

MALACCA LAWS: THE EFFECT OF ISLAM AND CUSTOMS IN THE ASPECT OF FAMILY LAW

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Abstract: Malacca Laws (Hukum Kanun Melaka), is a written law existed during the Malacca Sultanate. It was established as a Malay customary law that is compatible with Islamic law. Malacca Laws is believed to be enacted during the ruling period of Sultan Muhammad Shah (1424-1444 AD) and implemented during the reign of Sultan Muzaffar Shah (1445-1458 AD), and methodically organized during the ruling period of Sultan Mahmud Shah (1489 -1511 AD). Malacca Laws is the first Islamic law that was introduced by Sultan Muhammad Shah in the state of Malacca. Its jurisdictions covered the Malacca state and all territories conquered by Malacca. Malacca Laws which has 44 articles related to ruling power, laws, and taboos of family law, significantly affects the laws of other states. Family aspects in Malacca Laws are discussed in the present study to understand the influence of Islam and customs adopted in the past, in terms of their effects on the family law as well as other laws. Literature search is used in the present study. The objective of this study is to find articles that are related to family aspects contained in the Malacca Laws. The discussion focuses on matters related to marriage, guardianship, and inheritance of property as well as some provisions of the law relating to marriage.

Keywords: Family Law, Guardianship and Inheritance, Malacca Laws, Marriage

1. Introduction

Malacca Laws is the first Islamic Law introduced by Sultan Muhammad Shah - in the state of Malacca. Malacca Laws is a written document that shows that Sharia law was enshrined in the legal system of Malacca and its colonies, and it was enforced based on historical facts. The present study also describes the history of laws in Malacca that were practiced by the Malay community during the reign of Sultan Muhammad Shah. There are some aspects that are emphasized in the laws including marriage law, trading and its procedures to demonstrate that Malacca Laws is Islamic law. The existence of the Malacca Empire with all its greatness was immensely associated with the practice of Islamic laws. The rulers of Malacca respected the teaching of Islam and established the palaces as the place to spread Islam. Under the implementation of this law, the Malacca Sultanate became the government and Islamic authority which had influences in the Southeast Asia region. The history of Malacca proves that system of life proposed by Allah is the civil and state laws which were adopted before the colonization. These laws surpassed the boundaries of time and place as the laws reiterated the leadership of the Prophet Muhammad in Medina. Therefore, social progress should never be used as a pretext for not implementing Islamic law.

2. History of Administration of Islamic Law before British Colonization

Before the arrival of British in Malaya, Malay customary laws either being influenced by the teachings of Islam or not, were the foundation of the laws in the states of Malaya. Most of these Malay customary laws were unwritten and the chiefs of a district or an ethnic, learned about the customs through traditions. Malay customary laws were the customary practices and traditions of the Malays which eventually acquired legal status and thus could be enforced by the heads of districts. There are documents on the old Malay laws collected mainly by Western scholars in studying the history of law in the Malay states. Among the legal texts which describe the old Malay laws practiced

at the time are Malacca Laws, Pahang Laws, Kedah Laws, 99 Perak Laws, and Sungai Ujung Laws in which similarities are observed among the texts found in the Malacca Laws and the Laws of Pahang, Kedah and Perak.

Careful inspection on the texts indicated the existence of two customary systems that are extremely different but have been widely implemented, especially in the Malay Peninsula. It is Perpatih custom law (Adat Perpatih) that is practiced only in Negeri Sembilan, while Temenggong custom law (Adat Temenggong) is practised in other states. Adat Temenggong is believed to be first practiced in Malacca, and later was modified according to the laws of Islam after the acceptance of Islam by the sultans, ruler of the country. Customary law can be divided into three main sections:

- i. *Adat Perpatih*
- ii. *Adat Temenggong*
- iii. Translation of teachings (laws) of Islam.

