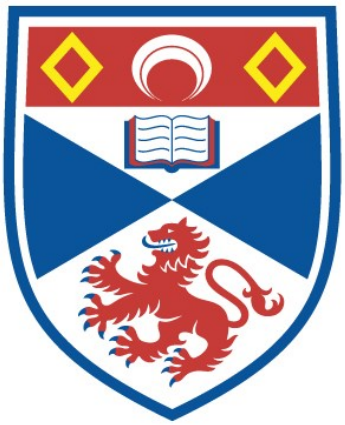
THE QUALIFICATIONS AND ROLE OF THE QADI IN KEDAH, MALAYSIA

Kamarudin B. Ahmad

A Thesis Submitted for the Degree of MPhil
at the
University of St Andrews



1993

THE UNIVERSITY OF ST. ANDREWS

THE QUALIFICATIONS AND ROLE OF THE QADI IN KEDAH, MALAYSIA

BY

KAMARUDIN B. AHMAD

A DISSERTATION PRESENTED TO THE
UNIVERSITY OF ST. ANDREWS FOR THE DEGREE OF M. PHIL. (A).

1992

DECLARATION AND CERTIFICATION

a. I, Kamarudin b. Ahmad, hereby certify that this dissertation has been written by me, and that it has not been submitted in any previous application for a higher degree.

date. 27-05-92 Signature of Candidate. _____

b. I was admitted as a candidate for the degree of M.Phil. on October; the higher study for which this is a record was carried out in the University of St. Andrews between 1990 and 1992.

date. 27.05.92 Signature of Candidate. _____

c. I hereby certify that the candidate has fulfilled the conditions of the Resolution and Regulations appropriate to the degree of M. Phil. of the University of St. Andrews and that he is qualified to submit this dissertation in application for that degree.

date. 31/05/92 Signature of Supervisor. _____

TABLE OF CONTENTS

ABSTRACT

Sharī'a has never ignored the need of and the function of judge. This institution, as developed in the early age of Islam, aimed to establish the rule of God on earth, to decide and explain the law according to the Islamic Law. It appears that anybody could be appointed as a judge but he was required to adopt certain criteria laid down by the fuqahā' based on the Qur'ān, Sunna, Ijmā' and Qiyās.

The requirements needed to be a judge in this Islamic approach are discussed widely in this study. This study also attempts to show and demarcate the limits of the power of judges in Sharī'a Courts in Kedah, Malaysia. It also shows how Islam established its system of justice in Malaysia.

Some questions or hypotheses are examined, the first concerns whether or not people who lack capabilities should be allowed to be appointed judge. The second concerns whether or not the Islamic judicial system follows the Sharī'a in terms of punishment and procedure.

The historical and theoretical settings in every age since the pre-Islamic to the 'Abbasid period are also presented. The situation of judge in Sharī'a Court in Kedah, Malaysia is also emphasised, beginning with the developments of the Sharī'a Court and the powers and duties of a judge according to the Malaysian constitutional system. Finally the subjects which have been discussed in separate chapters are actually related to each other. The whole important discussion is brought together, analysed and a conclusion drawn concerning the various problems raised.

INTRODUCTION

For Muslims, the foundation of government is the Sharī'a, the sacred law. This forms the basis of the judicial, economic and administration issues that it faces. God is the ultimate source of authority and so is the sole legislator. In Islam, law preceded the society and the state and is immutable for all times and under all conditions. Thus, the concept of law in Islam is that the community has God as its head. The law cannot be other than the will of God revealed to the Prophet.

There is no denying that the Sharī'a Court today in Malaysia and other Islamic countries, has lost its significance. The Sharī'a Court still struggles to fulfil the demands of Sharī'a. What is happening now is that the Sharī'a Court and parliamentary legislation reflect the struggle between two cultures, the Western, with the idea of separation of church and state, and the Islamic concept of religious unity in all aspects of life. The Sharī'a Court should be provided with fundamental laws that would satisfy the needs of Muslim.

Sharī'a Court in reality does not exist. In modern times the greatest challenge is from the West. Islamic law is bound to feel its impact. Generally speaking, the Sharī'a Court faces many problems and at the same time in the conflict between Sharī'a Court and Civil Court, the Civil Court prevails.

Below is the overview of the steps that were taken in developing the answer to the topic.

In Chapter I, specific eminent individuals in the history of Islamic jurisdiction were studied. Qāḍīs in the various ages and periods were studied, beginning with the pre-Islamic period, the period of Prophet Muḥammad, the period of the Caliphs, the Umayyad period and the 'Abbasid period. Examples of juridical institutions were also viewed, their system of operation and their effect on the people under their influence were studied. The early history of Islamic jurisdiction in Kedah, Malaysia too was involved in the discussion.

Chapter II, the criteria required to become a qāḍī are analysed in detail. The criteria discussed are sex, religion, freedom, vision, hearing and speech, 'adāla, ijtihād, maturity and sanity and other qualifications.

Chapter III, points out the functions of a qāḍī, methods and the separation of powers and duties, and the etiquette (adab) of a qāḍī.

In Chapter IV, the history, diversity and style of the Malaysian Legal system was elaborated. Various aspects of the systems were looked into and the conflict between Sharī'a Court and Civil Court. The sources of Islamic law that is Qur'ān, Sunna, Ijmā' and Qiyās were also elaborated.

Chapter V, a closer and more specific approach is made to the system of Sharī'a Court in Kedah including the Sharī'a Qāḍī Court and the Court of

Appeal, their procedures, duties, responsibilities, powers and the position of qāḍī and finally the requirements to be a qāḍī are analysed.

Chapter VI, the setbacks that arise in practising the law are considered. The reasons that lead to the problem, and the consequences are described. The contents of the previous chapters converged in this concluding chapter, and the interplay of contents leads to the conclusion and aims of the discussion.

List of Abbreviations

Andalusī, Muntaqā,	Al-Qāḍī Abū Walīd Sulaimān bin Khalaf bin Sa'd bin Ayyūb bin Wāris al-Bājī, Andalusī, al-Muntaqā.
Bakr, Qadā'iyya.	Muḥammad 'Abd al-Raḥmān al-Bakr, Al-Sulṭatu al-Qaḍā'iyya wa Shakhsiyyat al-Qāḍī.
Coulson, A History.	N. J. Coulson, A History of Islamic Law.
d.	Died.
E. I.	Encyclopaedia of Islam.
Esposito, Islam.	John L. Esposito, Islam The Straight Path.
F. C.	Federal Constitution of Malaysia.
F M S L R	Federated Malay States Law Reports.
Gibb, Mohammedanism.	H.A.R. Gibb, Mohammedanism.
Hooker, Personal.	M. B. Hooker, The Personal Laws of Malaysia.
J M B R A S	Journal of the Malayan Branch of the Royal Asiatic Society.

J R A S	Journal of the Royal Asiatic Society.
Ky.	Kyshe's Law Reports.
Kāsānī, Bada'i.	Al-Kāsānī, 'Alā'uddīn Abū Bakr ibn Mas'ūd, Badā'i al-Ṣanā'i fī Tartīb al- Sharā'i,
Khadduri, Justice.	Majid Khadduri, Islamic Conception of Justice.
M L J	Malayan Law Journal
Māwardī, Aḥkām.	Al-Māwardī, Abū al-Ḥasan 'Alī ibn Muḥammad ibn Ḥabīb, Al-Aḥkām al-Sulṭāniyya.
Māwardī, Adab.	Al-Māwardī, Abū al-Ḥasan 'Alī bin Muḥammad ibn Ḥabīb, Adab al-qāḍī.
Marghinānī, Hidāya,	Al-Marghinānī, Burhān al-Dīn Abū al-Ḥasan 'Alī ibn Abī Bakr ibn 'Abd al-Jalīl, Al-Hidāya Sharḥ Bidāyat al-Mubtadī.
n. d.	no date, the date of publication of certain source is not cited.
S U K. or P S U K.	Pejabat Setiausaha Kerajaan Kedah (The Office of the State Secretary of Kedah).

Schacht, An Introduction.	Joseph Schacht, An Introduction to Islamic Law.
Sharbinī, Iqnā'.	Al-Sharbīnī, Muḥammad ibn Aḥmad al-Khaṭīb, Al-Iqnā' fi Hall al-Fāz Abī Shujā'.
Q.	Qur'ān.
Qudāma, Mughnī.	Ibn Qudāma, Muwaffaq al-Dīn 'Abdullāh, Al-Mughnī.
Al-Ṭarābulsī, Mu'īn.	'Alā'uddīn Abū Ḥasan 'Alī bin Khalīl, al-Ṭarābulsī, Mu'īn al-Ḥukkām.

NOTES ON THE SYSTEM OF TRANSLITERATIONS

The system of transliterations adopted by Encyclopedia of Islam, new edition, 1979, has been followed with the following exceptions:

ج : j

ق : q

ح : h

Chapter I

(Part one)

The Qāḍi in Islamic History.

The Pre-Islamic Period

In the pre-Islamic period, the 'Arab people lived in a Bedouin tribal society and culture. Social organisation and identity were rooted in membership of an extended family. A grouping of several related families comprised a clan. A cluster of several clans constituted a tribe. Tribes were led by a chief (shaykh) who was selected by a consensus of his peers, that is, the heads of leading clans or families. These tribal elders formed an advisory council (majlis) within which the tribal chief exercised his leadership and authority as the first among equals. [1]

The desert with its oases does not permit a social and political organisation larger than the family, the clan or the tribe permits. Until the advent of Islam, allegiance was paid to the tribe which was composed of blood relations claiming a genealogical tie. The Bedouins lived as shepherds in a wide desert dominated by the continual hostility between tribes or clans which was a common result of tribal life. To achieve a larger and higher unity a force was needed which was capable of binding together men of differing customs and traditions. [2] The 'Arabs also placed great emphasis on tribal ties, group loyalty and solidarity ('asabiyya), as the source of power for a clan or tribe. Tribal affiliation and law were the basis not only for identity but also for protection. [3]

The only authority recognized by the pre-Islamic 'Arabs was that of their tribe which was collectively responsible for the safety and well-being of its members, and in the event of its members sustaining a loss or injury or being killed, it was the collective duty of the tribe to obtain redress or wreak vengeance. [4]

The decision leading to either course of action was neither official nor uniform. It did not follow any consistent rules of procedure, but was often the result of an instinctual-circumstantial customary code which greatly varied from one case to another according to different circumstances, the actions of litigating parties, and the particular tribal custom concerning the different types of injury. This may not have been the exact case in the settled communities of both Makka and Madina, Makka being a trade centre and Madina an organized agricultural settlement. Both appear to have had a sort of organized, though fragmented, system of law. [5] So justice was guaranteed and administered not by God, but by the threat of group vengeance or retaliation. Thus Arabian religion had little sense of cosmic purpose or of individual or communal moral responsibility. [6]

No central authority bound the 'Arabs in the Arabian Peninsula together. The tribes were bound by the body of unwritten rules which had evolved along with the historical growth of the tribe itself as the manifestation of its spirit and character. Neither the tribal shaykh nor any representative assembly had legislative power to interfere with this system. Modifications of the law, which naturally occurred with the passage of time, may have been initiated by individuals but their real source lay in the will of the whole community, for they could not form

part of the tribal law unless and until they were generally accepted as such. [7]

Each tribe was composed only of a self-governing political community without any sort of organisation to administer the law. Each tribe defended only its own members and accepted responsibility for their actions. There was no organised political authority to control their actions, and the individual outside his own tribe had no protection at all. Enforcement of the law was generally the responsibility of the private individual who suffered injury. If a dispute arose within the tribe, this would be settled by an intra-tribal arbitrator or if the dispute was inter-tribal they would go to a war. [8]

Arbitrators were chosen from the soothsayers (kāhin) priests of a pagan cult, who in the belief of the Arabian tribes, had a supernatural power of divination. [9] It was believed, that they also had spiritual contacts which gave them the ability to know what would happen in the future. The parties in order to establish the true character of a kāhin, used to test his ability before they submitted their cases by making him divine a particular secret. [10] The Encyclopaedia of Islam observes on this subject: "In private the kāhin especially act as judges in disputes and points of law of all kinds so that the conception of kāhin is closely connected with that of hakam (judge).... This decision is considered as a kind of divine judgment against which there is no appeal". [11]

The social framework that was the foundation of all laws in the pre-Islamic period has been identified by Joseph Schacht, "The law of personal status and family or inheritance and criminal law were dominated, both

among the Bedouin and among the sedentary population, by the ancient 'Arab tribal system". [12]

