malacca empire during its heyday covered Pahang, Siak, Kampar, Rokan, Terengganu, Johore, Riau-Linggi, Patani and Kedah, the influence of the Malaccan legal experiences based on Islam is clear. At least, the existence of the Pahang Digest (1596) and the Kedah Di-

gest (1605), served to prove this proposition. In the eighteenth century, the Ninety Nine Laws of Perak and the Johore Digest (1789), are said to belong to this composite class.

Having said that, there is a crucial question to be clarified, that is, to what extent can Islamic prescription be considered an accurate expression of actual legal practice? The evidences from the law texts is variable. Hooker observed that:

*“... while the Malacca complex reproduces elements of fiqh, this is not true in Java; in Acheh it is the more theological element which is stressed and in Minangkabau the whole character of Islam is a subtle blend of polemic and pietism. With the exception of the Malacca texts, the treatment of Islam in other writings has a public law character... The public law of character of Islam is, therefore, a reference to the elements of sovereignty only, the Digests were not manuals for the legal administrators except in a fairly remote sense. The reality of fiqh lay outside the Digests in the ‘mosque and market’...”*<sup>15</sup>

It is from the late sixteenth century onwards that the indigenous Islamic literature started emerging as a result of a constant interactions between people in Malaya with Islamic scholars from the Indian sub-continent and the Middle East. Together with it are translations and commentaries of major works of theology and law. This new culture has impetus by the support of the Rulers and was further enhanced by the establishment of urban centres and the launching of a vigorous intellectual life. It was highlighted that “in the wake of the Islamic penetration into Malaya, both Islamic legal terminology and institutions gained rapid currency and affected the further development of legal thought in the country”.<sup>16</sup> The attempt of communicating Islamic ethic and system was carried out through three categories of Islamic literature, namely:

- (a) General works on religion and religious history which provide a background for the specific rules of obligation;
- (b) The Legal Digests which contain rules of local origin together with element of *fiqh* of various combination; and
- (c) Standard texts of Islamic legal scholasticism of Middle Eastern origin, often translated into Malay language and usually incorporating extensive gloss.

Siddiq Fadhil scrutinized that “the emergence of the intellectual Ruler in the Malay history of civilization is a sign of an awareness among the leaders in traditional Malay milieu that a change of value system has taken place”.<sup>17</sup> Having said that, it is acknowledged that the community is still primarily feudalistic in nature. There are some truth in Winstedt’s comment, while discussing the Ninety Nine Law of Perak about a saying by a minister of Perak that “the law are merely a book of reference

kept by a private family and used by member of that family when called upon to advise the Sultan".<sup>18</sup> However, the fact that Islamic precepts and rules being embodied in the legal digests and the classical Islamic legal manuals being read and taught in royal courts, are good enough to prove a wave of change in this respect.

At this juncture, it is also worthwhile to evaluate Hooker's fine observation about the reality in Malay society concerning the Islamization of Southeast Asia. Firstly, there has not been a linear progression of Islamic adherence. Henceforth, the relationship between an absolute scheme of revealed obligations and its adaptation to indigenous cultural realities. The second difficulty pointed by Hooker was the mode of transformation of the thoughts. It was perceived by some that it is through *fiqh* with its legalistic emphasis this process is effected. This contradicted the *sufi* approach which hold that legalism was but a preliminary step toward agnosis. Transformation is much seen as a matter of religious feeling rather than legalistic conviction. The third difficulty arises from the existence of the Legal Digests that have brought about a variety of interaction between Islamic principles and local ethic, in which the former is generally subordinated to the politically possible and legally practicable.<sup>19</sup>

### **Colonialism and Interactions of Legal Thoughts**

The first European who came to Malaya were the Portugese and the Dutch. The Portugese occupied Malacca from 1511-1641 and were succeeded by the Dutch who after occupying it for 130 years surrendered it to British in 1795. They reoccupied it from 1801-1807 but finally ceded it to the British in 1824. The contact with the Europeans and their legal thought had resulted in another aspect of cultural tension. The idea of nation-state, derived from European political theory, had no parallel in South-east Asian let alone the Malayan history. It introduced the principle of secularism as the basis of the nation-state; thus the sovereignty of law is derived from the state itself and is manifested in the institutions of state whatever its form.