3. Implementation of Malacca Laws

Malacca Laws is essentially based on Islamic laws, while not denying the existence of elements of customary law and legal sense. Malacca Laws is also known as Undang-undang Melaka. However, Malacca Laws is more appropriate to be used since it is part of the essence within the text of the original Undang-undang Melaka which contains various other laws. It was amended based on places (Liaw, 1976). In other words, Malacca Laws is Malay customary laws which are consistent with Islam. Formulation and collection of Malacca Laws are believed to have started during the reign of Sultan Muhammad Shah (1424 – 1444 AD) and then completed during the ruling period of Sultan Muzaffar Shah (1445 – 1458 AD) which was the glorious era of the Malacca Sultanate. Malacca Laws is divided into two main parts, namely customary law and Islamic law. The customary law is the main law, while the Islamic law is included as an option for punishment. Malacca Laws is also influenced by Islam and Hindu.

Sultan Muzaffar Shah of Malacca (1445 – 1458 AD) had introduced Malacca legislations known as the Malacca Laws. The laws commonly known as Undang-undang Melaka, was originally an unwritten rule. The regulations were to protect the government, citizens, and the state of Malacca. Although Malacca Laws was implemented during the reign of Sultan Muzaffar Shah (1445 – 1458 AD), it was only written and methodically arranged during the reign of Sultan Mahmud Shah (1489 – 1511 AD). Thus, Malacca Laws is considered to exist after the year 1489 AD.

The Malacca Laws that was methodically arranged and used in the rulings is divided into two parts;

- i. Malacca Laws: It contains Criminal Law, Mu'amalah Law, Family Law, and Law of Evidence and Procedure which defines the terms to become a ruler and the responsibilities to the government.
- ii. Strait of Malacca Laws: It is related to the regulations of shipping and trading, crimes in trading and jurisdiction over the master of the ship as well as related cases.

Malacca Laws consists of several parts including Constitutional Law, Criminal Law, Agriculture Law, Slavery Law, Contract Law, Guardianship Law, Family Law and Sink in Water/Oil Law . Each section was organized at different periods. The first part was the essence of the Malacca Laws which was prepared during the reign of Sultan Muhammad Shah (1424-1444 AD). The section was subsequently expanded and supplemented with regulations or laws on voyage by Sultan Muzaffar Shah (1445-1458 AD), which was during the height of the Malacca Sultanate. While the part for Islamic law, especially regarding law on bai' and shahadat (testimony), it was arranged soon after the establishment of Islam in the Nusantara (archipelago). Accordingly, the State Laws were prepared at the beginning of the sixteenth century when the Portuguese arrived in Malacca (Liaw Yock Fang, 2003).

Two sources of written law that existed during the Malacca Sultanate are Malacca Laws and Strait of Malacca Laws. Malacca Laws contains 44 clauses regarding the powers and jurisdiction of the king and ministers, the taboos in the society, the punishments for criminal offenses, and family law. The Strait of Malacca Laws contain 25 clauses that outline the rules of trade and sea traffic, cruise arrangements, power and jurisdiction of the ship's officers and the punishments for offenses committed at sea. Some of the clauses contained in the Malacca Laws and Strait of Malacca Laws are based on Islamic law. The content of Malacca Laws is based on 6 main clauses which are;

Clause 1 has 44 clauses, which 18 of those are based on Islamic law. The clauses are for Islamic Marriage Law, Islamic Trading Law, Law of Evidence, and Islamic Criminal Law. The matters included in the Islamic Marriage Law is engagement (S.18.1-18.3), wali (S.25.1), Ijab and Qabul (S.25.2), witness (S.26), khiyar (S.27), the right to marriage (S.28), the law of Muslim marrying a non-Muslim (S.26) and the marriage of free/independent people and slaves (S.28.1).

Clause 2 is about the king's jurisdiction

Clause 3 is about the minister's jurisdiction

Clause 4 deals with taboos in the society

Clause 5 is about the punishments on public offenses

Clause 6 is about family law.

4. Family Law

Marriage laws for Muslims as listed in Malacca Laws is a translation and modification of the principle content in the Shafi'i madhhab (Zaini Nasohah, 2004). Family law can be tried in two parts. The first part states that if a male proposes to someone else's fiancée, he would be fined. Under certain circumstances, a woman or her parents can return the dowry she received during the engagement, while the man can also ask for his dowry to be returned.

