

# A Comparative of Family law development in a Colonized and a Non - Colonized State

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## ABSTRACT:

The paper will be discussing whether colonization has any effect in family law development of a colonized country like Malaysia as compared to a non-colonized country like Iran. These two countries have a common factor of Islamic law having dominance in personal law sphere. It will showcase how the development of Iran had a different kind of revolution while Malaysia is still in a colonization hangover and is finding its own identity along with external and internal factors shaping its institutions. The main argument is that colonialism introduced a secular feature to colonized Malaysia whereas Iran underwent absolute Islamisation of country's institutions. Colonialism was instrumental in institutionalizing laws and creating structures and courts but such creation can also be observed in Iran. It can be said that western influence was too strong a wave for any country to remain unaffected from as shadows of this influence can similarly be seen in Iran. Even though Islamic Ideology is commendable can it be that this can be seen as a polarized position with no space for diverse views as blindly following one ideology has its own repercussions..

“Scholars such as Bernard Cohn who have studied British India have argue that colonialism involves more than just the conquering of physical space.”<sup>1</sup>

Colonialism is not just an attack on a state's territory but an overpowering dominance and influence on the state's cultural, social, legal and economical ideologies and policies by another state. British colonialism is the greatest example of how colonialism can have deep entrenching effects on colonized country's development, even decades after independence. British brought their own legal systems as they thought any other legal system to be “primitive”, disorderly and still in the evolutionary stage, unlike the English legal system, which they considered systematic, just and universal (Victor Purcell 1965)<sup>2</sup>

One of the colonies under such seize was Malaysia that got colonized by British in the 18<sup>th</sup> century. Malaysia in contemporary times has an ongoing debate about the confusion in jurisdiction of Sharia Law and The Constitution as the latter promotes secularism whereas the former only favors Islam. On the contrary, Islam Republic of Iran was one of the few countries which wasn't a victim of colonization but still had its own revolutions which shocked the world and was seen as a “traditionalist revolution” which established a strong Islamic Ideology. The Iranian family law never faced any confusion on the state religion, even though there was western influence, as it was always an Islamic state. Hence, the paper will be discussing whether

<sup>1</sup> Shamsul, A.B. “Making Sense of the Plural-Religious Past and the Modern-Secular Present of the Islamic Malay World and Malaysia.” *Asian Journal of Social Science*, vol. 33, no. 3, 2005, pp. 449–472. *JSTOR*, JSTOR, [www.jstor.org/stable/23654382](http://www.jstor.org/stable/23654382).

<sup>2</sup> Raihanah . “The Development of Family Mediation in Malaysian Muslim Society.” *European Journal of Social Sciences* , vol. 18, no. 2, 2010, [umexpert.um.edu.my/file/publication/00002815\\_83961.pdf](http://umexpert.um.edu.my/file/publication/00002815_83961.pdf).

colonization has any effect in family law development of a colonized country like Malaysia as compared to a non-colonized country like Iran. Reasons for taking these two countries for comparison is that there is a common factor of Islamic law having dominance in personal law sphere. The development that is being referred in the hypothesis means an understanding about the process of formation of family laws and how its initial formation had an impact later.

Prior to any colonization in Malaysia, Hinduism and Buddhism came first through the influence of neighboring countries and later came Islam. Islam entering Malay world has many theories attached to it but it is predominantly divided into two schools, former believes it to come with trader and merchants and later believes it to arrive with Sufis.<sup>3</sup> This origin of Islam is significant in this discussion as it will help in better understanding of the roots of Islam in that country and how colonialism influenced and resulted into a “Bureaucratization of Islam”<sup>4</sup> and secularism in family laws. Malaysia was colonized by three major forces namely Portuguese, The Dutch and lastly The British<sup>5</sup>.