The period of the Prophet

During the missionary life of the Prophet (610-632 C.E) the foundation of Islamic Law was firmly laid. This is apparent in the Qur'ān "This day have I perfected for you your religion and completed My favour to you and chosen for you Islam as a religion". [13] Muḥammad, in addition to his office as a messenger of Allāh to promulgate Islam, was himself the first qāḍī for the Muslim community. The Prophet laid down the basis for jurisdiction and for the judges. [14] During his lifetime and especially during the ten years he spent in Madina, the Prophet adjudicated in all spheres of human intercourse, including the judging of cases which were of a criminal nature. He even assigned himself the judge for those who confessed other faiths, such as in his adjudication of the case of the two Jews who committed adultery. [15]

Furthermore, it is clear in the Qur'ān that the decision of the Prophet as qāḍī is binding and final. The Qur'ān says "But no, by thy Lord! they believe not until they make you a judge of what is in dispute between them, then find not any straitness in their hearts as to that which you decided and submit with full submission". [16] With the death of Muḥammad, prophethood came to an end, but during his missionary period, the Qur'ān, as the revealed word of God, was established as the ultimate authority for all legislation for the faithful. A second source of law existed, Sunna, or inspired behaviour of the Prophet, including what

he said, did and agreed to. During the Prophet's life the Companions (ṣaḥāba) learnt everything, for instance saying prayers, judgment and ablutions, by observing the Prophet's normative actions under his instructions. No doubt the Companions occasionally asked him questions relating to certain problems, as we learn from the Qur'ān (2:189.215), and the Prophet gave suitable replies to them. [17]

In the case of Sunna, the Prophet fulfilled another of his inherent functions or capacities, i.e., acting as a qāḍī or judge and as an exemplary Muslim. This function was ordained by God on various occasions as recorded in a number of sūras. An example is sūra 57, which states "We sent afore time our apostles with Clear Signs, and sent down with them the Book and the Balance (of right and wrong), that men may stand forth in justice". [18] Other sources of Qur'ānic authority with regard to the Prophet's acting as a qāḍī include, "We have sent down to thee (Muḥammad) the Book in truth that than mighest judge between them, as guided by God". [19]

During the lifetime of the Prophet, the legislative power was centred on him and no such power was given to anyone else. Although no special office seems to have been created by Muḥammad for this purpose, the Prophet acted as arbitrator or judge to settle the disputes which occurred. The Qur'ān states that "And We have revealed to you the Book with the truth, verifying that which is before it of the Scripture and guardian over it, so judge between them by what Allah has revealed, and follow not their low desires (turning away) from the truth that has come to you". [20] These sūras and many others either implicitly or explicitly ordained that the Prophet is the judge of his community. His judgment

thus became legal precedent. Some examples show that the Prophet Muḥammad was a judge for his community, for example he adjudicated, rendered judgments, and executed the judgments in the following cases: (21)

1) In the fourth year of Hijra, he sentenced two Jews to death (by lapidation) after they had confessed to committing adultery.

2) The Prophet also sentenced Mā'iz to death (by lapidation) after he confessed the commission of adultery.

3) In a case of slander which involved his wife, 'Aisha, the Prophet, in the fifth year of Hijra (626 A. D) applied the punishment to some of those who had been found guilty of circulating the alleged defamatory statements.

4) In a case involving a custody dispute over a child, the Prophet adjudicated that the one parent chosen by the child should be awarded his custody. In this case the child went with the mother.

At the same time there was only one court for all Muslims, and he presided over it. When justice had to be administered outside Medina after the spread of Islam, Muḥammad allowed [illegible] give judgment. For example, he appointed [illegible] him in his capacity as a judge. (22) It is clear that this [illegible] way limit the competence of the qāḍī relating to [illegible] subject of the case. In fact, Muḥammad did not [illegible] competences but he did at a later time specify [illegible] person, place and time. This is clear in the appointment of [illegible] others. (23)

Muḥammad emigrated to Yathrib (Madina), a city two hundred miles north of Makka to serve as chief arbitrator or judge in a bitter feud between its 'Arab tribes. [24] The message of the Qur'ān and the example of the Prophet Muḥammad have constituted the formative and enduring foundation of faith and belief. They have served as the basic sources of Islamic law and the reference points for daily life. [25] The function of Muḥammad is also explicitly stated in the Constitution of Madina. It states that "Wherever there is anything about which you differ, it is to be referred to God and to Muḥammad". And it states again " Whenever among the people of this document there occurs any incident (disturbance) or quarrel from which disaster for it (the people) is to be feared, it is to be referred to God and to Muḥammad, the messenger of God. God is the most scrupulous and truest (fulfiller) of what is in this document". [26] So, the position of Muḥammad under the Constitution was that of an arbitrator with great authority, and his position in this capacity improved with the development of his power. [27]

The position of Muḥammad was established by Qur'ān, which commanded the Muslim to obey God and his Messenger and accept whatever decision he might take. The Qur'ān also commanded the Muslims what they had to do if they had disputes. ".... and He revealed with them the Book with truth, that it might judge between people concerning that in which they differed...". [28] At last, one of the functions of the Prophet was to judge between people according to the Qur'ān.

The value of the legacy that Muḥammad, both as judge and law-giver, left to his followers is well suggested by Gibb, " The structure of law

and government which Muḥammad bequeathed to his successors, the Caliphs proved its value". [29]

The period of the Rāshidūn.

After the death of the Prophet (632 C.E) the period of al-Rāshidūn,[30] witnessed the continuance of the system of courts as instituted by Muḥammad. Abū Bakr, the first Caliph, filled the dual rule of leader and sole judge. For example, when he was leading a pilgrimage as early as the year (12.A.H), al- Ṭabarī tells that two youths were involved in a fight and one of them was hurt as a result. Presumably a dispute arose and was referred to him. He decided the case and referred to 'Umar to carry out the decision.[31] He also continued the system of courts which existed in the time of the Prophet. [32]

During this period, Abū Bakr was obliged to settle the zakāh (tax) problem and the war against apostasy (ridda war), which arose after the death of Muḥammad, and during this time there was no expansion of Islam. [33] He died in 634 C.E, and 'Umar b. al-Khaṭṭāb succeeded him. Under 'Umar, the apparatus of government was expanded, several tribunals being established for the better administration of all functions of government. A new development was instituted by 'Umar who appointed judges in the every city; the Prophet, as in the case of Mu'ādh had appointed them only in distant places. However 'Umar appointed Abu -l-Darda' in Madina, Shurayḥ in Baṣrah, Abū Mūsā al-Ash'arī in Kufah and 'Uthmān bin Qays in Egypt. [34] This means that for 'Umar's Caliphate, there are two phases in the judicial system: one in which he was the sole judge, the other in which he shared the judicial

administration with others who were his colleagues rather than his subordinates.[35]

By his step to appoint independent judges, 'Umar was the first Muslim ruler to make the judiciary an institution separate from the administration. [36] The separation was not complete, however, as the governor did himself retain judicial functions. This was natural in the beginning, because of the simplicity of the government, and because of the religious tone of the community; but inevitably, changes in organisation become necessary with changes in the conditions of the community. The evolution of the system may be seen in the case of 'Amr b. al-'Āṣ, who was at one time commander of the army and governor of Egypt. In addition he exercised all the judicial functions, and was responsible for collecting the kharaj (land tax). He was also the imām in the prayers. 'Umar eventually relieved 'Amr b. al-'Āṣ of all these functions except the first and the last. [37]

An important decision attributed to 'Umar which also shows the separateness of the offices of caliph and qāḍī, is in the account of a judgment given by Zayd. The losing party reported the outcome of the case to 'Umar, who agreed that had he disposed of the case, his judgment, would have been different from that of Zayd. The complainant accordingly appealed to 'Umar's authority as caliph to reverse the adverse judgment. The caliph, however expressed his powerlessness to interfere with the judgment of another qāḍī. [38]

'Umar also introduced measures for the governor to exercise his own initiative in appointing a judge. For example, 'Umar wrote to his

governor 'Amr in Egypt, to appoint Ka'b bin Yasar as a judge. When the latter refused the office 'Amr b. al-'Āṣ proceeded to appoint 'Uthmān bin Qays as judge of Egypt. Thus 'Amr b. al-'Āṣ was the first governor who independently chose a judge. [39]

In the early period, no salary was attached to the office, and there were no legal fees, but by the time of 'Umar, the judge was a full time salaried person. [40] From the period of Abū Bakr and 'Umar came two other foundations of the Sharī'a, ijmā', (consensus of opinion) and qiyās (analogy). These additional foundations were, of course, implicit in the Qur'ān and the Sunna. Coupled with these chiefs sources, other supplementary sources were established later, al-istiḥsān (juristic preference) and al-istiṣlāḥ (taking the public interest into account). [41] Thus in the period of al-Rāshidūn, there are four sources or foundations of Islamic law in evidence to help the qāḍīs in giving a right decision and to provide strong support for their judgment, the Qur'ān, Sunna, ijmā', and qiyās.

The Caliphs expanded Sunna by using original thinking in analogous cases and by authoritatively applying and interpreting Prophetic Sunna. They adjudicated new cases by using their own original thinking or ijtihād in matters that came to their attention for which they could not find a solution in the Qur'ān or Sunna. The first and second caliphs, furthermore made it clear to their appointed judges that in making legal determinations they ought to consider the available sources in the following order: [42]

1) the Qur'ān;

2) the Sunna;

3) a precedent by an authoritative lawyer, the requirements for whom were piety and knowledge of Islamic theology and law; and finally

4) their own personal judgment or consensus (according to the first caliph) or referral of the matter to the caliph by correspondence (according to the second caliph)

'Uthmān succeeded 'Umar and was succeeded by 'Alī, who died in 661 C.E. Until the time of 'Uthmān, no special building was set aside for the court of the qāḍī. The court sat either at first in the house of the qāḍī, or in the mosque, and he could even hold court on the public highway. [43] The third Caliph was the first to have a special building set aside for sessions of court.[44] The prison in the real sense of the word did not exist either at the time of the prophet or during the reign of the first Caliph, Abū Bakr. It was established during the reign of 'Umar b. al-Khaṭṭāb. At first, the guilty man was prevented from mixing with any other person, but he was put up in a house or in a mosque. [45]

The conclusion could be drawn that as long as the Prophet was alive, he legislated adjudicated and executed the divine law. In his capacity as a messenger and interpreter of the Qur'ān and other forms of divine orders, he could deal with any case or situation by the leave of God. His personal judgment could either be sanctioned, corrected or reformed by God who watched over his acts and 'kept the communications channel open' with him through the angel Gabriel. Thus all that the Prophet said or did stems from and is in conformity with the will of God. With the Prophet's death, all that was left for the caliphs but at that time all these were not written but retained in the hearts and mind of his

followers. An example of the circumstantial Qur'ānic legislation is cited in a number of the Ḥadīth books. [46]

The period of the Umayyads.(661-750 C.E)

During the Umayyad period, the Muslim state grew extensively, and encompassed a vast and diverse population. The state required the development of a judicial system, centred around individual judges, and the judge now just became a delegate of the local governor. The governor, within the limits set for him by the caliphs, had full authority over his province, administrative, legislative, and judicial without any conscious distinction between functions, and he could in fact and regularly did, delegate his judicial authority to his 'legal secretary', the qāḍī. The governor retained the power of reserving his decision in any lawsuit he wished, and of course of dismissing his qāḍī. The judge in this period is concerned only with the judicial function, unlike the practice of the preceding period, where the judge adjudicated in addition to performing administrative work. [47]

During the early Umayyad time, the office of chief of police (ṣāḥib al-Shurṭa) was set up. This was, at the same time, the person who executed the judgments of the qāḍī in matters of Qur'ānic criminal law. He also kept a watch on criminals, whom he sought out and eventually brought before the qāḍī. [48] The judges in this period were completely independent, and not under the influence of the executive authorities. Their decisions were enforceable on the executive authorities. [49] And in the time of the Umayyads the caliph appointed a qāḍī for each province. [50]

Nāẓir al-maẓālim was introduced in this period, and effectively controlled the judiciary and corrected miscarriages of justice. In the absence of a court of appeal a litigant who was dissatisfied with one magistrate's decision could take his case to another magistrate, provided the decision of the first had not been carried out. It was also possible to claim damages for an unjust decision by application to this court. [51] Before the Umayyad period, persons aggrieved by their situation, often sought redress from the caliph openly and informally. This development was designed specifically to meet this problem. The first caliph to sit in this court was 'Umar b. 'Abd al-'Azīz, called also 'Umar II. [52]

During the Umayyad period, the Muslim law was characterised by two main features; first the judge exercised his discretion, because the four schools of Muslim law which judges later had to abide by were not yet established . At this time, the judge had to draw his own judgment from the Qur'ān, the Traditions, or the consensus (ijmā'), or to use his own discretion; second, the judge was not influenced by politics, he was independent in his judgment. His authority was unlimited and the governors of the provinces, the revenue collectors, and even the caliph had to submit to his judgment. [53]

By the end of the Umayyad period, the qāḍīs had advanced far beyond their original position as official arbitrators. They had become an integral and important part of the administrative machine, no longer controlled by, but themselves controlling the customary law and by their decisions adapting it to meet the changing circumstances of society. [54]

There was no uniformity in the administration of law throughout the realm, decision naturally being influenced by local customary law. The amazing speed of political expansion made this state of affairs inevitable, apart from the fact that, as N. J. Coulson says "No real unifying influence was exerted by the central government and there was no hierarchy of superior courts whose binding precedents might have established the uniformity of a case law system". [55]

The period of the 'Abbasids.