The second part is the Islamic marriage law. A person who wants to marry should have the presence of guardian, witnesses, as well as a marital contract. For married couples, they can also exercise the right of khiyar and divorce according to Islamic law as well as being married to a slave (Yock Fang Liaw, 2003).

4.1 Clause 18: Fault Law (Engagement)

Matters relating to engagement are referred in Clauses 18.1 to 18.3. If a man wants to propose to a woman who is already engaged to another man and the woman knows the man's intention, then he must inform the judge. The judge then will ask the woman to call her parents, and if they agree with the intent of the man, they should return twice the amount of the dowry to her former fiancé and the man will be fined by the judge as much as ten tahl and one paha (scales or units of heavy metric that were used in East and Southeast Asia). However, if he is poor, the fine is five tahl and one paha. Conversely, if the man does not know that the woman is someone's fiancée, he will not be fined- (Liaw Yock Fang, 2003, p.121).

However, if the parents of the woman agree with the second proposal, but the man does not know that the woman is engaged to another man, the fine will be imposed on the parents of the woman. This is because they have accepted the proposal of the first man and yet they accept the second proposal. Therefore, they are imposed with fine as above, unless of a khiyar as allowed by the judge. On the other hand, if the parents do not agree, then no fine will be imposed on them (Liaw Yock Fang, 2003, p.121).

A woman can break her engagement for three reasons;

- i. Payment without doubling the amount.
- ii. The man is in disfavour which is unknown by the woman prior to the engagement. Dowry is also returned without doubling the amount.

- iii. The man conceals important information such as he is already married, he is impotent, or has diseases such as foul-smelling ulcer, vitiligo and so on. The dowry must be returned by paying double the amount.

On the other hand, there are three reasons for a man to break his engagement;

- i. The woman is a servant (slave).
- ii. The woman brings disgrace to the family.
- iii. The woman has diseases such as ascites, urinary incontinence and so on.

All the above rules are permissible for a person, whether male or female who decides to break the engagement unless both or one of them accept the other partner for who he or she is. On the other hand, if it involves a servant (slave), fine is imposed as much as ten gold and no more than that (Liaw Yock Fang, 2003). According to the Enactment in the Selangor Family Law No. 4 1984 in item 15, if someone had tied a contract engagement in accordance with Islamic Law, either orally or in writing, and either personally or through an intermediary, and then refused to marry the other party on the contract without any reason while the other party agreed to marry, the party in breach is liable to return the betrothal gifts, if any, or the value and payment of any money that has been spent in good faith by or for the other party to prepare for the wedding.

4.2 Clause 25: Marriage Law

Clause 25 discusses matters covering marriage guardianship (S 25.1), Ijab and Qabul (S 25.2). In the case of approval of marriage, if the female is biker (virgin) and young (has not reached puberty), consent is not required from her. Otherwise, if she has reached puberty it is advised to get consent from her for her qaul azhar. If the woman is a muhsan (divorcée/widow) who has reached puberty, therefore consent must be obtained whether she wants to get married or not. This is because consent is a requirement in determining the validity of the marriage. Malacca Laws states that signs of puberty of a woman include reaching the age of 15, menstruation and growth of pubic hair and ikhtilam (this refers to discharge of fluid (semen or vaginal secretion released at orgasm during sleep) which is considered as a sign of puberty of men or women in Islam).

4.3 Clause 25 (1): Wali (Guardian)

Based on Malacca Laws, the wali for a woman must be in the order starting from her biological father, paternal grandfather and brother from the same parents. Guardian must be in accordance with Islamic law, known as wali Mujbir and wali Aqrab (close). The guardians are divided into three groups:

- i. Biological father as the main guardian.
- ii. Wali Mujbir (brother or uncle).
- iii. Wali Aqrab (family member who is close to the woman).