The impact of the Portugese and Dutch legal thoughts among the Malays was not substantial owing to their rather haphazard legal system. It is the contact with the British rule and the English legal principles that has brought about a complex interactions of legal thoughts. Yegar observed that:

*"Three strands of law were interwoven in the creation of the Malayan legal system. Religious of Muslim law (Shari'a) coexisted with indigineous custom ('adat) and the inconsistencies between them went largely unnoticed in pre-British Malaya. The reforming drive of the British, and their notions of a consistent written body of law forced changes and accomodations in these two basic sources and introduced a third, British statutory law".<sup>20</sup>*

The gradual British penetration during the last quarter of the nineteenth century brought about radical changes in all areas of Malaya's life, including legal and religious affairs. The British rule introduced English law, replacing the existing Muslim law. In the cases of Penang and Malacca, they become colonies and therefore the English law was introduced by the Charter of Justice 1826, which set the Court of Judicature and provided in effect that the courts should apply English law, subject to the qualification that where the introduction of English law would cause hardship and injustice to the inhabitants, then they would be allowed to follow their own personal law. Thus, in regard to the Muslims in Malacca and Penang, they were allowed to follow their own personal law in matters of marriage and divorce. Hooker commented there has been a process of adaptation and modification of English law, which has in significant measure has been an accommodation to the various personal laws of the area.<sup>21</sup>

The Malay states were in theory independent Malay kingdoms but English law was introduced through in two ways. Firstly, under the treaties made by the Malay sultans with the British, the sultans agreed to receive British Resident or Advisers and to follow their advice in all matters of administration except in relation to Muslim religion and Malay custom. Under these provisions of the treaties, the British Resident advised the Sultan to make laws like the Contract Act, the Penal Code, the Evidence Act, the Criminal Procedure Code and the Civil Procedure Code, based on the Indian modifications of English law. In the case of land, laws following the legislation in Australia based on the Torrens system of registration of title was adopted.

The result was that English law replaced Islamic law in many matters and this was confirmed by the Civil Law acts, culminating in the Civil Law Act 1956 which provided in section 3 "save in so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the common law of England, rules of equity and statutes of general application shall be applied so far only as the circumstances of the states of Malaysia and their respective inhabitances permit and subject to such qualification as local circumstances render necessary".

The formative period in the development of modern Islamic law in Malaysia is characterised as having "extensive legal uncertainty" and "variation of practice from state to state". For instance, in *Ong Cheng Neo v. Yap Kwang Seng*<sup>22</sup> the court was not prepared to admit that Muslim law and the territorial definition as the law of a state. This view was later confirmed in *Shaikh Abdul Latif & Ors. V. Shaik Elias Bux*<sup>23</sup> In this case, Islamic law was applied not because it was law of Selangor but because it was the proper law for the distribution of the estate of a deceased Muslim. Having said that, there are also evidence to suggest that Islamic or rather said as Muhammadan law is not foreign law but the law of the land of which the court must take

judicial notice. The decision in *Ramah binti Ta'at v. Laton binti Malim Sultar*<sup>24</sup> is celebrated example.

The relationship between Muslim law and secular laws of the state has increasingly becoming a conflict. The Muslim legal outlook in cases involving Muslim parties was intentionally neglected despite pledges given by the British not to encroach into the sphere of religion and custom of the Malays.<sup>25</sup> This paper disagree with Hooker's contention that the limitation upon the practice of Islamic law are not directed against the substance of Islamic law in any way but arise out of jurisdictional issue involving the secular and religious court.<sup>26</sup> Rather the jurisdictional issue between the secular and religious court has been so designed to further enhanced the superiority of English legal thought and institution.

The following are some leading examples:

**(a) *Ainan Mahmud v. Syed Abu Baka* [1939] MLJ 209.**

It was held that the requirements of the Evidence Enactment as to presumption of legitimacy must prevail over Muslim rules of evidence. According to the Shāfi'i's law, when a child is born to a woman who is married to a man, after six months from the date of the marriage or within four years of the termination of the marriage and the mother not having remarried, the paternity of the child is established with the husband. If the child is born within six month of the marriage the paternity would not be established unless the man asserts that the child is his and does not say that the child is the result of fornication. It has been held that section 112 of Evidence Enactment overrides the Muslim law on the point. The section provides that the fact that any person was born during the continuance of a valid marriage between his mother and any man or within 280 days after its dissolution and the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time, when he could have been begotten.<sup>27</sup>

**(b) *In re Maria Hertogh: Mansor Adabi v. A.P. Hertogh & Anor* (1951) 17 MLJ 164.**

In this case, it was held that the rule that a marriage must be valid by the law of the respective domiciles of the parties applies to Muslim marriages, so that a Muslim marriage between a Muslim man and a Muslim girl domiciled in Holland may be invalid if the marriage is invalid by the law of domicile of the girl. According to Muslim law, in order that a marriage may bear the character of a suitable union in law, the husband must be equal of the woman in social status (*Kafa'āh*)<sup>28</sup>