The 'Abbasid period is called the period of the founding of the schools of law, because with the emergence of the 'Abbasids, the science of jurisprudence was set up. During the early period, the four major madhāhib of Abū Ḥanīfa, Shāfi'ī, Mālik and Aḥmad b. Ḥanbal came into existence. The judge gave his judgment in accordance with the principles of one of these schools. [56] These madhāhib are important in many ways, not least because of their influence in many aspects of the work of qāḍī, in matters of substance, procedure and decisions.

Among the important characteristics of the judiciary system in the 'Abbasid period was the appointment of judges representing the four orthodox schools in each province. Each of these judges was entrusted with the task of dealing with cases relating to persons who adhered to the teachings of their particular schools. [57]

The early 'Abbasid caliphs continued with the tradition of selecting, but it became a fixed rule that the qāḍī had to be a specialist in

the Sharī'a. He was no more the legal secretary of the Governor, but was normally appointed by the central government and once appointed, until he was relieved of his office, he was to apply nothing but the Sharī'a, the Sacred Law, without interference from the government. However Schacht said that this independence remained theoretical. [58]

The 'Abbasids set up the system of the Chief Judge or Supreme Judge (Qāḍī al-Quḍāh), who took up his residence in the capital of the empire and appointed judges in the Muslim provinces. During the reign of Hārūn al- Rashīd, Abū Yūsuf was the first to receive the title of Chief Judge. [59] The Chief of Judges soon became one of the most important counsellors of the caliph, and the appointment and dismissal of the other qāḍīs under the authority of the caliph was the main function of his office. Schacht described the Chief Judge, " it was originally an honorific title given to the qāḍī of the capital whom the caliphs normally consulted on the administration of justice". [60]

Furthermore, in accordance with the Qur'ānic direction (3:100-104) the office of the Muḥtasib, an officer responsible for enforcing Islamic morals and good behaviour in the community of Muslims, was set up. [61] The function of the Muḥtasib was the prevention of obvious breaches of law, specifically in relation to weights and misrepresentations as to the nature and quality of goods in the market, and avoidance of payment of admitted debts. He was also charged with punishing persons resorting to public drinking or failing to attend congregational prayers without sufficient reason. [62] The office of Muḥtasib, inspector of the market, is said to be of Byzantine origin. On the other hand, the title Chief Judge

(Qāḍī al-Quḍāh), is said to have been modelled on the Sassanian Persian Mobedan Mobed (Chief Priest) in Zoroastrian worship. [63]

Jurisdiction Institutions.

In this I try to focus briefly on the institutions of qāḍī, al-muḥtasib, al-maẓālim, ḥākim and muftī.

Wilāyat al-qaḍā'

I begin with the institution of qāḍī. The qāḍī was the most important judicial officer of the Islamic state and played an important part in the sphere of the administration of justice. The account of his functions and qualifications is given in the next chapter. Al-qaḍā' originally meaning decision, has in the Qur'ān different meanings, according to different contexts. For example it means doomsday, jurisdiction, revelation of the truth, predestination, determination and decree. [64]

Ibn Khaldūn has pointed out how the office of qāḍī was developed. At first he had to judge only between individuals, but the burden of statesmanship became so great as to make it impossible for the caliph or even his representative to busy himself with the multitude of affairs that touched the inner life of the community. Many of these tasks were placed upon the shoulders of the qāḍī. It became his duty to take charge of the weak-minded, of orphans and bankrupts. Testamentary disposals and pious foundations were committed to his care. At this time he was also inspector of streets and building and especially of market

places and of weights and measures. [65] In the dictionary of Islam, T.P. Hughes gives the following concise definitions of the word: [66]

1) the office of qāḍī or judge,

2) the sentence of a qāḍī,

3) repeating prayers to make up for having omitted them at the appointed time,

4) making up for an omission in religious duties, such as fasting,

5) the decree existing in the divine mind from all eternity, and the execution and declaration of a decree at the appointed time,

6) sudden death.

Wilāyat al-Maẓālim

The maẓālim jurisdiction is delimited as compelling those who would do each other wrong to mutual justice, and restraining litigants from renouncing claims by inspiring fear and awe in them. The maẓālim court should include these five sets of person; Guards, (ḥāmī and 'aun) for the use of necessary force; judicial persons (qāḍī or ḥākim), for ascertaining the principles of law and the procedure applicable; jurists (faqīh), referees on doubtful or difficult points; scribes (kātib), to note down what passes between the parties and what is decided for or against them; approved witnesses (shāhid), to show by evidence where the right lies and what the judgment should be. [67]

'Abd al-Malik b. Marwān was the first to fix a day for going into the case of persons complaining of unjust treatment. This is not by hearing from the person, but from the qāḍī, Abū Idrīs, who in dread of his

master's close knowledge and attention, cleared up doubtful points and did what was necessary to enforce the decrees made. [68] In addition, the function of this institution was to set right cases of miscarriage of justice which occurred in the administration and judicial department.

The qāḍī is bound to adjudicate a case at once. The maẓālim judge may delay the verdict if such delay appears to further the finding of the truth. The qāḍī cannot summon witnesses directly. He has to wait until the complainant brings forward witnesses and examined them. The maẓālim judge is free to act as he sees fit in the best interest of justice. [69] According to Māwardī, the jurisdiction of maẓālim differs from that of the qāḍī's court. He set out the following matters to show the difference ; [70]

1) superiority in dignity and power, enabling it to check baseless denial on the part of litigants and restrain acts of violence on the part of wrongdoers,

2) a jurisdiction wider and more unfettered, both in scope of action and in sentence,

3) power of intimidation and of eliciting and getting at the facts of the case, a task which qāḍīs find difficult, and thus arriving at the truth,

4) power of checking open wrong doing and visiting open trangression with correction and discipline,

5) power of deliberation, by recalling the litigants to attend when a case is doubtful and making searching inquiry into the facts, whereas a qāḍī is bound to adjudicate when required to do so by litigants without any such delay,

6) power to refer the litigants, if they be obstinate to an amīn, as referee, to settle the dispute without the need of any consent. While the qāḍī can do this only by consent of the parties,

7) full power of securing the attendance of litigants (mulāzama) in case where an absence of good defence is apparent, and of requiring security when that is admissible to the furtherance of injustice and discouragement of false defence,

8) power to hear the evidence of persons leading a retired life (mastūrīn), on matters beyond the qādī's means of knowledge, through approved witness,

9) power of putting the witness on oath where they seem to be wanting in their duty , or where their number is very great, so as to remove doubt and suspicion. This again a judge or qādī has no power to do, and

10) power, at the outset, to summon the witnesses and to interrogate them as to their knowledge of the dispute, whereas the practice of the qādī is to require the complainant to bring forward his witnesses, and they are heard only after being examined by the complainant.

The court of mazālim also has a function as stated below: [71]

1) to investigate and redress the misuse of authority by the executive in the levying of taxes and the recording of rights by public scribes.

2) to hear, adjudge and enforce orders on complaints by those in receipt of official stipends that these have been reduced in amount or have not been paid.

3) to look after the interests of awqāf, whether public or private.

4) to secure the enforcement of decisions made by qādīs not sufficiently strong to see their judgment executed by defendants of high rank or occupying powerful positions.

5) to undertake the suppression of evil doing and the enforcement of regulations within the jurisdiction of the muḥtasib but beyond his power to enforce.

6) to ensure the care of public worship and religious practice in general and to see that there are duly performed.

7) to undertake in proper care the adjudication of disputed cases by the same procedure as adopted by qadis.

Wilāyat al-Ḥisbah

The office of muḥtasib came into being in response to the verse of the Qur'ān, " And among you there should be a party who invite to good and enjoin the right and forbid the wrong". [72] The function of muḥtasib, was both that of superintendent of the market and public censor. As regards his official religious duties, al-muḥtasib was to enforce Islamic morals and religious behaviour on the community. For example, he must see that the five prayers are performed daily at the proper times, that the fasting of the month of Ramaḍān be observed and everyone observes modesty of behaviour and strict code of morality, that no men and women are allowed to mix together in the streets and in the public places. The maintenance of the mosque came also under his control. [73] He was also charged with punishing persons resorting to public drinking or failing to attend congregational prayers without sufficient reason.[74]

Another function of the muḥtasib was to see that justice is being smoothly administered. Al-Māwardī believed that if any qāḍī attempts,

unnecessarily, to disguise from litigants, or refuse without lawful course, to entertain their complaints until the machinery of justice stopped its motion and litigants suffered, the superior of the qādī would not prevent the muhtasib from showing his disapproval of the former's blameworthy attitude. Al-Mawardi illustrates this, reporting that Ibrāhīm ibn Batha', wali al-hisbah at Baghdad, had passed by the house of the qādī, Abū 'Umar ibn Ḥammād. There he saw the litigants sitting at the door of qādī's house waiting for the qādī to come out. Wali al-hisbah stopped and called the qādī's usher and instructed him in these words, " go and tell the qādī that these litigants are sitting at his door and are suffering from being here under no shelter from the hot sun waiting for him. He should come out and either hear them or tell them to disperse and come back on another fixed day". [75] So it became clear that the muhtasib can discover evils and social vices on his own initiative, while the qādī has power to adjudicate only when matters are raised before him. (However Muhtasib has no right to dispense justice in matters of marriage and mu'āmalāt. [76])

According to ibn Khaldūn, al-muhtasib's duties include enforcing the public welfare in towns. For example, he would stop any inconvenience that may occur to users of the streets, he prevents carries and ship owners from carrying too much load on their animals ships. When he find houses that are threatening to collapse, al-muhtasib would order their owners to demolish them immediately, so as to forestall any unsavoury consequences or damage. The smooth running of the schools, also comes under the jurisdiction of al-muhtasib. He can punish any school teachers if they unnecessarily beat their pupils. [77] His duties are intermediate between those of the qādī and the mazālim judge. He is not entitled to deliver judicial opinion, but he upholds what may be called the

common law. His activities partake of those of the police officer and of those of the judge. His authority is both executive and judicial, but it is restricted to application and enforcement of prior rulings of 'higher' courts or of the popular feeling of equity. [78]

Muḥakkam

Ḥakam or arbitration precludes action before a qāḍī. The Hidaya lays down that where two persons agree upon an arbitrator (ḥakam) and agree to his giving the award, the arbitrator possesses the same powers as that of a qāḍī. [79] Arbitration is possible [illegible] (ḥuqūq l-'ibād), but not in the case of the [illegible] Allāh). [80]

Arbitration naturally proceeds from the will of the parties involved and arbitration constitutes an act of jurisdiction. It is described in the text as a branch of the judicial power, although on the [illegible] arbitrator's decision is regarded as a [illegible] give judgment in conformity with the [illegible] possible only for the settlement of private [illegible] property. On the other hand, the effects [illegible] to the persons who are directly involved. [illegible] arbitrator, or the parties may nominate two or [illegible] case the arbitrators must, in principle, give a unanimous decision.

If the parties refer the award of the arbitrator to a [illegible] conformable to his opinion, he must cause it to be carried into [illegible]

because it would be useless to annul it, and then pass a similar decree. But if it be contrary to his opinion, he must annul it, as the decree of an arbitrator is not binding on the qādī, since he did not authorize it. [82]

The necessary qualities of an arbitrator are the same as those demanded of a qādī. So it is not valid to appoint a slave, or an infidel, or a person that had been punished for slander, or an infant to act as an arbitrator, because none of these is competent to be a witness. [83] However a woman is eligible to be an arbitrator. The appointment of a ḥakam is not valid in cases of ḥudūd and qiṣās, because the party has no power over his own blood, and is therefore not capable of assigning it to others. In particular, arbitration is to be recommended in matters involving property, divorce, emancipation of slaves, marriage and guarantee but not in zinā, theft and libel (qadhf). [84] The arbitrator also cannot benefit himself or his close relations by his award. This is the rule also for the qādī, and the arbitrator cannot delegate his duty to another person. [85]

Muftī

A muftī is a specialist on law who can give an authoritative opinion on points of doctrine. His considered legal opinion is called fatwā. So muftī is a person who gives a fatwā, opinion on point of law, the term 'law' applying in Islam, to all civil and religious matters. The conditions required by the classical doctrine for the exercise of the profession, or even for the delivery of fatwā; are Islam, 'adāla or integrity, legal knowledge (ijtihād) or the ability to reach, by personal reasoning, the

solution of a problem. So the muftī can give a fatwā on the ground that he is mujtahid. As opposed to a qādī, a muftī can be a woman, a slave, a blind or dumb person, except in the case of a muftī who is a public official. Fatwās may be given to private individuals, to magistrates in the exercise of their profession, and to any other authorities. [86] Some scholars said that a fāsiq is not capable of being a muftī, because the giving of a fatwā is connected with the religion, and the morals of a fāsiq are not creditable in matters relative to religion. [87]

(Part Two.)