Guardian can mean a dear friend, leader, protector or helper from the closest male relative to the bride. Guardian is one of the pillars of the wedding. Wali Mujbir means the guardian has the power to marry off the daughter or granddaughter who is still a virgin without getting consent from the woman. According to the Shafi'i madhhab, wali Mujbir consists of biological father, paternal grandfather and above. While other wali like her paternal brothers, paternal uncle and so on are not wali Mujbir, meaning they have no power to force the girl to marry (Akhmal Md.Zain, 1999). According to the Shafi'i madhhab, some conditions are imposed to allow wali Mujbir to marry off a daughter or granddaughter namely:

- i. There is no enmity between the guardian and the female.
- ii. The marriage is performed with the man of equal status.
- iii. Dowry should be fair.
- iv. The husband is unable to pay the dowry.
- v. Dowry shall be in the currency of the country.

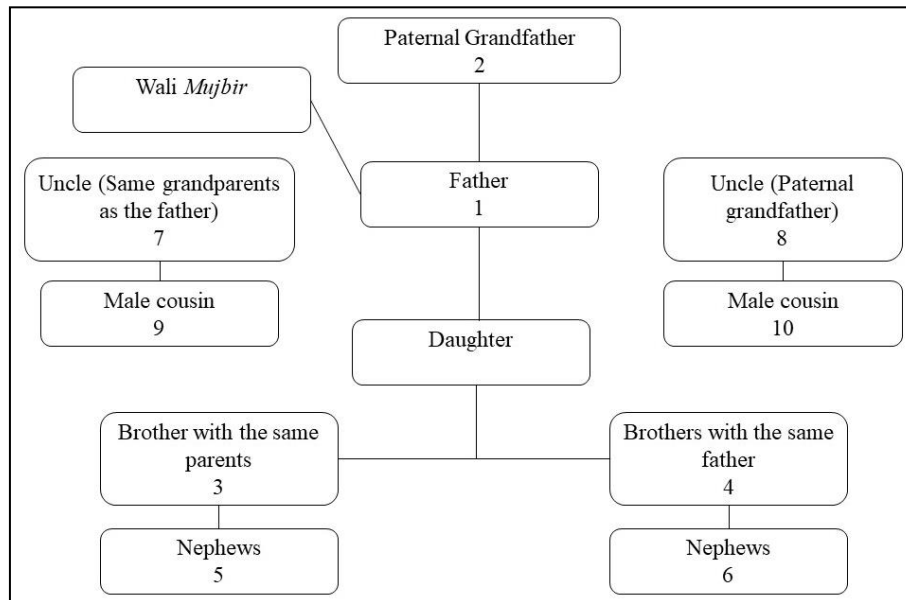
- vi. Marriage is not performed with a man who is blind or too old, who would make the marriage difficult.
- vii. The woman is not in the middle of performing the pilgrimage that must be completed.
- viii. There is no enmity between the woman and her future husband.

As wali is one of the requirements in Islamic marriage, therefore, not everyone can be a wali. To be a wali, these conditions must be met;

- i. Muslim
- ii. Has reached puberty (at least 15 years old).
- iii. Of sound mind
- iv. Male
- v. Fair
- vi. Independent or Free

A man who is blind or deaf can be a wali as long as he can consider and think about compatibility and matters that are important to the woman, can understand gestures or writing, and meets the requirements to be a guardian. The composition of the lineage for the guardian of the woman who has guardians is shown in Figure 1 below:

Figure 1: The Composition of the Lineage for Guardian of the Woman with Guardians



According to Figure 1, the order of the guardians is as follows;

- 1. Biological father
- 2. Paternal grandfather and those before
- 3. Brothers from the same parents
- 4. Paternal brothers
- 5. Nephews (Sons of brothers from the same parents)
- 6. Paternal nephews
- 7. Uncles (Sons from the same grandparents)
- 8. Paternal uncles
- 9. Cousins (Sons of uncles from the same grandparents)
- 10. Cousins (Sons of paternal uncles)
- 11. Muktiq (master to female slave who was released).
- 12. Asabah (heir) to a muktiq
- 13. King/Sultan.

If the first guardian is unavailable, the second guardian should be selected. If the second guardian is unavailable, the third guardian should be selected, and so on. By order of guardians, biological father should be the wali of the daughter's wedding. If the father has passed away, the guardianship is transferred to the bride's grandfather. If the grandfather is also deceased, the guardianship is transferred to the brothers of the bride with the same parents, and the guardianship follows the order. If the bride has no guardian, she will be married in the presence of a judge as a wali. It depends on several situations;

- i. Absence of first wali (biological father), wali Mujbir and wali Aqrab.
- ii. The distance between the woman's house and the wali's place takes more than a whole day to travel.
- iii. The woman is an orphan or has no other family member.