**(c) *Nafsiah v. Abdul Majid* (1969) 2 MLJ 174.**

This is Malacca case in which the court, in relying upon section 4 of the Courts

of Judicature Act 1964, expressly stated superiority of its own jurisdiction. This was an action in damages for breach of promise to marry where both parties were Muslim. It was contended that the Malacca Administration of Muslim Law Enactment 1959, section 40(3)(b) excluded any court other than the Court which refused to accept this on the ground that the jurisdiction of the High Court cannot be limited in view of the Courts of Judicature Act of 1964.<sup>29</sup>

The Federal Constitution provides that Islam is the religion of the Federation but other religion may be practised in peace and harmony in any part of the Federation.<sup>30</sup> It may be seen that this provision is confined to recognizing Islam for ritual and ceremonial purposes. The real opportunity to the implementation of Islamic law in entirety is still absurd as the *Shari'ah* only ranks fifth out of the eight sources of Malaysian law.<sup>31</sup> Furthermore, the power to legislate on matter of Muslim law is a matter for the State Legislature alone. The ninth schedule List II State List of the Federal constitution sets out the following among the powers in the State List:

*“Except with respect to the Federal Territories, Islamic law and personal and family law of person professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustee and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the state; Malay custom; Zakāt; Fīṭrah and Baitul Mal or similar Islamic religious revenue; mosques of any Islamic public place of worship, creation and punishment of offences by persons professing the religion of Islam against precept of that religion, except in regard to matters included in the Federal list: the constitution, organization and procedure of the Shari'ah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in aspect of offences except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine of Malay custom”*

Many of the states, including the Federal Territories, have enacted legislation relating to Islamic law,<sup>32</sup> which includes:

- (1) The Administration of Islamic Law Enactments,<sup>33</sup> which provided for three



important institutions namely [a] the council of Muslim Religion, which aids the advises the Yang di Pertuan Agong (the Malaysian King) or the State Rulers in respect of all matters relating to the religion of Islam in their respective territories; [b] the *Mufti* who shall aid and advise the King or the State Rulers in respect of all matters of Islamic law and in all such matters shall be the chief authority in the respective territories after the King or the Rulers, as the case may be and [c] the *Shari'ah* courts, which are organized in three layers, the *Shari'ah* Subordinate Court, the *Shari'ah* High Court and the *Shari'ah* Court of Appeal.

- (2) The Islamic Family Law Enactment, which deals with the Islamic family law in respect of marriage, divorce, maintenance, guardianship and other matters connected to with family life;
- (3) The Criminal Procedure Enactment for the *Shari'ah* Court;
- (4) The Civil Procedure Code Enactment for the *Shari'ah* Court;
- (5) The Evidence Enactment for the *Shari'ah* Court.

All these enactments refer to the administration and implementation of Islamic law. Enactments item 2, 3, 4 and 5 mentioned above, are of recent development, when the government are upgrading the status of the *Shari'ah* Courts as part of its Islamization programme and by a recent popular demand for a return to the application of Islamic law in all areas.<sup>34</sup> In some of the enactment which is inconsistent with the Islamic law shall to the extent of such inconsistency be void. In the event of any lacunae or the absence of any matter not expressly provided for in the enactment, the court shall apply the Islamic law. The phrase "Islamic law" here is defined as the laws of Islam in any recognized *madhhab* or school of law. Thus Islamic law is the basis of all the legislation and the *Shari'ah* Courts have the duty of interpreting and applying the Islamic law. In doing so, the *Shari'ah* Court will refer to the primary sources of Islamic law, that is the Qur'an and the Sunnah as well as other subsidiary sources: views of the jurists, courts decision and the *fatwā* of the *Mufti*.

Muhammad Kamal Hassan described this as "the resurgence of the holistic Islamic consciousness spearheaded by the *da'wah* movement of the seventies with its call for Islamic alternatives continued to exert its influence on Malay community as well as state authorities and reached a high-point around 1979-1982..."<sup>35</sup> In a more specific term, Hooker observed that "since the independence there has been a move toward a more complete and comprehensive expression of Islamic legalism" and his prediction turn to the true based on the most recent development of intensive implementation of Islamic law far beyond the boundary of Islamic family law.<sup>36</sup>