There is a contention that Britishers improved Malaysian life but they were also responsible for reducing the importance of Islam as after the Pangkor Treaty (1874) British had full control over the Malaysian administration except for in matters concerning religion and custom by appointing a British official in the Sultan’s court. Later this exception was also breached by the British. They brought English legal and court system for dispute resolution when they brought the Charter of Justice of 1807 in Penang<sup>6</sup>. This division that they created between customary laws and civil and criminal laws, i.e, a division of Public and Private sphere can be inferred in Law Reform (marriage and divorce) Act 1976 wherein Part 1, section 3(3) states that this Act will not apply to any Muslim or person married under Islamic law or someone professing Islam can be married under this act but it also have an element of court with power to enforce a decree of divorce even if one of the party converted to Islam post marriage.

The new Malay-Muslim government heads appointed by British came from imperialistic background after years of such domination due to which they had an inclination towards policies that had an impression of Islam being denoted as a religion which was incongruent with harmony and development due to which Islamic law

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<sup>3</sup> Shamsul, A.B. “Making Sense of the Plural-Religious Past and the Modern-Secular Present of the Islamic Malay World and Malaysia.” *Asian Journal of Social Science*, vol. 33, no. 3, 2005, pp. 449–472. *JSTOR*, JSTOR, [www.jstor.org/stable/23654382](http://www.jstor.org/stable/23654382).

<sup>4</sup> HAMID, AHMAD FAUZI ABDUL. “Implementing Islamic Law within a Modern Constitutional Framework: Challenges and Problems in Contemporary Malaysia.” *Islamic Studies*, vol. 48, no. 2, 2009, pp. 157–187. *JSTOR*, JSTOR, [www.jstor.org/stable/20839160](http://www.jstor.org/stable/20839160).

<sup>5</sup> “Timeline: Malaysia's history.” *Timeline: Malaysia's history* - Al Jazeera English, [www.aljazeera.com/indepth/spotlight/malaysiaelections/2013/04/201342882836970501.html](http://www.aljazeera.com/indepth/spotlight/malaysiaelections/2013/04/201342882836970501.html).

<sup>6</sup> Raihanah . “The Development of Family Mediation in Malaysian Muslim Society.” *European Journal of Social Sciences* , vol. 18, no. 2, 2010, [umexpert.um.edu.my/file/publication/00002815\\_83961.pdf](http://umexpert.um.edu.my/file/publication/00002815_83961.pdf).

made little progress in initial year post-independence<sup>7</sup>.

The Constitution of Malaysia can be seen having English influence as the commission that formed it did not contain any natives so their local ideologies got suppressed whereas English institutions and their laws gained significance in the courts as in cases of gap in law, English common law as an authoritative interpretive value in legal system. Hence colonialism introduced a secular feature to The Constitution of Malaysia as seen in Article 3(1) of the Federal Constitution which states that "Islam is the religion of the Federation, but other religions may be practiced in peace and harmony in any part of the Federation" and a dual judicial system came into existence wherein personal Islamic laws are decided by Shariah Courts and Secular/Federal courts decide civil and criminal disputes and personal laws for non-Muslim citizens.

In contemporary times, there is reluctance by civil courts of Malaysia to decide on cases on forced conversion and the Islamisation happening due to problems of jurisdiction and there is a tendency of judges to send cases of non-Muslims in Shariah courts to seek redressal which is a violation of their fundamental liberties guaranteed by their constitution. This can also be inferred from the New York Times<sup>8</sup> article wherein it is described how the two-tier system of judiciary have problems due to the lines being blurred in cases of interfaith disputes. The religious minorities claim it to be a disadvantageous for them when their case falls to Sharia, that is, Islamic Courts as they tend to prefer Muslim ideologies over other things. Hence, even though the Law Reform (marriage and divorce) Act 1976 clearly states that only such people who profess Islam shall have an exception in this Act, Non-Muslims are being dragged onto Shariah courts if one of their spouse converts to Islam and judges decree them to be heard in Islamic courts only, where they face disadvantaged as they are not Muslims.