The Prophet said:

"So, Sultan who became the guardian of those who do not have a guardian".

(Narrated by At-Tirmidhi and Abu Dawud)

A judge as a wali is a Sultan or King who is a Muslim. He acts as a guardian of the bride who does not have a wali. As the Sultan or King is busy with tasks of the country, then the position as wali is given to the Qadi (marriage officiant) or a Registrar of Marriages to act as a magistrate guardian.

In the act of Islamic Family Law of Federal Territory, Section 2 (1) a magistrate guardian is defined as a wali that is authorized by the His majesty the king in the Federal Territory, Penang, Sabah and Sarawak or by the king in the case of other states to marry a woman who does not have a guardian in the lineage. Among the reasons for using the magistrate guardian is;

a) *Absence of wali in the lineage*

For the bride who does not have a guardian in her lineage such as the woman is a new convert in Islam, and thus none of her relative is a Muslim, or the woman does not have a guardian according to the list, or the woman is a child born out of wedlock, therefore a magistrate guardian will be the wali for her marriage

The Prophet said:

"Sultan will be the guardian for the woman who has no wali".

(Narrated by Al-Khamsah)

b) *Illegitimate child or foster child*

An illegitimate child or child born out of wedlock is conceived or born before a legal marriage. For example, if a pair of male and female cohabitates either for a long or short period, then a child is conceived, the child is considered illegitimate even if the child is born after the parents are legally married. In other words, a child conceived before marriage but born within marriage is still considered as illegitimate. Therefore, for a woman born out of wedlock, the wali must be the magistrate guardian. Similarly -, if an adopted child comes from an unmarried couple, then the guardian is the magistrate as the child has nobody who is blood related. However, if the adopted child comes from legitimate parents or a legal family, the guardian is based on the structure or order of the guardians of the paternal father, and not the foster parents.

c) *Guardian does not meet the requirements*

In Islam, if a wali Aqrab does not meet all the conditions required as a wali such as insane, has not reached puberty and so on, the jurisdiction of the guardian is transferred to the wali Ab'ad (far) according to the order of the wali. If the one and only wali available does not meet the requirements and there is no other wali available, therefore the task as a guardian is given to magistrate guardian.

d) Wali Aqrab is performing Hajj or Umrah (pilgrimage)

In the book of Minhaj Talibin in respect to Nikah (marriage), it is stated that if the wali Aqrab is in the middle of performing Hajj or Umrah, he has forfeited his rights as a guardian and the right is not transferred to wali Ab'ad, but the guardianship is transferred to the magistrate guardian. If the wali Aqrab provides a wakalah (representative) guardian before or during the Hajj or Umrah, then the wakalah is not valid.

The Prophet said:

"People in Hajj or Umrah cannot marry people and cannot be married."

(Narrated by Muslim)

Therefore, for a future bride, she must wait until the wali has returned from Mecca or she can marry in the presence of a magistrate guardian.

e) A refused guardian

The Fuqaha agrees that the guardian shall not refuse to let a woman under his guardianship to get married and shall not hurt or prohibit a woman to be married if the groom-to-be meets all the criteria. Therefore, the act of preventing or refusing to let the woman marry without proper reason according to Islamic law is prohibited and is considered as an act of injustice to the woman. According to most jurists (Shafi'i, Maliki and Hanbali), when a wali Aqrab refuses to marry off the bride, then the judge will marry her off.

Prophet Muhammad said:

"If the wali refuses, therefore the Sultan or the judge becomes the wali for the woman who has no wali".

(Reported by Abu Dawud and At-Tirmidhi)

f) Wali is located far or missing

Often arise in our society, wali Aqrab of the bride is located far away or missing. This poses a problem for the bride as the wali is not available. According to the Shafi'i madhhab, if wali Aqrab is missing or is living far and no guardian is available, in principle the guardianship is still his responsibility. However, since it is difficult to perform his responsibility, a magistrate guardian will replace his position. The question is the distance that is considered far. According to the Shafi'i madhhab, the distance is two marhalah, which requires performing Qasr prayer and a whole day and night of camel ride in the desert. Based on the obstacles and difficulties of the journey, a magistrate guardian will take over the job of the wali Aqrab.