## The Majallah and the Malay World

The Majallah of *al-Ahkām al-‘Adliyyah* was a product of the *tanẓīmāt* reform movement in Turkey that brought about numerous changes in the Ottoman Empire, in the first part of nineteenth century. It was perceived as one of the important means of preserving Islamic institutions while the Ottoman Empire was responding positively to rapid Westernization. The Ottoman civil law, was the continuity to be based on the *Shari‘ah*. Thus, there existed a basic irreconcilable difference between traditional Islamic law applied on the Empire and the new statutes derived from foreign sources. As far as rules of classical Islamic law were concerned, they were scattered throughout the words of various jurists and most of their works were written in classical Arabic, of which the lawyers practicing in the new secular court had little or no knowledge. The Muslim jurists themselves, in turn are not only unacquainted with the principles of Western law but often found it difficult to deduce principles of divergent and scattered sources of the *Shari‘ah*. In order to resolve the difficulties, a new civil code was indispensable. A committee of jurists led by the prominent scholar and statesman Cevdet Pasha, undertook the task of formulating the code.<sup>37</sup>

The committee reported that “the work of compiling the religious principles to make a code containing provisions to satisfy the needs of our society was vested to us by the decree of the Sultan”. And the committee went on to propose that “in a controversial matter the opinion held by the Sultan is the one to be obeyed”. The *Majallah* consists of 1,851 articles, with an introductory section and sixteen books, each treating different subjects: sale, hire guarantee, transfer of debt, pledges, trust and trusteeship, gifts, wrongful appropriation and destruction, interdiction, constraint and pre-emption, joint ownership, agency, settlement and release, admission, actions, evidence, administration of oath and administration of justice by the court.

The influence of Ottoman Empire throughout the nineteenth century was immense in all Muslim countries except Egypt. The *Majallah* was applied as civil law in Ottoman domains and thus was applicable civil law in Jordan, Syria, Iraq and Kuwait.<sup>38</sup> The *Majallah*, according to Ballantyne was never promulgated expressly as law in any of the Gulf jurisdiction but a practice became *ad hoc* civil code in those jurisdictions.<sup>39</sup> Despite Kuwait’s rejection to the *Majallah* to fill the vacuum of the cessation of British Extraterritorial Jurisdiction in 1950s in favour of occidental codes, the trend was reversed in 1976 Jordanian Civil Code and 1985 UAE code which owe overwhelmingly to provisions of *fiqh* conveniently the *Majallah*.<sup>40</sup>

Malaya is not an exception of the universal appeal of the *Majallah*. Ahmad Ibrahim, a leading authority on Malaysian law, highlighted that in Johore at the beginning of the twentieth century, the modification of the Islamic law which were made in Turkey and Egypt were translated and adopted.<sup>41</sup> He also testified that “the *mejelle*

produced in the Ottoman Empire was translated in Malay and enforced for a time in Johore".<sup>42</sup> The Egyptian link that Ahmad Ibrahim was referring to was the Egyptian-styled *Majallah* known as *Murshid al-Hayrān* (Guide for the Confused). *Murshid* is seen by legal historians as a by-product of the *Majallah*. This compilation, unlike the *Majallah* was a work of a single man, Muhammad Qadri Basha, Egyptian Minister of Justice from 1879 to 1892.<sup>43</sup> His compilation of civil laws was prepared on behalf of the Egyptian government, presumably to compete with the *Majallah*. The state of Johore seem to be wanting to benefit the best of the two worlds, by also making adaption of *Murshid* as the *Ahkam Shar'iyah Johore*. However, linking *Ahkam Shar'iyah Johore*, a family law compilation, with *Murshid* a compilation of civil law, is rather questionable. The closest assumption is that, it could be Qadri Basha's compilation also known as *al-Ahkam al-Shar'iyah*, a compilation on matters of personal status which was adapted, not *Murshid*.<sup>44</sup>

This paper does not wish to exaggerate the extent of *Majallah's* influence on Malaya as a whole and the state of Johore in particular. There has been no conclusive proof of its real impact but it cannot be equally ruled out. What is available were fragmented evidences which would shed some light if there were accumulated. One of the important evidence is a Malay translation of the *Majallah* in early twentieth century, which could be the basis of such an inquiry. The translation has been adopted in to as *Majallah Ahkam Johore*. At the preamble, the Mufti of Johore, Sayyid 'Abd al-Qadir b. Muhsin al-'Attas proclaimed:

*"That His Royal Highness Sultan Ibrahim, the ruler of Johore and its territories, hereby assented, by virtue of section 49 and 47 of the State Constitution and by the agreement of the Judicial and Religious committee that the Majalla Ahkam Johore to be applied by all officers, magistrates and judges in the state of Johore. It is on matters concerning rulers of the Shari'ah, whereby the Majallah must be used guided by its commentaries."*<sup>45</sup>

In Johore, copies of the *Majallah Ahkam Johore* are distributed to the officials particularly the *qadīs* as their statue law. It was even suggested that certain states like Kelantan and Trengganu have requested copies for their use. There are few assumptions on the way this Ottoman code could win a appeal in Johore.