Islam In Kedah

The history of the Islamization of the Malay Archipelago is still a much neglected field, particularly the period from the thirteenth to the sixteenth century, a period of large-scale and vigorous conversion to Islam. At the heart of this neglect are two related issues; the impact of Islam in the Malay Archipelago and the periodization of Malay history.[1] In the history of Malaysia, most historians say that Kedah was the earliest known kingdom to embrace Islam, established as early as between 600 and 700 A.D. Kedah was a potential area for the establishment of a port and emporium for trade in various commodities between the Middle East and China. This activity was occurring , even before Islam. The success of Kedah at that time was probably due largely to its geography. There was the distinctive landmark of the Kedah peak 3,987 (Jerai Mountain) which is visible from the sea as far as thirty miles away, and which the Indians considered to be a home of the Gods. [2] In addition to this, the Sungai

Bujang (river) during that time was navigable to vessels of large size, and possessed an excellent water supply. Finally, it provided easy access by land from Kedah to Patani, Singapore (Songkhla) and Ligor which were all on the other side of the Malay Peninsula.[3]

Although Kedah has a long history, its ancient history as a whole and the history regarding the coming of Islam, in particular, are very limited. There are many histories regarding the coming of Islam in Kedah. The date of the coming of Islam remains questionable. Present-day historians try to date the introduction of Islam to Kedah by use of local historical sources. Possibly the presence of Islam in Kedah began earlier than the establishment of the Malacca Sultanate in the early 15th century. This evidence is based on the tombstone, which has been found at Tanjung Inggeris, Kedah dated 291H/ 903 A.D. The tombstone belongs to Sheikh 'Abd al-Qādir b. Ḥusain Shah 'Alam and describes the shahāda and his name.[4]

According to G. Khan, it is claimed that Islam was brought to Kedah during the 7th century A.D. It is thought that Indian Muslim traders who frequently visited Kedah introduced Islam and converted some people to Islam. [5] He stated that in 774 'Arab traders, Khurthas Bey and Sulaimān left the teachings of Islam in this country. In the 8th century there had been continuous contact with Indian Muslim traders and resident Muslim merchants. Some Muslim merchants married Malays. Inter-marriage helped to spread Islam in many Malay families. According to Khan the earliest evidence showing that Islam was there is based on the silver dirham coin dated 848 (234 A.H), the coin of 'Abbasid caliph al-Mutawakkil (847-861) which was found at a Hindu temple. [6]

Many authors dealing with the history of the Islamization of this area have stressed the fact that Islam was brought to the region by traders from 'Arabia, Persia and India. Ḥasan bin Aḥmad Mullabī, writing towards the end of the tenth century, reported that a thriving area existed on the west coast of the Malay Peninsula (named Kalah or Klang) inhabited by Muslims from Persia and India.[7]

Speaking about Kalah, Abū Zayd of Sīrāf (d. 916) says that 'this city, which lies half-way between China and Arabia, is the centre of all trading in spices and aromatic essence, it is there that the Omani ships come nowadays to traffic and it is from here that they return to Oman'. [8]

It is actually very difficult to fix the precise date of the coming of Islam to Kedah. However based on the first government, Kedah was established by Raja Mahawangsa. In 695, Srivijaya took over Kedah from Raja Mahawangsa. During that time the commercial links between Telok Benggala and South-East Sumatra effectively occurred and Kedah became a stop-over. [9]

In 1068, Chola conquered Kedah and it was reported there were many traders especially 'Arab, Persian and Indian who visited the Malay Archipelago during this time. It is probable that Islam had been introduced into Kedah by this time. [10] However according to Fatimi, these areas accepted Islam officially at the end of 15th century A.D in the time of Malacca Sultanate. [11]

According to another views, the Hindu kingdom of Aceh in Sumatra had gradually become converted to Islam since 1106 by the 'Arab

missionary Ibn Baṭūṭah and Muslims going to Kedah to trade left behind their Islamic customs. By 1136 Islam found a place in Kedah and began to compete with Hinduism. Persian script was also introduced by Indian Muslim residents. [12]

With regard to Sulṭāns, historians have different views on the matter of who was the first Sulṭān converted to Islam. One claims that the first ruler of Kedah was Merong Mahawangsa also known as Pra Ong Mahawangsa who was converted Islam under the efforts of Sheikh 'Abdullāh al-Yamanī. [13] However, according to Al-Tarikh Salasilah Negeri Kedah, the first king Maharaja Durbar was converted to Islam on the efforts of a learned 'Arab, Sheikh 'Abdullāh bin Tuan Sheikh Aḥmad al-Qumairī from Yaman in the year 531 H /1136 A. D. [14] Having came to Qalha, he is said to have visited the king and inquired about the religion of this state. The king replied " my religion and that of all my subjects is that which has been handed down to us by the people of old. We all worship idols". "Then has your highness never heard of Islam, and of the Qur'ān which descended from God to Muḥammad and has superseded all other religious, leaving them in the possession of the devil?" " I pray you then, if this be true", said the king, "to instruct and enlighten us in this new faith". [15] After this conversion, the name of the king was changed to Sulṭān Muẓaffar Shah. Sheikh 'Abdullāh was appointed as a religious adviser to the Sulṭān. In five years Islam became widespread in Qalha or Qalaha. Sheikh 'Abdullāh suggested that the Sulṭān should rename Qalha or Qalaha. Sulṭān Muẓaffar Shah agreed and the name "Kedah Darulaman" meaning an abode of tranquillity was given and remains to the present day. [16] Sheikh 'Abdullāh died and was

buried in the flat area on the Jerai Mountain which until today is known as Padang Tok Sheikh. [17]

It seems that there is a difference between them in determining who was the first ruler of Kedah converted to Islam. To remedy this, it is said that Maharaja Durbar Raja founded his palace called "Kota Langkasuka" at Sok approximately sixty miles to the east of the Jerai Mountain, while Merong Mahawangsa also founded his palace on the eastern part of Jerai Mountain near the sea and it was called "Kota Langkasuka" as well. It is obvious that the kings tried to isolate themselves from the centres of worship and the activities of Hinduism and Buddhism which were scattered around the banks of the Sungai Bujang (Bujang River). From this, therefore, we can assume that Maharaja Durbar Raja and Merong Mahawangsa were probably the same person. And we should notice here that before the emergence of Islam, the religions of the ruler and the subjects of Kedah were Buddhism and Hinduism.[18]

Furthermore, the conversion of Maharaja Durbar as stated is said to have occurred through the efforts of a learned 'Arab, Sheikh 'Abdullāh bin Sheikh Aḥmad Ja'far al-Qumairī from Yaman. Merong Mahawangsa was converted to Islam through an effort of the same person. Thus, we can conclude that Maharaja Durbar Raja and Merong Mahawangsa were probably the same person.

Other than this event, it is said that during the disturbance which occurred in China at the time of Hi Tsung Emperor 265-276H/ 878-889 A.D, 'Arab merchants who settled in Canton migrated to Kedah and the

western coast of the Malay Peninsula.[19] This argument is possibly true because, from the geographical point of view, Kedah was of easy access by land from Patani, Singgora (Songkhla), Ligor and even from China. [20] However all this can only be tentative suggestions because undoubtedly many aspects and problems of early Malaysian history remain unanswered.

From the above description and evidence that is given, we find that there is no specific date for the coming of Islam to Kedah. Kedah probably converted to Islam before Malacca did. Possibly the conclusion could be that the existence of the stone represents the settlement of a Muslim community with its own government in that region. The kalimah al-Shahāda which is written on the front face of the stone also indicates the existence of Islam in Kedah. Therefore, one might simply accept that the coming of Islam could have occurred in 10th century A.D.[21] However there is no unanimity among historians on the exact date of the coming of Islam to Kedah

Kedah was under Siamese occupation from 1821-1842 before the English took it over in 1909 after a treaty between them. Kedah became allied to the Unfederated Malay States. The Kedah Sulṭān accepted a British resident, whose advice was to be asked and acted upon in all matters of administration, except those concerning religion and custom. [22]

Islamic Organisation

Data about the administration of Islam in the early years have not been uncovered. However there was one office at that time called Sheikh

al-Islām. Its function was to advise the Sultān in religious matters. The first person appointed as Sheikh al-Islam was Muḥammad Khayāt, an 'Arab. He held this office from 1901- 1903. The second adviser or Sheikh al-islām was Sheikh 'Abdullāh Dahlan, who served for one year. The third and last Sheikh al-Islām was Wan Sulaimān Wan Sidiq. He served almost thirty years. It should be mentioned that there have been only three holders of the office of Sheikh al-Islām. [23]

After the death of the last Sheikh al-Islām, Majma' Sheikh al-Islām was introduced to replace Sheikh al-Islām. This committee includes a Chief qādī. The first office of Islamic administration took place in Limbong Kapal, Alor Star Kedah. However the date of the establishment is not known. [24]

Throughout the Muslim period, arrangements were made to arrest and punish those Muslims who abstained frequently from the congregational prayer on Friday and those able-bodied Muslims who had not fasted in Ramaḍān but ate in restaurants openly, and those Muslims who sinned in the company of the non-Muslims opposite sex and those Muslims who purposely refused to contribute the zakāh. [25] From this statement, we may conclude that there was an office or organization to handle this problem. However no mention was made about the Shari'a Court or any office of qaḍā'. Thus the existence of Sharī'a Court at this time was not known. The reason for this is that for the most part the laws were undated and unwritten.

Nevertheless, there were a few written laws which could be found in the law of Dato' Sri Paduka Tuan dated in the year 1667 A. D which laid down that; [26]

1) Thieves, robbers, cock-fighters, opium smugglers, gamblers, worshippers of trees and rocks, drunkards, all those sins against Allāh must be reported by the leaders of a village to the headman. Failure to report on the part of the elders or the headman shall be punished;

2) The headman shall order villagers to observe the five times of prayer, the fast and Friday services. The recalcitrant shall be brought to the mosque with a yoke round his neck;

3) Land owners shall pay religious tithes.

Apart from these, there are also Kedah Laws which were prepared during the reign of the Sulṭān Muḥammad Shah (1122-1174 H) and were based on three sources, al-Qur'ān, 'aql and naql. [27] We find that the influence of Malay customs is less and that more of the Islamic laws are generally followed. The Kedah laws is said to have consisted of forty parts. It dealt with criminal, marriage, mal, land law and the qualification to be a Sulṭān and other officer. [28]

The clear date illustrates that there were a Qāḍī and Chief Qāḍī in the year 1910. The statement mentioned that Wan Sulaimān Sidiq before he was appointed as Sheikh al-Islāmi was Qāḍī and Chief Qāḍī. This occurred in 1910. [29] Actually this is not the earliest date of the existence of Sharī'a Court, but Sharī'a Court at this time was well known. And one of the letters sent by the Chief Qāḍī in 1913 , clearly has shows that the office of qāḍī or Sharī'a Court was established. [30] In truth, it is still doubtful as to the actual date of the drawing up of the Islamic court

and of the Islamic law. According to Ahmad Ibrahim the Sharī'a Court was established in 1905 under the Enactment of Mahkamah 1905. [31]

In 1912, the Appeal Court of the Civil Court was entitled to hear any appeal from Sharī'a Court, provided that two learned men (faqīh) were among the committee members in the Civil Court. For example in 1912, one appeal was brought to the High Court before the judge of the Civil Court and Sheikh al-Islām was among the committee members. One may conclude here that before 1948, the Sharī'a court was under Civil Court administration. [32] In 1948, the Courts Ordinance established a judicial system for the Federation and omitted the Sharī'a Court as being part of the federal courts system. [33] When the British came and exercised their influence in the Malay state, the Sharī'a Court lost its significance. R.J Wilkinson said, "There can be no doubt the Muslim law would have ended by becoming the law of Malaya had not British law stepped in to check it". [34]

Footnote.

Part One.

1. John L. Esposito, Islam The Straight Path. New York : Oxford University Press. 1988. p. 5.

2. Erwin I. J. Rosenthal, Political Thought In Medieval Islam, An Introduction Outline. Cambridge : University Press. 1958. p. 21.

3. Esposito, Islam, p. 5.

4. Bello Daura, A brief account of the development of the four Sunni schools of law, and some recent developments, Journal Of Islamic and Comparative Law. 2 (1968), p. 1-2.

5. Richard Bell, Introduction to the Qur'an. ed. W. Montgomery Watt. Islamic Surveys. No. 8. Edinburgh: University Press. 1970. pp. 4, 82.