Based on the current measurement, two marhalah equals to 91 km. If in the past, two marhalah is a whole day and night of camel ride, but now, the travel distance of two marhalah only takes several hours of driving. Even a trip between continents and oceans feels like a short distance. As a result, the current scholars believe that when a wali Aqrab is far away or missing, such as living in Europe or in the United States, the wali should be contacted and informed by a letter that he has to delegate the right to his guardianship to someone else to either marry off the bride or to wait for his return (if he wants to return home soon) because transportation nowadays is easy to get and fast. If the wali Aqrab is missing or situated far and the location is unknown, therefore the guardianship is transferred to the magistrate guardian.

g) Wakalah wali (wali delegates the responsibility to other people)

There is a principle in Islamic Law which states everything that a person can perform by himself, he may delegate that something to someone else.

According to this principle, the fuqaha agrees that any arrangement which is made by someone who has jurisdiction can also be appointed to another person such as in the case of nikah, trading, divorce, rent, right claim and other covenants. In the case of marriage, when a wali Aqrab is situated far away and unable to be present at the marriage ceremony, or the guardian may be present but is unable to conduct the ceremony, therefore the wali may appoint another person who has the qualifications according to syar'i (religious rules).

Similarly, for the prospective husband, if he is unable to attend the ceremony because he is studying abroad, he may appoint another person who has the qualifications to receive the ijab of the marriage. However, for the woman (future wife), she does not have the authority to appoint others to marry her off because her rights are in the hands of her guardian. According to most scholars, the conditions of people who could represent the wali are;

- i. Male
- ii. Has reached puberty
- iii. Independent/ Free
- iv. Muslim
- v. Sane
- vi. The wakalah (representation) cannot be made while the person who makes it is performing Hajj or Umrah.

The person who is asked to be the representative shall perform wakalah by himself based on what has been specified when creating the wakalah. This is because the person who receives the duty cannot delegate it to someone else except with permission or when the representative himself is asked by the wali in a manner as such; "It depends onto you (the person who receives representation) to implement the appointment, you yourself or others". Therefore, a representative can appoint another person to conduct the wakalah.

The representative shall exercise wakalah according to what has been determined by the person giving the appointment. For example, a representation is given to him to marry off the woman with A, then, it is compulsory for him to marry off the woman with A. If instead the representative marries her off with B, then the marriage is invalid. As practiced in Malaysia, often wakalah of a guardian is made before a Qadi or a marriage officiant in the presence of two witnesses. Before choosing a wakalah guardian, it is important to learn the background of the person you wish to accept the representation.

If the father is a fasiq, for he commits adultery, drinks alcohol and so on, he cannot be the wali of his daughter's marriage according to the first opinion. On the other hand, in the second opinion, a fasiq father can be a wali for the marriage of his daughter. However, if her guardian is of other relationship such as a brother, and the brother is a fasiq, he cannot be a wali for his sister's marriage. In this situation, a magistrate guardian has the right to the marriage instead (Liaw Yock Fang, 2003).

Thus, the jurisdiction of the guardians is crucial in a marriage because it determines the validity of the marriage. Therefore, prior to marriage, each parent and the bride should check and see who is eligible to become a wali according to the order of guardians. If the parents and guardians are not aware about the wali, they shall refer to any Qadi, Imam or religious people to get further explanation.

4.4 Clause 25 (2) Ijab and Qabul

In the Malacca Laws, the declaration of ijab and qabul is a term that makes the marriage valid. What it means by ijab and qabul is "a pledge that is said by the guardian and prospective husband". The rules for valid ijab and qabul are a continuous pledge between the ijab and qabul, the pledge is heard by two witnesses who understand the meaning, the name of the bride is specifically mentioned, the pledge is without ta'liq (proclamation to void the marriage), the duration is short, and the word Nikah is said in Arabic. Among the terms for ijab are (Akhmal Md.Zain, 1999);

- i. The word nikah or tazwij (marriage) is precise and accurate.