#### **(a) Links Between Malay Sultanete and Ottoman Empire**

The link is due to the Ottoman Empire's position as representing the Islamic caliphate. Their sovereignty of certain degree over the Malays is established. It was suggested that the relationship between the Ottoman government and Sultan Abu Bakar of Johore is a close one. The Sultan of Johore visited Turkey in 1893 in view of learning the Turkish experience as far as Islamization was concerned.<sup>46</sup> The first ever compila-

tion like the *Majallah* is a great achievement especially in adapting Islamic law to the need of the changing milieu, would be shared by the Malays. Yegar suggested that the British liberal policy on religious matters allowed the link to flourish.

**(b) Pan-Islamism Movement**

Pan-Islamic sentiment were shared by many Muslims in Malaya and Singapore. Relationship was established between the Ottoman Empire and leading Arab families. Since the *Majallah* had a universal acceptance in various countries in the Middle East, Malaya in general and Johore in particular is no exception. It is presumed that the inter-*madhhab* cordial relationship has been fostered and the strengthening of their solidarity should prevail. Hooker described that “the habit of producing ummaries of Middle Eastern materials has persisted into the present century when more secular models have been utilized”.<sup>47</sup>

**(c) Codification Endeavour**

As far as the development of Islamic law is concerned, this phase is full of debate on the question of *ijtihād* and *taqlīd* as well as the issue of “presenting Islamic law in its new garment” (*al-fiqh al-Islāmī fī thawbih al-jadīd*). As codification of Islamic law has become a trend and the *Majallah* is considered the model, its adoption is necessary and timely. The comprehensiveness of the compilation and the absence of a similar compilation based on Shāfi’ī school made the *Majallah* be willingly accepted. There are even evidence to suggest that in 1923 Bailie’s Digest of Muhammedan Law which is Ḥanafī based was accepted by the Legislative Council of the Straits Settlement as main reference on Islamic law beside the English translation of the Qur’an, Howard’s translation of *Minhaj al-Ṭālibīn* by Imam al-Nawawī and Syed Amir Ali’s Muhammedan Law.

**(d) The Iṣlāḥ Movement**

The emergence of Islamic reformist (*iṣlāḥ*) at the beginning of the twentieth century which began to question the socioeconomic backwardness and religious conservatism of traditional Malay society. This is a result of the powerful influence of revivalist and reformist ideas of al-Afghānī and ‘Abduh brought back to Malaya by several religious scholars who studied there.<sup>48</sup>

Unfortunately, the *Majallah* was short-lived. It only survived until about 1914. There are a least two explanations for such a development. Firstly, with the British intervention, the rapid process of Westernization took place. It has also, as Hooker abserbed “drive a wedge between the Sultan and religion by interposing a secular validating authority for laws, including laws relating to religion.”<sup>49</sup> There are few decided cases which could reflect the perception of English judges towards Islamic law for instance, in 1915, in the case of *Wong Ah Fok v State of Johore*<sup>50</sup> it was held that the

law of the state of Johore was not solely Muslim law, though the religion of the state was Islam as stated in Constitution of 1895. In *Anchom bt. Lampong v. Public Prosecutor*<sup>51</sup> Poyser C.J. passed an obiter that “Muslim law was never adopted in its entirety in the State of Johore” and argued on the basis of the existence of Thomas Branddell’s translation of Johore Laws. Hooker said, in actual fact, the Judge himself was unaware that the compilation are misnamed and are in fact part of Raffles MS 33, an importat version of the Malacca Legal Digest.<sup>52</sup> An earlier decision in *Mighell v. Sultan of Johore*<sup>53</sup> marked a serial changes in respect of the relationship between the sovereign and Islam as upheld in Johore and other Malay states. This case provided a new definition of sovereignty based on English constitutional thought.

Secondly, in Turkey itself, the *Majallah* has been abandoned in favour of a new code based on the Swiss Civil Code and Code of Obligations. On this point, it is suggested in discarding religious law from the scene on ground of inadequacy for the modern days. Liebesny added that it was through capitulations that Western legal thoughts and legal procedure were introduced. This is true in the case of the Ottoman Empire and Egypt when they adopted continental European codes and procedures and endeavor to follow European standards in the administration of justice.<sup>54</sup>

### ***Majallah*’s Reemergence**

The era of the resurgence or the reassertion of the *Shari’ah*, beside many other reasons, was seen to have caused the *Majallah* regaining some prominence in twentieth century in Malaysia, especially in respect of legal thoughts.