6. Esposito, Islam , p. 6.

7. N. J. Coulson, A History of Islamic Law. Edinburgh : University Press. 1964. p. 9-10.

8. Coulson, A History, p. 10 ; Joseph Schacht, An Introduction to Islamic Law. Oxford : Clarendon Press. 1964. p. 7.

9. Coulson, A History, p. 9. ; Schacht, An Introduction, p. 8.

10. Schacht, An Introduction , p. 7.

11. The Encyclopaedia Of Islam. New Edition, edited by B. Lewis, C.H Pellat and J. Schacht, Leidin: E. J Brill, 1965 see "kāhin"

12. Schacht, An Introduction, p. 7

13. Q, 5 : 3.

14. Ḥasan and 'Alī Ibrāhīm Ḥasan, Al-Nuẓūm al-Islamiyyah. Cairo: Maṭba'ah al-Nahḍah. 1939. page 329 ; Maḥmūd bin Muḥammad 'Arnūs, Ta'rīkh al-Qaḍā' fi 'l-Islām. Cairo : Maṭba'ah al-Miṣriyya al-Ahliyya. 1934. pp. 10-11.

15. Aḥmad 'Abd al-Mun'im al-Bahī, Tā'rīkh al-Qaḍā' fi al-Islām. Cairo: Lajnat al-Bayan al-'Arabī, 1970, p. 22 ; Mustafa 'Abdul Magid Kara, The Philosophy of Punishment In Islamic Law. 1977, p. 64 A Dissertation submitted to the Faculty of Claremont Graduate School in partial fulfillment of the requirements for the degree of Doctor of Philosophy in the Graduate Faculty of Government.

16. Q, 4 : 65.

17. Ahmad Hasan, The Early Development of Islamic Jurisprudence. Islamabad : Islamic Research Institute. 1970. p. 12. ; Abdul Rahman I. Doi, Sharī'a, the Islamic Law. London : Ta Ha Publishers. 19 . p. 7.

18. Q, 57: 25.

19. Q, 4 : 105.

20. Q, 5 : 48.

21. Farīd Muḥammad Wāṣil, Al-Sulṭatu al-Qaḍā'iyya wa Niẓām al-Qaḍā' fi al-Islām. Cairo: Maṭba'ah al-Amānah. 1983. pp. 39-40. ; 'Abd al-Mun'im al-Bahī, op.cit,. pp. 22-31.

22. 'Arnūs, op.cit., p. 11. ; 'Alī 'Alī Manṣūr, Nuẓūm al-Ḥukm wa al-Idārah fi al-Sharī'a al-Islamiyyah wa al- Qawānīn al-Waḍ'iyyah. Beirut : Dār al-Fatḥ. 1971. p. 362.

23. 'Alī 'Alī Manṣūr, ibid.

24. Esposito, Islam,. p. 11.

25. ibid,. p. 36.

26. W. Montgomery Watt, Muḥammad At Medina. Oxford : Oxford University Press. 1956. pp. 223-224.

27. ibid., p. 228.

28. Q, 2 : 213.

29. H. A. R. Gibb, Mohammedanism, An Historical Survey. Oxford University Press. 1949, p. 3.

30. The first four Caliphs or successors to the Prophet.

31. Abū Ja'far bin Jarīr al-Ṭabarī, Ta'rīkh al-Ṭabarī. vol.3. Cairo: Dār al-Ma'ārif. ed. Muḥammad Abū al-Faḍl Ibrāhīm. 1960. p. 386.

32. 'Aṭiyah Muṣṭafā, Al-Qaḍā' fi al-Islām. Maṭba'ah al-Ittiḥād. p. 100. ; H. R. Abdul Majid, A Historical Study of Muhammedan Law. Law Quarterly Review. vol XXVII. 1911. London. p. 41.

33. Esposito, Islam, p. 42 ; Muhammad Salām Madkūr, Al-Qaḍā' fi al-Islām. Dār al-Nahdah al-'Arabiyyah. 1384 p. 25.

34. Muḥammad Shahīr Arslān, Al-Qaḍā' wa al-Qudāh. Beirut: Dār Ittiḥād, 1969, p. 56 ; Madkūr, ibid., p. 26 ; Ḥasan and 'Alī Ibrāhīm Ḥasan ,op.cit., p. 331-332.

35. 'Arnūs, op.cit., p. 12.

36. ibid., ; Arslan, op.cit., p. 55.

37. Ḥasan and 'Alī Ibrāhīm Ḥasan, op.cit., p. 301.

38. Muḥammad Al-Khuḍari, Ta'rīkh al-Tashrī' al-Islāmī. Cairo : Matba'ah al-Sa'ādah, 1964, p. 116. ; Edward Jurji, Islamic Law in Operation. American Journal of Semitic Languages and Literatures. 1940. p.47.

39. Arslān, op.cit., p. 99-100.

40. ibid., pp. 224-225. ; Ḥasan and 'Alī Ibrāhīm Ḥasan, op.cit., p. 351.

41. Ibn 'Abd al-Barr, Jāmi' Bayān al-'Ilm wa Faḍlih. vol 5. Damascus : Munir al-Dimashqi. n.d. p. 1.

42. Ibn Qayyim al-Jawziyya, I'lām al-Muwaqqi'īn. vol 1. Cairo : Maṭba'ah al-Sa'ādah. 1955. p. 62.

43. Maurice Gaudefroy-Demombynes, Muslim Institutions. translated from the French by John P. Macgregor. London: George Allen and Unwin Ltd. 1950. p. 151.

44. 'Abd al-Hamīd Mutawallī, Mabādi' Nizām al-Hukm fi al-Islām. Dār al-Ma'ārif. 1966. p. 635 ; Madkūr, op.cit., p. 26.

45. Hasan and 'Alī Ibrāhīm Hasan, op.cit.,p. 330.

46. Mustafa A. Kara, op.cit., p. 70

47. Schacht, An Introduction, p. 24-25.

48. Gaudefroy-Demombynes, op.cit., p.154.

49. Madkūr, op.cit., p. 29-30. ; 'Alī 'Alī Mansūr, op.cit,. p. 370.

50. Gaudefroy-Demombynes, op.cit., p. 149.

51. ibid., p. 157.

52. Anwar Ahmad Qadri, Justice in Historical Islam. Lahore : Sh. Muhammad Ashraf. 1968, p. 34.

53. Hasan and 'Alī Ibrāhīm Hasan, op.cit., p. 334. ; 'Alī 'Alī Mansūr, op.cit,. p. 370.

54. Coulson, A History, p. 33.

55. ibid., p. 30.

56. Madkūr, op.cit., p. 30 ; Arslān, op.cit., p. 60 ; Hasan and 'Alī Ibrāhīm Hasan, op.cit., pp. 334-336. ; Anwar Ahmad Qadri, op.cit., p. 46.

57. Hasan and 'Alī Ibrāhīm Hasan, op.cit., p. 334.

58. Schacht, An Introduction, p. 50.

59. Josepht Schacht, "The School of Law and Later Development of Jurisprudence". in Law in the Middle East. ed. Majid Khadduri and Herbert J. Liebesny, Washington: The Middle East Institute. 1955, p. 58 ; Mutawallī, op.cit., p. 636.

60. Schacht, An Introduction., pp. 50-51.

61. ibid,. p. 52 ; Esposito, Islam., p. 88.

62. 'Atiyah Mustafa, op.cit., p. 190 ; Esposito, Islam, , p. 88.

63. Schacht, An Introduction , p. 51.

64. E. I , "Qadā"

65. Franz Rosenthal, The Muqaddimah. Abridged and edited by N. J. Dawood. London: Routledge and Keegan Paul. 1967. pp. 173-174.

66. Thomas Patrick Hughes, A Dictionary Of Islam. London: W. H. Allen & Company. 1935, p. 479

67. Mawardi, Ahkam ,. p. 80 ; 'Ali 'Ali Mansur, op.cit,. pp. 380-381. ; H. F. Amedroz, The Office Of Kadi In The Ahkam Sultaniyya Of Mawardi, Journal Of The Royal Asiatic Society. 1910, p. 637

68. Mawardi, Ahkam,. p. 78 ; Amedroz, ibid,. 636

69. Gustave E. Von Grunebaum, Medieval Islam. 2nd edition. Chicago: The University Of Chicago Press. 1953. p. 65

70. Mawardi, Ahkam,. p. 83 ; Amedroz, op.cit, p. 641

71. Khalid M. Ishaque, Al-Ahkam al-Sultaniyya, Islamic Studies. Vol: IV September 1965, pp. 291-292.

72. Q, 3: 103

73. A.I. Omer, The Institution Of al-Hisba In the Islamic Legal System, Journal Of Islamic And Comparative Law. Vol: 10, 1981 p. 70. ; Khalid M. Ishaque, op.cit,. p. 293.

74. Khalid M. Ishaque, op.cit,.p. 293. ; Franz Rosenthal, op.cit,. p. 178.

75. Mawardi, Ahkam,. p. 257. ; A.I. Omer, op.cit,. p. 72 .

76. Al-Tarabulsi, Mu'in, p. 12 .

77. Franz Rosenthal, op.cit,. p. 178. ; A. I. Omer, op.cit,. p. 70.

78. G. E. V. Grunebaum, op.cit,. pp. 165-166.

79. Charles Hamilton, The Hedaya, vol. 2. New Delhi: Bhavan, 1985 p. 638.

80. A. A. Fyzee, The Adab al-Qadi in Islamic Law, Malaya Law Review. Vol : 6 1964 ,p. 414 ; Al-Ṭarābulsī, Mu'īn, p. 12, 25.

81. E. I, "Hakam"

82. Charles Hanilton, op.cit,. p. 639

83. ibid, p. 638

84. A. A. Fyzee , op.cit,. pp. 414 -415 .

85. Charles Hamilton, op.cit,. p. 640.

86. E. I , "Fatwa"

87. Charles Hamilton, op.cit,. p. 614. ; Marghinānī, Hidāya. p.101.

Part Two

1. Syed Farid Alatas, Notes On Various Theories Regarding The Islamization Of The Malay Archipelago, Muslim World. Vol: LXXV 1985 (January). p. 162.

2. N. J. Ryan, The Making of Modern Malaya, Kuala Lumpur: Oxford University Press, 1965 p. 7

3. R. Braddle , Most Ancient Kedah, Malayan In History, 1958, vol. 4. p. 25 ; A. W. Hamilton, The Old Kedah-Patani Trade Route. J M B R A S, 1922. no. 86 p. 389

4. Abdullah Ishak, Islam Di Nusantara (Khususnya di Tanah Melayu), Selangor (Malaysia): Al-Rahmaniah, 1990 p.45

5. G. Muhammad Khan, History Of Kedah, 3rd Edition. Penang : Premier Press Co. Ltd. 1958. p. 21

6. ibid,. p. 22

7. Syed Farid Alatas, op.cit,. p. 163. ; S. Q. Fatimi, Islam Comes to Malaysia. Singapure : Malaysian Sociological Research Institute Ltd. 1963. p. 67.

8. R. R. De Meglio, 'Arab Trade with Indonesia and the Malay Peninsula from the 8th to the 16th century'. in D. Ds. Richards, ed. Islam and the Trade of Asia. Oxford : Bruno Cassier. 1970. p. 116. ; Syed Farid al-Attas, op.cit,. p. 164.

9. D. G. E. Hall, A History of South East Asia, London: Macmillan and Company Ltd. 1955 . p. 43.

10. Ibid,. p. 140, 191

11. S.Q. Fatimi. op.cit,. pp. 73-75 ; R. O. Winstedt, Notes on the History of Kedah, J M B R A S. vol XIV. London. 1936. part 3 pp.155-189

12. G. M. Khan, op.cit,. p. 22

13. R. O Winstedt, op.cit,. pp. 155-189.

14. Muhammad Hasan bin To' Kerani Muhammad Arshad, Al-Tarikh Salasilah Negeri Kedah, Kuala Lumpur: Dewan Bahasa dan Pustaka, 1968. p. 26

15. T.W. Arnold, The Preaching Of Islam: A History of the Propagation of the Muslim Faith. Lahore : Sh. Muhammad Ashraf. 1968. p. 378.

16. Abdullah Ishak, op.cit,.pp. 48-49

17. G. Muhammad Khan, op.cit,. p. 23 ; Abdullah Ishak, ibid,. p. 49

18. G. A. Hodgson, An Introduction to The Kedah History,. Published in the Annual Reports of the United Kedah Planting Association, 1963. pp. 11-12.

19. Syed Muhammad al-Attas, Preliminary Statement on a General Theory of the Malay-Indonesia Archipelago. Kuala Lumpur : Dewan Bahas dan Pustaka. 1960. p. 11. ; Abdullah Ishak, op.cit,. p. 44.