On the other hand, the history of Islamic Republic of Iran was quite distinctive shadow from the dominance felt in a colonized Malaysia. But, nevertheless it had its own revolutions. From being ruled for decades by Pahlavi monarchy there came a revolution of 1979 that shook their world when they overthrew the dynasty as it was believed that he had submitted to the western influences and is imitating them in search of strengthening economic ties for trade benefits. Shiism became the official religion in 16<sup>th</sup> century and series of laws were passed related to civil, criminal, family and economy and by 1936 laws for secular education for judges were made. Thus, under Reza Shah major changes were made after Family Protection Law 1967 was passed which abolished extra-judicial divorce, restricted polygamy, as inferred from Sub section 3 of the Act wherein there is

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<sup>7</sup> HAMID, AHMAD FAUZI ABDUL. "Implementing Islamic Law within a Modern Constitutional Framework: Challenges and Problems in Contemporary Malaysia." *Islamic Studies*, vol. 48, no. 2, 2009, pp. 157–187. JSTOR, JSTOR, [www.jstor.org/stable/20839160](http://www.jstor.org/stable/20839160).

<sup>8</sup> Gooch, Liz. "Malaysian Custody Dispute Lost Between Courts." *The New York Times*, The New York Times, 1 Apr. 2010, [www.nytimes.com/2010/04/02/world/asia/02malay.html](http://www.nytimes.com/2010/04/02/world/asia/02malay.html).

restriction of polygamy as women can apply to courts in cases of non-reconciliation if the husband marries another woman without her consent, and established Family Courts for the application of personal laws. Then the revolution of 1979 came that brought Iran's too progressive laws, for that time, back to a restricted ideology where there was male dominance, polygamy, age of consent reduced to 13 for girls, etc. Supreme Judicial Council passed an order to make all un-Islamic laws adjourned and thus steps were taken to Islamize legal system.

Aljazeera article also noted how the Iran's revolution impacted nearby regions as mentioned:

*"The emergence of Hezbollah in Lebanon, the moral boost provided to Shia forces in Iraq, the regional cold war against Saudi Arabia and Israel, lending an Islamic flavour to the anti-imperialist, anti-American sentiment in the Middle East, and inadvertently widening the Sunni-Shia cleavage, are for me the most important by-products of the Iranian revolution," said Mehrzad Boroujerdi, professor of political science at Syracuse University, when asked for the top five geopolitical events set off by the Iranian revolution.*<sup>9</sup>

Iran post 1979 adopted "ideology", a western instrument for protest, to oppose the western culture domination<sup>10</sup> in order to establish Islamic ideology and the revolt happened when the clergy didn't accept the Family Protection Law 1967 as it had a lot of western influence and was a deviation from the Shariah as it can be seen from a comparison drawn between this Act and Pakistan Family law wherein Iranian law stressed more on satisfactory arrangement to be made in cases of custody and maintenance of children post separation but there is no such provisions in Pakistani laws. This eventually led to a strong opposition and declaration of the law as un-Islamic leading to a contention that all marriages and divorce that happened under them were not even true marriages or divorces.<sup>11</sup>

The argument of colonialism bringing secularism in personal laws of colonized countries can be countered as in contemporary times PEMBELA (Pertubuhan-pertubuhan Pembela Islam) which consists of mostly Muslim professionals and lawyers has been influencing the state to not pass any judgement in cases of Apostasy as they think that it would pave way for Muslims to leave Islam at will through such legal channels. Due to such pressure the State responded to a Malay-Muslim constituency by not only relaxing such provisions but also to increasing the role for Islam in public affairs by emboldening various UMNO (United Malays National

<sup>9</sup> Parvaz, D. "Iran 1979: the Islamic revolution that shook the world." *Iran | Al Jazeera*, Al Jazeera, 11 Feb. 2014, [www.aljazeera.com/indepth/features/2014/01/iran-1979-revolution-shook-world-2014121134227652609.html](http://www.aljazeera.com/indepth/features/2014/01/iran-1979-revolution-shook-world-2014121134227652609.html).

<sup>10</sup> Arjomand, Said Amir. "THE REFORM MOVEMENT AND THE DEBATE ON MODERNITY AND TRADITION IN CONTEMPORARY IRAN." *International Journal of Middle East Studies*, vol. 34, no. 4, 2002, pp. 719–731., doi:10.1017/S0020743802004063.