#### **(a) Islamization of Laws**

The Islamic resurgence with the reconsidering the notion of the “closing of the door of *ijtihad*” has resulted in the Islamization of laws as well as other aspects of life. In this respect, the serious study of *fiqh* and *uṣūl al-fiqh* is vital. In doing that, there no longer be much concern about the traditional rigid separation of the various schools of law. Islamic law was now considered an intergrated whole and there were no compulsion to restrict oneself to any particular school. Gamal Morsi Badr suggested that this eclecticism and interschool fertilization was condusive to various legal reforms in the Muslim country like Pakistan and the Sudan, and it is through this joint effort, the various experiences were shared. One of those could be the use of the *Majallah*. This is further enhanced with the founding of the *Majma’ al-Buḥūth al-Fiqhiyyah* where various legal issues are to be decided collectively.

#### **(b) Practical Enlightenment**

As the *Majallah* has been practiced in the Ottoman era along side the other occidental-based codes, it has given an immense confidence to the Muslim in Malaysia of its

value. This is the reason why the *Majallah* was used and adopted in a varying degree.

- (i) For instance, in teaching Islamic law in universities particularly Islamic Law of Commercial Transactions (*fiqh al-Mu'āmalat*), Islamic Property Law (*fiqh al-amwāl*) and Islamic law of evidence (*fiqh al-da'wā wa al-bayyināt*), has been carried out with the *Majallah* as a "statute book". The commentaries of the *Majallah* like *Sharḥ al-Majallah* by Sālim Rustam Bāz and *Durar al-Hukkām* by 'Ali Haydar are very valuable for the teachers in explaining the principles embodied in the *Majallah*. Subjects like Contemporary Islamic law will inevitably focus on the *Majallah's* contribution to the Muslim world.
- (ii) In drafting various state enactments, the *Majallah* has been the inspiration to the tremendous undertaking as well serve as a model to be followed to the reasonable extent. This perception has been a general feeling amongst those involved in the drafting work though lay people might not feel it. Certain parts of the enactment particularly in respect of law evidence has some *Majallah's* influence in it.
- (iii) In areas of law where the Ḥanafīs experiences is relatively richer, Muslims in Malaysia have benefitted. As a clear example, the guide book to the *Shari'ah* concepts in the Malaysian Islamic Bank, stress most of its content from the *Majallah*.<sup>55</sup> Furthermore, as a member of the International Associations of Islamic Banks, the BIMB are governed by the *Mawsū'ah al-'Ilmiyyah wa 'al-'Amaliyyah li al-Bunūk al-Islāmiyyah* (The Encyclopaedia of Islamic Bank), which is heavily *Majallah* based. In his analysis on the land development according to Islamic perspective, Abdullah Alwi Hassan suggested that the study of land provisions in *al-Fatāwā al-'Alamgiriyyah* and the *Majallah* are important because of their practical experiences. This is not in any way denying the need to refer to the primary sources of *fiqh* works.<sup>56</sup>
- (iv) Another practical example is that the *Majallah*, born in the strand of comparative jurisprudence, managed to attract people with legal training very convincingly. Its approach, came with ease to this people together with the availability of this English translation. Recently, the new Malay translation was produced, undertaken by a local *Shari'ah* scholar, Md. Akhir Haji Yaacob. In the preface of the translation, it was mentioned that the book will be an important reference for law students in the country as well as a valuable guide for the practitioners.<sup>57</sup>

## Conclusion

The development of Islamic legal thoughts in Malaya was enriched not only with the massive influence of Islamic heritage from the Middle East but also with the imposition of Western culture. The *Majallah*, after all, had a similar experience. This has

called for an intensive study of the sciences of Islamic legal tradition -*fiqh*, *uṣūl al-fiqh* and *qawā'id fiqhiyyah* as well as the study of comparative jurisprudence. This is why in Malaysia, the comparative approach in legal education has become a trend especially led by the International Islamic University. The Shāfi'ī doctrines however, are always preserved in areas of 'ibādāt and family matters. Efforts are all the time made to make Islamic law and Islamic tenets understood amongst the Muslims and Malaysian non-Muslim alike, recently manifested in the founding the Institute of Islamic Understanding (IKIM). Cultural links which bring about unity and diversity is a fact of life.