20. H.I.Ismail, Sejarah Kedah, Kedah:Uni. Utara Malaysia, 1987. p. 5.

21. Abdullah Ishak, op.cit,. p. 45.

22. R. Emerson, Malaysia: A Study of Direct and Indirect Rule, Kuala Lumpur, 1966 pp.235-236. ; Kenneth Roberts-Wray, Commonwealth and Colonial Law, London: Steven and Sons, 1966. p. 716.

23. Othman Haji Ishak, Fatwa dalam Perundangan Islam, Kuala Lumpur: Fajar Bakti, 1981 p. 46.

24. ibid,. pp 46- 47.

25. G. Khan, op.cit,. p. 25.

26. R. O. Winstedt, Kedah Laws, J M B R A S, vol:VI pt. 11.1928, p. 8.

27. Kodin b. Komis, Undang-Undang Kedah, Legal Advisor's Office Law. (K/P. U. I, 1970) Arkib Negara, Introduction part. ; Abu Bakar Abdullah, Kearah Perlaksanaan Undang-Undang Islam di Malaysia: Masalah dan Penyelesaiannya, Pustaka Damai, 1986. p. 60

28. ibid,. p. 61

29. Wan Yahaya bin Wan Mohd Taib, Salsilah atau Ta'rekh Kerajaan Kedah, Alor Setar. 1329 H p. 23.

30. Fail S. U. K. Kedah Bil : 477/32.

31. Ahmad Ibrahim, Kearah Penyelarasan Undang-Undang Islam di Malaysia. Journal Hukum. 1987 (Jun). p. 244.

32. "Peningkatan Mahkamah Shari'a dan Hukum Shari'a di Malaysia'. Seminar Pentadbiran Undang-undang Islam, Peringkat Kebangsaan, 28-29 hb Mei 1990. Dewan Konvokesyen Wisma Darul-iman, Terengganu. p. 7.

33. Ahmad Ibrahim and Ahilemah Joned, The Malaysian Legal System. Kuala Lumpur : Dewan Bahasa dan Pustaka. 1987. p. 55.

34. ibid,. p. 54 ; R. J. Wilkinson., 'Papers on Malay subjects'. Law. Kuala Lumpur. 1971.

Chapter II

Analysis of the criteria required to become a Qāḍī

Islamic Law has imposed certain conditions to become a qāḍī (judge). A candidate must fulfil these conditions before he could be approved to exercise his own judgment in the lawcourt. According to some fuqahā' there are as many as about fifteen [1] conditions of eligibility for the office of qāḍī whereas some fuqahā' said there are seven, [2] and some fuqahā' reduce them to only three. [3]

In brief, the writer of al-Hidāya gives the following conclusion that a minor who has still not attained the age of puberty cannot be a qāḍī; a non-Muslim is not eligible to become a qāḍī; an insane person cannot be a qāḍī; a person convicted of qadhf (slandering with accusation of adultery) loses his competency for the office of qāḍī; a fāsiq is competent to become a qāḍī, though the appointing authority should not select a fāsiq for the office of qāḍī; and a woman may be appointed as qāḍī in those cases wherein her evidence is admissible. [4]

Ibn Qudāma, lays down the three following conditions for the office of qāḍī. First the qāḍī should be a kāmil (perfect), that is of two kinds; kāmil al-aḥkām and kāmil al-khilqah. Kāmil al-aḥkām means the conditions of being eligible to perform general religious duties, and these conditions are being adult, sane, free and male. By kāmil al-khilqah is meant not to suffer from physical unfitness, that is, the appointee should be sound of organ of speech and sound of organ of hearing and sight. Second a qāḍī should be 'adl and, third a qāḍī should be a mujtahid.[5]

While Ibn Farḥūn gives the following list of the qualifications of a qāḍī, being Muslim, sane, male, free, adult, 'adl, knowledgeable, being one (in a circle of jurisdiction), sound of hearing, sound of sight, and sound of speech. [6] Regarding these, certain conditions are ijmā'ī, agreed upon by all the fuqahā', and the rest not ijmā'ī, not recommended by all the fuqahā'. Yet no matter how they differ one from another, they all seem to hold that conditions are necessary. That means Muslim scholars have asked for certain conditions to become a qāḍī, but they have different views about the number of conditions. These conditions in detail concerned the following matters:

Sex.

Scholars have different views on this condition. Some scholars are not agreed to give the post to a woman. The majority of the Muslim scholars expressed the view that the judge had to be a man, [7] and they forbid a woman to act as qāḍī. A woman is altogether disqualified to hold the office. When a woman has been appointed, her appointment and her judgment can be dismissed and the one who appoints her is a sinner. [8]

However Abū Ḥanīfa thought that a woman could exercise jurisdiction when her testimony was valid. [9] The reason lies in the fact that the rules of jurisdiction are derived from the rules of evidence. [10] Their testimony is valid only in civil cases, which means a woman

can be appointed as a judge in all cases except in cases involving fixed penalties (hudūd) and retaliation (qisās). [11]

Al-Ṭabarī, unlike all the other scholars, moved further by having the opinion that a woman is qualified for the office of judge in the same way as a man in all cases, even hudūd and qisās. [12] When a women has been appointed, the one who appoints her is not a sinner and her judgment is acceptable. [13] Madhab al-Khawārij agreed with al-Ṭabarī. [14]

Shāfi'ī argued against Abū Ḥanīfa saying that if a woman were to be allowed to judge civil cases, she could not be prevented from becoming a judge in criminal ones as well as a man. [15] The other reason for the objection is women are dependent on a man, therefore accordingly they were not capable of carrying out this responsibility. According to al-Māwardī(d. 450/1059) a man and not a woman, should hold leadership because a man is more intelligent and has a higher level of understanding than a woman. [16]

Shāfi'ī in arguing this matter had given arguments from Qur'ān and Ḥadīth. From the Qur'ān, "Men are maintainers of woman, by reason that Allāh has made some of them to excel others". [17] With regard to this verse, leadership in this context consists of a man's responsibility to a woman in nafaqah, and in delivering jurisdiction. [18] Moreover, it is obvious that leadership is restricted to men, as women were regarded as inferior in administration and physical strength. However, some scholars argue that this verse of al-Qur'ān can be used only as evidence to allow husbands to reprimand their wives. [19]

In addition, a judge has to deal with men in hearing cases, however women are not allowed to have dealings such as this to avoid temptation. [20] Muslim rulers, during the reigns of al-Rāshidūn and even after that period selected for the post of qāḍī only those male persons who were erudite and proficient, because the function of qāḍī, as discussed in the following chapter, is to assist the ruler in the right carriage of his responsibility. Another scholar said that this did not occur in the period of the prophet. [21] And if as a qāḍī she is incapable of administering efficient justice she creates more problems and increases the responsibilities of the ruler. Woman is inferior to man, she has fewer duties from the religious point of view, and her position is less advantageous than that of man. [22]

Women are also forbidden to execute the office because they are not capable of leading prayers in the community. Among the duties of qāḍī is to lead the congregational prayers and presiding over the Friday prayers. This is a religious duty and the women are not allowed to be leader in these prayers, so this is the main reason why a women cannot be a qāḍī. [23]

An interesting argument is put forward based on the Ḥadīth, which says that "Qāḍīs are of three kinds: he who deliberately perverts the law and he who errs by ignorance, goes to hell; while he alone goes to paradise who acts in accordance with the truth". [24] It is obvious from Ḥadīth that a woman is forbidden to the office. This Ḥadīth mentioned just a man and not a woman. In further support of these arguments, the writer of al-Mughnī quotes the Ḥadīth which is narrated by Abū Bakrah who says that "a nation would not be successful if it

لن يفلح قوم ولّوا أمرهم امرأة

is led by a woman". [25] All the previous scholars had used this Hadith to support their respective opinions on the appointment of a woman judge. This command is for general application including jurisdiction. [26]

Moreover the formula laid down by Ibn Qudāma impliedly excludes woman from being a judge, as the appointee to the office of qāḍī ought to be kāmil al-aḥkām and kāmil al-khilqah. [27] Ibn Qudāma expressly argues woman cannot be a judge for the following reasons: First because she is not kāmil al-aḥkām, whereas man is kāmil al-aḥkām. Second because she is not kāmil al-khilqah because she is given to forgetfulness as says the Holy Qur'ān "And if two men be not (at hand) then a man and two women from among those whom you choose to witnesses, so that if the one erred (through forgetfulness) the other will remember". [28]

Ibn Farḥūn, the Mālikī, advances another argument as to the non-eligibility of a woman for the post of qāḍī. He says that a woman is not eligible for the post because of her defect, and because her speech is an inducement and because the (beautiful) figure of some woman is a temptation. [29]

However, al-Ṭabarī argued that the Ḥadīth narrated by Abū Bakrah above concerns only the leadership of a nation and not the appointment of judges. Al-Ṭabarī felt that the objective of appointing a judge is to implement justice. Whoever, man or woman, has the ability and credibility to be just and fair in arbitrating disputes between people, he or she can be judge. According to al-Ṭabarī, the giving of judgment is analogous to the giving of fatwā. He reasoned that

anyone who can issue a fatwā can perform the function of qāḍī; because a woman is qualified and eligible to be a muftī, she is also acceptable as a qāḍī, [30] and he said, manness is not a necessary requirement. Without this requirement the appointment of the qāḍī is still valid. [31] He put forward the views by saying that there are no arguments from the Qur'ān or Sunna which forbid women from being qāḍīs, and state clearly in the Ḥadīth that "Women administer their husbands' mal and are responsible for their subordinates". [32]

The majority of the scholars were opposed to that view. As their reasons did not satisfactorily answer the question of their objection to the appointment of women to the office of judge. Ḥumaidan offers two possible explanations. He said that it may be because the Qur'ān stated that the testimony of two women was equal to the testimony of one man, so in order that her verdict be accepted as a woman she had to be accompanied by another woman, and as Muslim scholars did not envisage any kind of collective judgment, they objected to the appointment of women. Or it may be the natural attitude of their traditional society as a whole which objected to the women being in such a leading role as to preside over a court of justice. [33]

Ibn Ḥazm argued in favour of admitting the appointment of a woman without restriction saying that al-Qur'ān commanded all the believers to judge between people with justice. He argued that this command is general to both man and woman. Therefore it can be argued that it is not wrong for a woman to be a judge. In further support of this argument Ibn Ḥazm quotes that it is narrated that 'Umar b. al-

Khaṭṭāb had once appointed a woman, Shafā' bt. Abī Sulaimān, during his time. [34]

According to Abū Ḥanīfa's point of view, a woman cannot be appointed as a judge, but if appointed, the appointment is valid but the one who appoints her is a sinner. Judgments by a woman qāḍī are valid in all cases except ḥudūd and qiṣāṣ cases, as long as they are according to Qur'ān and Ḥadīth. [35]

The argument to support the Ḥanafī opinion is derived from analogical deduction (qiyās), that is, because testimony from a woman is valid and acceptable in certain cases, the appointment of women as judges and their judgments should also be valid. [36] This restriction has been imposed on the ground that no one can be appointed a qāḍī unless he posses the qualifications of a witness. But a woman is not competent to be a witness in cases involving the specific punishments of ḥadd or qiṣāṣ. Therefore she is not competent to pass orders in certain cases; otherwise she is fully competent to exercise the functions of a qāḍī.