- ii. The proclamation of consent does not contain words indicating that the marriage is for a limited time but instead forever. Therefore, mut'ah (contract marriage) is not allowed.
- iii. The proclamations of both ijab and ta'liq are not allowed

Whereas the conditions for Qabul are (Akhmal Md.Zain, 1999, p.346);

- i. Must be between the proclamation of ijab and qabul, it is continuous and not punctuated or interrupted by other words and so on.
- ii. The proclamation is accepted by the future husband, as he said, "I accept...."
- iii. The proclamation of qabul does not use ta'liq.
- iv. The proclamation of qabul does not contain words that show that the marriage is for a limited time.
- v. The name of the wife shall be mentioned or replace it as "I accept the nikah of Maryam, or I accept her nikah".
- vi. The proclamation of qabul is precise and accurate and without innuendo.

4.5 Clause 26: Rules of Shahida (witness)

In a marriage, there must be four witnesses. However, the presence of two witnesses is already adequate. Conversely, if two witnesses are not present, the marriage is not valid, and the couple is considered committing adultery. The requirements for witness are as follows;

- i. A righteous person (Muslim, with dignity)
- ii. A person who is fair (reliable)
- iii. A mursyid (smart, understanding, understands the purpose of ijab and qabul, can listen, observe, and speak, sane and has reached puberty)
- iv. A free person

A person cannot be a witness if he is fasiq, a slave, and a female according to qaul azhar. This is because a woman is required as a witness in the case of menstruation and pregnancy problems only (Liaw Yock Fang, 2003, p.130-131).

4.6 Clause 27: Rules of Khiyar (Options)

Khiyar is allowed in marriage either on the male or the female side due to five defects or diseases:

- i. Insanity
- ii. Judzam (leprosy)
- iii. Baras (vitiligo)
- iv. Ratak (the vagina is covered with flesh or the person is impotent).
- v. Karan (the vagina is covered with bones).

A marriage is not valid when a spouse cannot accept all the above conditions. If both do not know that one of them suffers from leprosy and only knows it after marriage, then the marriage is dissolved immediately, which is termed as fasakh (void) marriage. As for the other opinion which states in the case of sexually impotent male, he is asked to seek treatment within a year, and if not cured within that period, then the marriage can also be dissolved by a judge who married them before. Conversely, if a man or woman accepts the inadequacy of a partner, then the marriage can be continued without being voided (fasakh). If both accept the inadequacies, then there is no Khiyar in the marriage according to valid kaul (opinion). On the other hand, if the defect or disease is on the male side, and the man dissolves the marriage, then the penalty is imposed upon him. Similar action will be taken for the woman who does the same (Liaw Yock Fang 2003: 131-132).

4.7 Clause 28: Rules of Talaq (Divorce)

In the Malacca Laws, it is stated that talaq is divided into talaq ba'in (cannot be nullified) and talaq raj'ie (can be revoked);

- i. Talaq Ba'in means a divorce that cannot be reconciled, such as triple talaq. If the husband divorces his wife with talaq ba'in (triple talaq), it is irrevocable until the woman marries another man. If the marriage also ends in divorce, then she can marry her first husband after the expiration of the iddah (waiting period) of three months and ten days.
- ii. Talaq Raj'ie is a divorce that can be reconciled such as single and double talaq. If the wife is divorced with talaq raj'ie (single or double talaq), the ex-husband can reconcile only after the iddah of three months and ten days.

Based on accepted kaul (opinion), it is not required for a male to marry a woman of Zoroastrianism and Wathani (worshiper of idols). For a free man, he cannot marry a female slave unless for four requirements;

- i. A free man who is a virgin (never been married to a free woman).
- ii. Inability to remain abstinent.
- iii. Unable to provide dowry to a free woman.
- iv. The female slave must be a Muslim.

As for a free woman, she can marry a male who is a slave if these two conditions are met;

- i. A free woman agrees to marry a man who is a slave without coercion.
- ii. Agreed by all the members of her family.