## Notes

1. Abdul Majid M. Mackeen, *Contemporary Islamic Legal Organization in Malaya*, New Haven: Yale University Southeast Asia Studies, 1969, p. 9.
2. Liaw Yock Fang [ed.], *Undang-undang Melaka (The Laws of Melaka)*, The Hague: Martinus Nijhoff, 1976; R.O. Winstedt and Josselin de Jong, "The Maritime Laws of Malacca," *Journal of the Malay Branch of Royal Asiatic Society (JMBRAS)* vol. XXIX, Pt. iii, pp. 29-46. See also Muhammad Yusuf Hashim, "Legal Codes of the Melaka Sultanate: An Appraisal", *Malaysia in History*, vol. 26 (1983), pp. 84-103.
3. R.J. Wilkinson, "Malay Law", in *Papers on Malay Subjects* edited by R.J. Wilkinson, Kuala Lumpur: FMS Govt. Press, 1908.
4. Ahmad Ibrahim, *Islamic Law in Malaya*, Singapore: Malaysian Sociological Research Institute Ltd., 1965; M.B. Hooker, "A Note of the Malayan Legal Digest", *JMBRAS*, vol. 41 (1968), pp. 157-170; M.B. Hooker, *A Concise Legal History of South East Asia*, Oxford: The Clarendon Press, 1978.
5. S.M.N. al-'Attas, *Preliminary Statement on a General Theory of the Islamization of the Malay-Indonesian Archipelago*, 1969, p. 5. See also M.K. Hassan, "Islamic Intellectual Life in the Malay-Indonesian Archipelago: A Preliminary Observation", Paper presented at the *International Seminar on Islamic Civilization in the Malay World*, Brunei, 1-5 June 1989.
6. *Ibid.*, p. 2. This important statements have been appended to his later book *Islam and Secularism*, Kuala Lumpur: Muslim Youth Movement of Malaysia (ABIM), 1978, pp. 161-175.
7. M. Yegar, *Islam and Islamic Institution in British Malaya*, 1979, p. 21.
8. Mackeen, *op.cit.*, p. 14.

9. Ahmad Ibrahim, *Towards a History of Law in Malaysia and Singapore*, 1970, p. 5.
10. *Ibid.*
11. Yusof Hashim, *op.cit.*, p. 1.
12. Liaw Yock Fang, *op.cit.*, p. 31.
13. *Ibid.*, pp. 32-34.
14. *Ibid.*, p. 35.
15. Hooker, *Islamic Law in Southeast Asia*, Oxford University Press, 1984, pp. 34-35.
16. See Mackeen, *op.cit.*, p. 15.
17. Siddiq Fadhil, "Penyegaran Ilmu", [Reinvigoration of Knowledge], *Tinjauan*, May/June 1994, p. 8.
18. Winstedt's opinion cited in Hooker, *Islamic Law in Southeast Asia*, p. 35.
19. *Ibid.*, pp. 35-36.
20. M. Yegar, *op.cit.*, p. 119.
21. M. B. Hooker, *The Personal Law of Malaysia*, 1976, p. 1.
22. (1922) 1 SSLR Supp. 1.
23. (1922) 1FMSLR 204.
24. (1927) 6 FMSLR 128.
25. For details see J.N.D. Anderson, "The Impact of Islamic Law on Commonwealth Legal System", *International and Comparative Law of the Commonwealth* edited by Robert. R. Wilson, 1968, pp. 63-64. See also J.N. Watson, "The Common Law Abroad: English and Indigenous Laws in the British Commonwealth", *International and Comparative Law Quarterly*, vol. 42 [October 1993], p. 753ff.
26. M.B. Hooker, *The Personal Laws of Malaysia*, 1976, p. 47.
27. Analysis by Ahmad Ibrahim in his *Islamic Law in Malaya*, p. 234. This case was decided by the guidance of the Indian case of *Sibt Muhammad v. Muhammad Hameed* AIR (1926) All. 589.
28. *Ibid.*, p. 195.
29. See Hooker, *The Personal Laws of Malaysia*, p. 47.
30. Article 3, See A.J. Harding, "Islam and Public Law in Malaysia: Some Reflections in the Aftermath of Susie Teoh's Case", *Malayan Law Journal* [1991], pp. xci-xcvi. Also see Ahmad Ibrahim, "The Position of Islam in the Constitution of Malaysia", in *The Constitution of Malaysia: Its Development 1957-1977*, edited by Suffian, Trindade and Lee, Oxford University Press, 1978.