Ibn Ḥammam agreed with this Ḥanafī opinion and said that a woman is qualified for the office of justice in all matters except for ḥudūd and qiṣāṣ. Since her testimony in any court matter except for ḥudūd and qiṣāṣ is acceptable by the court, he further argued that such an acceptability should also be applied to the woman regarding her power to become a judge. [37]

According to al-Marghinānī (d.593/1197), the authority of a qāḍī is not valid, unless he possess the qualifications necessary to a witness. It

means that in the opinion of al-Marghinānī, the conditions for the competency of the office of qāḍī is that the qāḍī be eligible for being an acceptable witness. [38]

In discussing the sex, we should bear in mind khunthā (hermaphrodite). Khunthā judge are not acceptable to hold the office.[39] however khunthā wāḍih (hermaphrodite) or if khunthā act or tend to be men in their acting, their judgment is acceptable. Nevertheless khunthā mushkil are not acceptable to hold the office. [40]

The first opinion which stated that a woman cannot be allowed to act as a judge is very strict. Since we are living in a community where women are more numerous than men, it may be possible to offer this job to the woman who is more erudite and more prudent than several men, and particularly when there is no qualified man available. There are only a few duties that women are allowed to perform. In certain circumstances, women are more eligible to preside over the court in cases involving female matters, since she knows better than men for instance in rape cases, pregnancy, 'idda, or as a qāḍī amongst women, because in this case neither her speech nor her face will prove to be a temptation. The testimony of two women alone is to be accepted with regard to matters about which men can have no knowledge, such as childbirth. [41]

However, in conclusion and given the previous arguments mentioned and according to the Islamic Law, a woman is not eligible to exercise the judicial work, so it may be recommended that women should not be appointed as qāḍī, but they may be appointed as jurisconsults in

order to give them an opportunity to play their role in the affairs of government. [42]

Religion

There are two situations, the judge for the Muslims and the judge for non-Muslims. Most Muslim scholars agreed that the judge for Muslims, and the population where the majority are Muslims, has to be a Muslim, and he should judge according to the Islamic Law. [43]

According to the al-Qur'ān, "And Allāh will by no means give the disbelievers a way against the believer". [44] It is clear that it is unlawful to choose the judge from non-Muslims to hear cases involving Muslims. That means in the first situation most scholars agreed that a judge for Muslims has to be a Muslim. However, most scholars have a different view on having a non-Muslim judge for non-Muslims. Abū Ḥanīfa acknowledged that the appointment of a non-Muslim judge to hear the cases of non-Muslim litigants was legitimate. [45]

Other scholars agreed with him in accepting this right and they added that if there is a dispute between a Muslim and a non-Muslim, then the case should be decided by a Muslim judge in accordance with Islamic Law. In the case of non-Muslim litigants submitting their cases to a Muslim judge, he can either apply the Islamic Law to them or refuse the hearing. Shāfi'ī held that the Muslim judge was not bound to entertain their suit. Abū Ḥanīfa held that by the contract of the dhimma, Islam

undertook to dispense justice to the dhimmīs, and the Muslim judge had to retain jurisdiction.[46]

Furthermore, all scholars agreed that non-Muslims can choose either to submit their cases to their own judges or to Muslim judges. However Ibn Ḥazm said that non-Muslims in a Muslim state are as subject to the Islamic Law as a Muslim is. [47]

Most scholars did not deny the legitimate right of a non-Muslim minority in the population to submit their disputes to their own courts and judges seeking decisions based on their legal procedure. This was a right which Islam guaranteed them. [48] Al-Qur'ān states that "listeners for the sake of a lie, devourners of forbidden things, so if they come to you, judge between them or turn away from them. And if you turn away from them, they cannot harm you at all. And if you judge, judge between them with equity". [49]

However, most scholars thought that non-Muslims are not allowed to be appointed as a judge. Judgments between them were allowed only in civil cases. [50] They agreed that non-Muslims were not qualified to work out disputes between Muslims according to al-Qur'ān as stated above. [51] And al-Māwardī does not allow a non-Muslim to be a judge even in connection with the disputes of the non-Muslims residing in a Muslim state. [52]

Abū Ḥanīfa, in accepting non-Muslim judges, has used an argument from al-Qur'ān and an analogy (qiyās). In further support of this argument, al-Qur'ān says that "O you who believe, take not the

Jews and the Christians for friends, they are friends for each other". [53] According to this verse, Yahūdī and Naṣārā can be a walī (guardian) between them only in the case of marriage, so a non-Muslim judge could be appointed to solve marriage problems between them. From analogy, a qualification to become a judge is based on the validity of one's testimony. Testimony from a kāfir dhimmī [54] is valid in issues between them, so they are qualified for the office of judge between them. In this matter no faults are committed because the power of the judge is restricted to certain cases. [55]

According to Ibn 'Ābidīn, non-Muslim judges were to be allowed to solve arguments between themselves because this situation would not bring any harm. [56] However certain scholars said that their appointment between them is not in the rank of judge but as a case of leadership. Most scholars argued against the Ḥanafī idea by saying that non-Muslim judges were not acceptable even between themselves. This case did not occur in the period of the Prophet Muḥammad and in the period of Rāshidūn. [57] Al-Māwardī insisted that non-Muslims were allowed to be appointed only in the sense of leadership. [58]

They have put forward the following arguments to reinforce the idea. The first argument comes from Ḥadīth, "Islam is higher than anything". [59] With regard to the Ḥadīth, it is forbidden to hand over authority to a non-Muslim in any circumstances, including judgment. The second argument comes from an analogy. Non-Muslims are forbidden to act as a judge, although a fāsiq is forbidden also, although bound by Islamic law. In conclusion, to prevent non-Muslims from becoming judges is better than to prevent fāsiq, because the latter is

obligated by Islamic Law. [60] Moreover, one important point which must be stressed here is the judge has to implement Islamic Law in a lawsuit. He has to know what the Islamic Law focuses on, so Islam is an essential condition for the candidate to obtain the post of judge. [61]

The writer of al-qaḍā' fi-Islām, unlike others scholars, moved further in having the opinion that non-Muslim judges were qualified to hear cases from Muslims. He uses an analogy as argument; the qualification to become a judge is the same as the qualification to become a witness. Non-Muslim witnesses are acceptable, except in family cases, so he thought that non-Muslims were qualified to become judges. [62]

If he is not a Muslim a question arises how he would manage the Sharī'a Court, because to be a qāḍī, everyone should know aḥkām al-sharī'a. It should be noted here that in Islam there are relations between 'aqīdah and aḥkām al-sharī'a. And as a qāḍī he should also prevent the wrong doing and command the truth and should attract people to do good things and to propagate Islam. From these duties we find that non-Muslims are not suitable to hold the office of qāḍī. [63]

The Ḥadīth mentions that there are three kinds of qāḍīs is a good example. The Ḥadīth noted that, "qāḍīs go to hell who deliberately pervert the law and who err by ignorance, while one goes to jannah (paradise) who acts in accordance with the truth". It should be pointed out here, how could non-Muslims be qāḍī as long as they do not convert to Islam because from the viewpoint of Islam non-Muslims are to be placed in hell although they do good deeds. Thus the qāḍī mentioned in the Ḥadīth, is a Muslim qāḍī. [64] And there are some

Qur'ānic verses to support this argument. The verse of the Qur'ān noted that, " Those who disbelieve from among the people of the Book and the idolaters will be in the Fire of Hell, abiding therein".[65] And the Qur'ān states again that "Whoever sets up a partner with Allāh he indeed goes far astray". [66] Furthermore, al-Kāsānī mentions that the jurisdiction of qadā' is categorized as an 'ibādah. [67]

Free men

According to Islamic theory, most scholars thought that a judge had to be a free man. [68] A slave ('abd) was disqualified from holding the office of judge because he had no authority over himself and he should not have authority over others. The scholars objected to the capacity of a slave to act as a witness, so they insisted they should object equally to the validity of his judgment. [69] If he had been appointed, his appointment is invalid and his judgment was disqualified. [70] Al-Mukātab [71] and al-Mudabbar [72] were also forbidden from holding the office. [73]

In discussing slaves, Schacht said that from the religious point of view the slave is considered as a person, but being subject to his master, he is not fully responsible. [74] Further a slave should have to work for his masters in all cases and his authority is less than that of a free man in terms of leadership. [75]

Most scholars use al-Qur'ān and an analogy to support their view. With regard to al-Qur'ān, it states "And call to witness from among your

men, two witnesses". [76] Qurṭubī interpreted this verse as saying that a man here is a free man and not a slave. [77] From analogy, a slave cannot be a witness as slave testimony was not acceptable. In that case, to forbid slaves from becoming judges is more important than to forbid them from becoming witnesses. [78]

However Ibn Ḥazm had no objection to the appointment of a slave to act as a judge. [79] Ibn Ḥazm's argument comes from al-Qur'ān, it states that "Surely Allah commands you to make over trusts to those worthy of them, and that when you judge between people, you judge with justice". [80] He uses the same argument he used to justify the appointment of a woman to office. A slave who had been emancipated could be appointed as a judge provided that he met the other conditions of the appointment. [81] A slave was able to be a muftī, so he was also able to be judge. [82]

Vision, Hearing and Speech.

Scholars argued about these matters. Abū Ḥanīfa and Shāfi'ī insisted that blind men are not acceptable for office. [83] However, Imām Mālik said that blind men are allowed to be appointed to the office, and their decisions can be implemented. Imām Mālik forwarded his argument by saying that the Prophet had appointed Ibn Maktūm, who was blind, to manage all the administration in Madina including being the leader in prayers and jurisdiction. [84]

Some scholars argued against Imām Mālik, saying that the blind man's testimony is not valid, therefore, it is more important to prevent the blind from becoming judges than to prevent them acting as witnesses. [85] Sight is a necessary condition for a judge. He should be able to distinguish between plaintiff and defendant. The behaviour, the tone of voice, and the way of speaking during the hearing, will help the judge in his judgment. [86] In connection with Ibn Maktūm's appointment, scholars said that that appointment was not as a judge but only as leader in prayers. [87]

To deal with the litigants, a qāḍī should be able to distinguish between plaintiff and defendant. In this matter, a blind man is not equipped, although he may have a sound knowledge of fiqh. A judge also needs good vision to preside over the court and reach the decision effectively. He ought to see everybody involved in the hearing. In contrast, a blind man is unable to do so. And, even if he can distinguish the voices, he has to do it repeatedly. [88] All this leads to bad consequences and makes the job of a blind judge difficult, which will eventually result in unfair judgment. Therefore good vision is necessary for one to be appointed as a qāḍī. Otherwise, the judge risks making an error in distinguishing the plaintiff from defendant.

Ibn Ḥazm argued that the Prophet Shu'aib was blind and was a Prophet, so he asked why the blind man could not be a qāḍī. The scholars argued that although the prophet Shu'aib was blind, he was not a qāḍī or judge, and the aforementioned requirements were applicable to generations of Muslims since the prophet Muḥammad.[89] They further argue, most of the criminal and other cases needed a good vision to

scrutinise and examine documents and other material related to the case. [90]

However, a one-eyed man can be appointed as judge. A person who has good vision only in the day time but not at night can also be appointed. In delivering the decision when he could not see anything, his decision cannot be acceptable, and he is in theory, like a blind man. [91] Some scholars said if his sight is poor and he cannot differentiate between litigants and cannot recognize voices, he is not allowed to be appointed. [92]

In order to be able to listen to the argument put forward by the plaintiff and defendant, a judge should have adequate hearing. It is not valid to appoint a deaf man to the post of judge. Another view is that a man with inadequate hearing is allowed to be appointed as judge, on the condition that he can hear loud voices. Therefore it is more important to appoint a man with adequate hearing. [93] On the other hand, candidates who recognised the voices at close hand but not from afar were allowed to be appointed. [94]

As to the mute, some scholars said that a mute is accepted to be a judge, on condition that his sign-language is understandable since his testimony is acceptable. Abū 'Abbās Shurayḥ had no objection to a dumb person being a qāḍī, on the condition that his sign language could be understood. He insisted that a dumb person's testimony was acceptable and that his appointment should be acceptable too. [95] However most Muslim scholars argued that the mute cannot be admitted to the office. Speech is important to deal with the litigants, and to deliver decisions. [96]

Although a mute can make a decision by using sign-language, his decision is more difficult to understand. Even if we understand the sign-language, there is still a problem in giving the decision. Thus the decision by sign-language is difficult to understand perfectly by everybody. With regard to a person who has a pronunciation problem, he is allowed to be appointed to office since his words are understandable. They said that the Prophet Mūsā was not prohibited from spread risālah even though he had a pronunciation problem. [97]

The scholars have the opinion that other parts of the anatomy are not relevant as a condition in the appointment of a judge. [98] However the perfect condition of the body is preferable. In conclusion, health is a part of three basic requirements.