<sup>11</sup> KEDDIE, NIKKI R. "Women in Iran Since 1979." *Social Research*, vol. 67, no. 2, 2000, pp. 405–438. *JSTOR*, JSTOR, [www.jstor.org/stable/40971478](http://www.jstor.org/stable/40971478).

Organization) state authorities to execute more Shariatic legislation.<sup>12</sup>

This contrast of two countries where one was colonized while the other was not leads us to an argument that even though there was far reaching effect of colonialism in the institutions and laws of Malaysia by having westernized ideas inculcated in their systems, on the other hand, Iran which was never under colonialism had western influence in its legal system that was later changed into a strong anti-imperialistic stand by the revolution leads us to believe that western influence was too strong wave for any country to remain unaffected from, irrespective of it directly controlling such countries or not as secularism was brought to Malaysia but this ideology can similarly be seen in Iran. Thus, even though colonialism helped in institutionalizing laws and creating structures and courts, such creation can be observed in Iran also so there is not much influence that colonialism had since, irrespective of it, these institutions and laws were made due to its need arising with time.

There also one more practice of mediation being observed in Malaysia for cases of matrimonial disputes where procedures followed aiming at reconciliation and court proceedings only followed when this fails<sup>13</sup>. This shows that the customary practice continued despite British's insistence or focus on litigation process in any kind of disputes.

This brings us to another point of Malaysia if professing secularism shall have separate courts for other religions also in cases of personal disputes rather than it being subjected to a common act as secularism can be seen as an approach wherein no one religion is given special status or privilege.

Hence, what Malaysia is facing in terms of a debate on whether it is an Islamic state or a Secular state should be answered for it to lead to any kind of development. Even though the prime minister of Malaysia gave an arbitrary statement of it "always being an Islamic state" this resulted into an uproar by the general public as the non-Muslims perceived it to be an outright violation of their constitutionally guaranteed fundamental liberties to profess any religion.

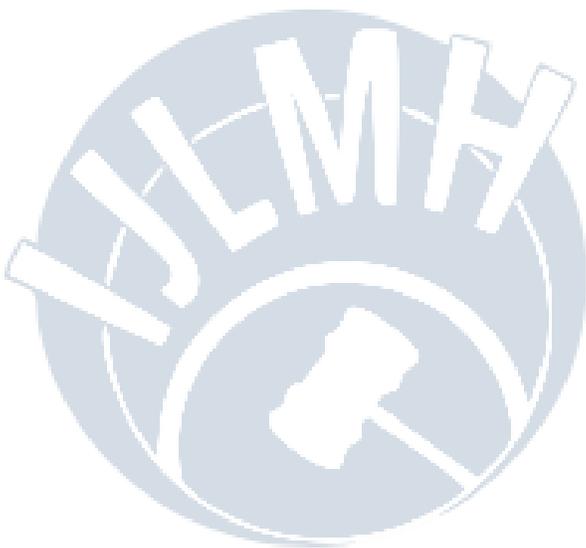
Another contention regarding Iran can be that even though its Islamic Ideology is commendable as it stands separate from the century old west and east divide and emphasizes the need to also focus on the middle east theories and ideas. But this strong stand on one side also has its own drawback has blindly following one ideology also has its own repercussions. Although Iran is not restricting itself from new amendments and development there is a need for it to rather than outright rejecting other ideologies, to consider and inculcate plus points from other ideologies and theories in the world because only such broadmindedness will lead to a

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<sup>12</sup> HAMID, AHMAD FAUZI ABDUL. "Implementing Islamic Law within a Modern Constitutional Framework: Challenges and Problems in Contemporary Malaysia." *Islamic Studies*, vol. 48, no. 2, 2009, pp. 157–187. JSTOR, JSTOR, www.jstor.org/stable/20839160.

<sup>13</sup> Raihanah . "The Development of Family Mediation in Malaysian Muslim Society." *European Journal of Social Sciences* , vol. 18, no. 2, 2010, umexpert.um.edu.my/file/publication/00002815\_83961.

holistic development of the country in a right direction. Hence, before revolution even though that Act was too progressive for that time it repositioned women in a better light as rights in terms of their marriage and custodial rights were more gender equal which I think is a need of today's time as well.



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