31. The sources are: [1] The Constitution [2] Statutes; [3] Subsidiary Legislations; [4] Judicial Decision; [5] Shari'ah; [6] Hindu Law; [8] Customary Law which includes Malay custom, native law in Borneo and Chinese Customary Law; [8] English common law and rules of equity. See Tun Mohamed Suffian, *An Introduction to the Legal System of Malaysia*, pp. 92-97. On one occasion, Ahmad Ibrahim called for a positive approach towards the provision of Article 3, as the basis for upholding Islam and Islamic law. He said the "We should try and act positively and work the Constitution in such a way as to uphold the principles of all the communities in Malaysia". The muslims, he argued, as entitled under Article 3(1) to lead their way of life according to the teachings of Islam. If they wish to follow Islamic law and not English Common law, they should be allowed to do so. See his "The Principles of an Islamic Constitution and the Constitution of Malaysia: A Comparative Analysis", *International Islamic University Law Journal*, vol. 1, No. 2 (1989), p. 7.
32. Ahmad Ibrahim, "The Influence of Islam on Law", Paper at the *Seminar on the Role and Influence of Religions in Society*, Institute of Islamic Understanding Malaysia (IKIM) and Goethe Institute, 13-16 September, 1993.
33. The first enactment was the Administration of Muslim Law Enactment Selangor 1952, a model followed by other states.
34. This move further enhanced by the amendment of Article 121 (1a) of the Federal Constitution which put to an end the interference of the Civil courts on decisions made in the *Shari'ah* courts on a *Shari'ah* matter. The real outcome is yet to be seen but at least the legal mechanism has become very accomodative to the change. Ahmad Ibrahim viewed that "the *Shari'ah* can no longer be regarded as inferior to the civil courts". See his "the Amendment to article 212 of the Federal Constitution: Its Effect on the Administration of Islamic Law", [1989] 2 MLJ xvii.
35. M.K. Hassan, *op.cit.*, pp. 8-9; Dr. Chandra Muzaffar, "Islamic Resurgence: A Global View", in *Islam and Society in Southeast Asia* edited by Taufik Abdullah and Sharon Siddique, Singapore: Inst. of Southeast Asian Studies, 1986, pp. 5-39.
36. Hooker, *Islamic Law in Southeast Asia*, pp. 163-164
37. S.S. Onar, "The Majalla", in *Law in the Middle East* edited by Majid Khadduri and Herbert Liebesney, Washington: The Middle East Institute, 1955, pp. 292-308. See also C.A. Hooper, *The Civil Law of Palestine and Trans-Jordan*, [vol. The Majallah], 1933.
38. Ian Edge, "Comparative Commercial Law of Egypt and the Arabian Gulf", *Cleveland State Law Review*, vol. 34, no. 1, 1985-86, pp. 129-144.
39. W.M. Balantyne, "The New Civil Code of the United Arab Emirates: A Further Reassertion the Shari'a", *Arab Law Quarterly*, vol. 1, pt. 3, 1986, pp. 245-246. See also his *Commercial Law in the Middle East: The Gulf State*, Lon.: Lloyds, 1986.

40. *Ibid.*, p. 247.
41. See his "The Influence of Islam and Law", *op.cit.*
42. See his *Towards a History of Law in Malaysia and Singapore*, p. 7.
43. Farhat J. Ziadeh, *Lawyers, The Rule of Law and Liberalism in Modern Egypt*, 1968, p. 20.
44. Hooker pointed out that this particular compilation (1935) is a standard Shafi'i texts and deals only with family law. Therefore, the influence of the Egyptian compilations could just be in terms of the condification not the content of it. See his *Islamic Law in Southeast Asia*, p. 42.
45. See *Majallah Ahkam Johore*, Muar Johor: Matba'ah Khairiyah, 1912.
46. Abd Jalil Hj Borhan, "Sekularisme dalam Kodifikasi Undang-undang Islam: Rujukan kepada Penulisan Majalah Ahkam Johore", *Jurnal Syariah*, j. 1, Bil. 2 Julai 1993, h. 357-367.
47. See his *Islamic Law in Southeast Asia*, p. 42, note 147.
48. M.K. Hassan, "The Influence of Islam on Education and Family", *Seminar on the Role and Influence of Religions in Society*, 1993. See also Shafie Ibrahim, *Islamic Religious Thoughts in Malaya 1930-1940*, Unpublished Ph.D. Thesis Columbia University, 1987.
49. M.B. Hooker, *Islamic Law in Southeast Asia*, p. 132.
50. Johore Civil Suit No. 13/1915 reprinted in [1937] MLJ 121.
51. [1940] MLJ 18.
52. See his *Islamic Law in Southeast Asia*, pp. 134-135.
53. [1894] 1 QB 149.
54. Herbert Liebny, "Western Judicial Privileges", in *Law in the Middle East* edited by M. Khadduri and H. Liebesny, 1955, p. 332.
55. Gamal M. Badr, "Islamic Law and the Challenge in Modern Society", in *Law, Personalities and Politics in the Middle East* edited by James Piscatori and George Harris [1987], pp. 27-45.
56. Mahsin Mansor, *Konsep Syariah Dalam Bank Islam*, Bank Islam Malaysia Berhad, 1988.
57. Abdullah Alwi Hassan, "Pembangunan Hartanah Mengikut Perspektif Islam: Satu Ulasan", in *Al-Ahkam*, j. 3: "Undang-undang Harta Dalam Islam", 1991, pp. 113-135.