If the above two conditions are not met, then the marriage is void based on valid vows (Liaw Yock Fang, 2003, p.132-133).

5. Definitions of some basic and essential vocabulary related to Islam and Muslims towards a better understanding of the content in this article

- a) Sharia law – An Islamic legal system that is casted from Quran, Hadith and Sunna.
- b) Hadith – Statements of the Prophet Muhammad that have been written down and compiled. Used as a supplement to the Quran as a secondary source.
- c) Sunna – Actions of the Prophet Muhammad used to supplement the Quran as a secondary source.
- d) Mu'amalah Law – Jurisprudence of financial transactions according to Islam.
- e) Bai' – Islamic contract in which full payment is made in advance for specific goods to be delivered at a future date.
- f) Wali – For Islamic marriage, the wali of the bride is normally a male relative of the bride, preferably her father.
- g) Ijab and Qabul – Ijab (offer) and Qabul (acceptance) are the two essential elements of a contract (aqd) in Islamic financial and trading transactions. In Islamic marriage, ijab and qabul signify the agreement between the groom and bride to the marriage.
- h) Khiyar – The option or right that is given to buyer and seller whether to continue or cancel a transaction, upon the appearance of a defect.
- i) Shafi'i Madhhab – It is one of the four schools of Islamic Law in Sunni Islam.
- j) Tahil and paha – Scales or units of heavy metric that were used in East and Southeast Asia
- k) Qaul azhar – The opinion of Imam Shafi'I that is supported by strong evidence and is more powerful than his other opinions.
- l) Muhsan – Legal concept describing the personal status of an individual who is free (not a slave) and who either has never committed an act of illicit intercourse or has consummated a lawful marriage to a free partner.
- m) Ikhtilam – It refers to discharge of fluid (semen or vaginal secretion released at orgasm during sleep) which is considered as a sign of puberty of men or women in Islam.
- n) Fuqaha – A faqeeh (plural Fuqaha) is an Islamic jurist, an expert in fiqh, or Islamic jurisprudence and Islamic Law.

- o) Fasiq – It refers to someone who violates Islamic Law. As a fasiq, the individual is considered unreliable. Hence, his testimony is not accepted in Islamic courts.
- p) Wakalah – It refers to a contract where a person authorizes another to do a certain well-defined legal action on his behalf.
- q) Ta'liq – In Islamic marriage, the term means a promise expressed by the husband after solemnization of marriage in accordance with Hukum Syara' (laws of Islam accepted by Shafi'I, Hanafi, Maliki and Hambali Madhhabs). It means a conditional marriage stipulation in which ta'liq divorce can be given if the condition is breached.
- r) Mursyid – The term means a person who is sensible, mature and has integrity.
- s) Fasakh – Dissolution of marriage due to any valid reasons under Hukum Syara'.
- t) Talaq – A legal right given to a Muslim man to divorce his wife. It can be an unequivocal statement which constitutes a formal repudiation of his wife.

6. Conclusion

Before the colonial era began in the Malay Peninsula, people had already lived under the Islamic law, especially in Malacca. Under the implementation of this law, the government of Malacca became the government and authority of Islam in the Southeast Asia region. History of Malacca proves that the system of life that Allah has proposed is used in the civil and state laws which were implemented before the advent of colonialism. This law can surpass the boundaries of time and place when once again it partially implemented the leadership practiced by the Prophet Muhammad in Medina. The development in the society should never be used as a pretext for not implementing Islamic law. We, Muslims must believe that Islamic law is the law that best fits for us. Although practically all legal systems seek to achieve justice, since Islamic law stems from the revelations of Allah Almighty, who knows better what the human needs and what is best for them, Islamic law has precedence over other laws. We have inherited a legal system that is of good quality and unparalleled in terms of justice and humanity. We, who administer the law, carry a heavy burden. Our task is to show that Islamic law is not only the best, but its implementation will bring justice and will be well received by all parties. Improvements are necessary in the national and international laws. The Federal Constitution prohibits discrimination based on sex. Local and religious authorities in Islamic countries admit there are several aspects in their current and former family legislations require amendments to be unbiased and fair. The initiation towards reforming the law is the right step for Malaysia.

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