Sharbīnī summarises these three requirements : it is invalid to appoint a blind man, because he is unable to distinguish between plaintiff and defendant and their witnesses, it is invalid to appoint a deaf man, because he is unable to hear the evidence from plaintiff and defendant, and invalid to appoint a mute, because he is unable to deliver the decision and not everybody understands his judgment. [99]

'Adāla (Personal Character)

Literally the word 'adl is an abstract noun, derived from the root 'adāla, which means: First, to straighten or to sit straight, to amend or modify: second, to run away, deport or deflect from one (wrong) path to the other (right) one: third, to be equal or equivalent, to be equal or match,

or to equalize: fourth, to balance or counter-balance, to weigh, or to be in state of equilibrium. [100] Finally, 'adl may also mean example or alike (Q, V;96). a literal expression which is indirectly related to justice. [101] In the conceptual sense, Ibn Manẓūr states that "the thing that is established in the mind as being straightforward" is the meaning of justice. [102]

Most scholars opine that a candidate for the office of qāḍī should be of unblemished character ('adl). They agreed that fāsiq is not acceptable to occupy the office, [103] and 'adāla is one of the necessary conditions to become a judge. However, certain scholars said that 'adāla is not a necessary condition. They said that a fāsiq could be appointed to the office. According to Abū Ḥanīfa, a decision from a fāsiq judge is acceptable and can be implemented as long as his decision is in accord with the Sharī'a. Abū Ḥanīfa accepts a fāsiq qāḍī, because the rules with respect to jurisdiction are taken from those with respect to evidence. 'Adāla is not a major factor but only one of the requirements for the completion of his appointment. [104] However it is better to choose one qualified by 'adāla to be a qāḍī. [105]

Māwardī explained, 'adāla, it consisted of honesty, trust, not commiting any wrong doing, not making jokes, preserving dignity, the ability to be trusted, not to utter words when affected by happiness or anger. 'Adāla in other definitions is to put things in the right position that means when a judge is deciding a dispute between litigants, his judgment should be fair and strictly based on Islamic Law and not on personal bias. [106]

The early jurists used the term 'adl as a quality of the judge in a relatively broad sense, stressing religious and moral values. In his work , Shāfi'ī stated, in defining the term 'adl, that it means acting in obedience to God, and went on to explain that by "obedience to God" he meant "obedience to the Law" in the pursuit of justice. [107]

Moreover, when the candidate has those qualities in himself, he is entitled to this condition. His testimony is valid and at the same time his appointment is acceptable. But any deficiency in these requirements disqualifies him both to be a witness and to act as a judge. His judgment is invalid and cannot be authorized. [108]

Muḥammad Salām Madkūr clarified 'adāla as being trustworthy in his word, not being involved himself in something against the law and being in control of his emotions of happiness and anger. [109]

A judge has big responsibilities towards property, muruwah (virtues) and religion. These responsibilities cannot be borne except by the persons who have achieved all the requirements of 'adāla. Therefore a fāsiq is not a suitable person to be appointed to exercise his judgment. [110] This statement has been reinforced by one of the verses in al-Qur'ān. It states "O you who believe, if an unrighteous man brings you news, look carefully into it, lest you harm people in ignorance, then be sorry for what you did". [111]

According to Ibn Qudāma, this verse commands us to be careful in accepting reports from the fāsiq. 'Careful' here means to forbid us from receiving any news brought by the fāsiq. Their news was forbidden to us,

so it is very important to avoid the implementation of what they was saying. [112] Scholars also use a simple argument to declare that a fāsiq's judgment is invalid. If the testimony from a fāsiq is unacceptable, his judgment is unacceptable too. This means, if a fāsiq's testimony were acceptable, so his judgment also could be accepted. [113] Al-Qur'ān says that, "And never accept their evidence, and these are the trangressors". [114]

لا تقبلوا شهادة ابدا ... لئك هم الفاسقون

Abū Ḥanīfa in illustrating this verse said that the command is to ensure care and the scrutiny of any news coming from the fāsiq. However this does not mean that those reports can be regarded as totally wrong. We still can accept them after thoroughly examining them. When his claims have been approved, this means his testimony is valid and furthermore he is eligible to act as a judge, since both situations require the same qualification. [115] If a fāsiq is forbidden to become a judge, it may be possible to implement the jurisdiction, when it is impossible to find a person with the complete requirements of 'adāla. [116]

Another view is that fāsiq's testimony is valid, so he is qualified to act as a judge. Although that is the case, he is not competent to apply for the post of judge unless approached by the government. Once acting as a judge, his judgment during his tenure of the office is valid like that of other judges. [117] In addition, when the government wanted to appoint a judge, it had to take his character and his public reputation into account and accordingly consider whether he would be able to carry out his duties acceptably. [118]

No exact definition of fāsiq is given. It is generally understood that one who commits major sins, kabā'ir, and usually does not refrain from

commiting minor sins, sagha'ir, is a fasiq. Al-Marghinani says that a person of such character will not necessarily be unjust in his judicial capacity. He, bearing in his mind his reputation, will probably be very scrupulous and as just as possible in his judgments regarding the dignity of the office. [119]

Abu Hanifa, on the other hand, as an argument to support his view, uses a Hadith which says that "there will be a leader who will delay the prayers". [120] The leader here is categorized as fasiq, because delay in performing the prayers is a part of fisq. The Prophet approved the appointment of the leader who delays the prayers, therefore a fasiq can be appointed as a judge. [121]

Shafi'i objects to the appointment of a fasiq, using the same argument he used to justify the appointment of females to the office. He objected to his fitness to bear testimony, so he thought he should object to the validity of his judgment. [122] Some of them give their opinion that the appointment of a fasiq is valid, when at that time he is known to possess 'adala. If he became fasiq, he can be discharged from his office. They reason that the appointer appointed him from confidence in his integrity ('adala) and it is to be presumed that he will not acquiesce in his discharge of the duty without integrity. [123]

Ijtihad.

Scholars have different views on this matter. Imam Shafi'i, Ahmad b. Hanbal, and Imam Malik said that the person who is

appointed to be a judge should be a mujtahid. It is invalid to appoint an ignorant man (jāhil) and muqallid to be a judge. Jāhil, or follower is by no way eligible for the post. [124]

Shāfi'ī thought that this quality is an essential condition. This view is based on al-Qur'ān and Hadīth. Al-Qur'ān says that, "if there exists a quarrel about anything, men must refer it to Allāh and the Prophet", [125] that is, refer to al-Qur'ān and to the Hadīth. A dispute cannot be referred except by a mujtahid. The mujtahid is the most qualified person to deliver judicial decisions. During the early period of the Muslim community the Qur'ān and the Sunna were enough to answer their limited needs. Later on, the needs of the community increased as did the community itself. To bridge the gap between the unchangeable nass and the needs of day-to-day life of the Muslims, ijtihād was developed.

This stems from the Hadīth. [126] When Mu'ādh ibn Jabal was being sent to Yaman he was asked about the rule of his conduct. He answered that he would act according to al-Qur'ān, then according to what has been laid down by the conduct of the Prophet himself and in the absence of any available guidance from al-Qur'ān and Sunna, he would act according to his own judgment. The Prophet approved and this established the legality of ijtihād. This dialogue has a peculiar interest and great importance in the history of Islamic law and administration of justice. It is clear that a judge should have a discretion to use his own reasoning.

In dealing with the qualifications necessary for the judge, Māwardī stated that if the judge has a case in which he finds no judgment in al-Qur'ān or the Sunna, he has to use Qiyās, that is, to extend the effect of a Tradition by analogy (ra'y), or, in other words, he has to refer to similar cases in the traditions of the Companions (Ijmā'), provided that his judgment be drawn from al-Qur'ān and (Prophetic) Traditions.[127]

Ijtihād is necessary because sometimes a new problem arises that is not accompanied by a clear decision in al-Qur'ān and Sunna. So in this particular situation a mujtahid can use his own reasoning to deliver judicial decisions. It is feared that if the qādī himself is not fully conversant with the requisite knowledge one can easily lead him amiss and make him a tool of a tyrant. [128] Consequently the qādī today, in order to fulfil his duties, has to follow the steps of his predecessor Mu'ādh and adopt this practical attitude of mind inherent in ijtihād, through which he can give witness that the Sharī'a is still capable of developing and evolving to meet the demands of contemporary issues. If a jāhil is appointed at a city where no fuqahā' are residing, it is feared that he will pass judgments according to his will.

However, Abū Ḥanīfa insisted that ijtihād is not a necessary and essential condition for the candidate for this office. At the same time he says if the judge would consult scholars who have more knowledge than he and the latter give their opinions, then the judge would decide accordingly. [129]

Abū Ḥanīfa required the qādī to be of high knowledge, though he allowed a qādī to be a muqallid in such cases where he could not be a mujtahid. [130] Abū Ḥanīfa said that the purpose of jurisdiction is to give the right to the right person. This can be achieved through other people's opinions. Al-Marghinānī, on the other hand, is equally of the firm view that the appointment of a non-Mujtahid is valid. He says the more approved doctrine is that the condition of being a Mujtahid is merely preferable, but not indispensable, as ignorant persons may be appointed. [131] However, Ibn Farḥūn said that " If a jāhil is appointed at a city where no fuqahā' are residing, it is feared that he will pass judgments according to his will and whims as is prevalent in our cities and time. Knowledge has gone, ignorance is in abundance, ignorant persons are being projected and those who are knowledgeable are being rejected". [132]

Al-Kāsānī insisted that it is accepted for a muqallid to be a judge, on the same argument. Although the muqallid can be a judge, he should practise the law based on the Sharī'a. In conclusion, ijtihād is not a necessary condition for the appointment of a judge. It is only one of the requirements for the completeness of his appointment. [133]

The word ijtihād literally means exerting oneself. [134] A person entitled to exercise ijtihād is called mujtahid, and a person bound to practise taqlīd, is called muqallid. Mujtahid is the person qualified for independent derivation of fiqh rules from the sources, and muqallid is the person who practised taqlīd 'the adoption of the utterances or actions of the authoritative, with faith in their correctness without investigating his reasoning'. [135]

According to Māwardī, to be mujtahid, a candidate for the office of judge should have a necessary knowledge of Islamic Law by studying the legal decisions in al-Qur'ān as the first source, and its precepts. He should be fully conversant with al-Qur'ān that means to be in possession of knowledge of the following things; whether abrogating (nāsikh) or abrogated (mansūkh), whether verses that import clear orders (muḥkām) or that are allegorical and beyond the understanding of commoners (mutashābihāt), whether words pertaining to specific members of the class (khāṣṣ) or words denoting and pertaining to all the homogeneous members of the class ('āmm) and whether verses imparting brief and precise commandments (mujmal) or verses wherein the detail of brief commandment is given (mufassir). [136]

Ibn Qudāma adds two things to be fully conversant with al-Qur'ān, is to be in possession of knowledge of absolute commandment (muṭlak), and qualified commandments (muqayyad). [137]

Secondly, he should know the ordinance of the Prophet as established by his words and deeds, and how transmitted, whether continuously by a large number of narrators (tawātur) or by only one or two narrators (aḥād), whether genuine or doubtful, ad hoc or of general application. [138]

Ibn Qudāma adds that requisite knowledge of the Ḥadīth means the knowledge and understanding of those Ḥadīths wherein the law is laid down, the knowledge of those Ḥadīths which are reported from the Prophet through Tābi'ī (mursal) and of those which are reported from

the Prophet through a Ṣaḥābī, as well as the knowledge of continuous Isnād (musnad), broken Isnād (munqati'), knowledge of correctly transmitted a Ḥadīth (ṣaḥīḥ), weak Ḥadīth; of those Ḥadīths that are universally accepted and of those whereabout the opinions of the doctors of Ḥadīth differ. [139]

Thirdly, he should know the interpretation by early Muslims (salaf), whether unanimously (Ijmā') or not, thus conforming to the consensus of opinion and arriving at a right opinion on points of difference. These were the bases of the judge's decisions. He was not to contradict them in any way. [140] Lastly, he should know the power of deciding by analogy (Qiyās), or he should be able to express his own judgment by using analogy. [141]

The requisite of Qiyās for Ibn Qudāma means knowledge of the preconditions of reasoning, kinds of Qiyās and how to derive the rules of law. [142] Although the use of analogy was a controversial issue among Muslim scholars, Māwardī insisted that if a candidate for the office of judge did not believe in the validity of analogy, he should not be permitted to occupy this office, unless he was able to use a different method which would give the same result. [143]

One important requirement was that the judge should also know the 'Arabic Language. Knowing 'Arabic will help the judge to understand al-Qur'ān and Sunna better, whether in the aspect of 'āmm (general) or khāss (particular), whether in the aspect of amr (command) or nahy (prohibition), whether ism (noun), fi'l (verb) or ḥarf (preposition). That is the judge has to know Naḥū and Ṣaraf. [144] Knowing 'Arabic Language

is important because al-Qur'ān and Ḥadīth were revealed in 'Arabic. In conclusion, familiarity with the 'Arabic Language is a prerequisite. Without that, a judge cannot achieve a satisfactory level in his own judgment. Consequently a person who is not fully conversant with al-Qur'ān, the Sunna, Ijmā', Qiyās, and the 'Arabic language is not eligible for the post of qāḍī. When discussing the requirement of ijtihād Ghazālī (d 505/111) maintained that in order to reach the rank of mujtahid the people must: [145]

1) Know the 500 verses needed in Law; committing them to memory is not a prerequisite.

11) Know the way to relevant Ḥadīth literature; he needs only to maintain a reliable copy of Abū Da'ūd's, of Baihaqī's collections rather than memorize their contents.

111) Know the substance of furū' works and the points subject to Ijmā', so that he does not deviate from the established laws. If he cannot meet this requirement he must ensure that the legal opinion he has arrived at does not contradict any opinion of a renowned jurist.

1V) Know the methods by which legal evidence is derived from the texts.

V) Know the Arabic Language; complete mastery of its principles is not a prerequisite.

V1) Know the rules governing the doctrine of abrogation. However, he need not be thoroughly familiar with the details of this doctrine; it suffices to show that the verse or the ḥadīth in question had not been repealed.

V11) investigate the authenticity of Ḥadīth. If the Ḥadīth has been accepted by Muslims as reliable it may not be questioned. If a

transmitter was known for probity, all Hadīths related through him are to be accepted. Full knowledge of the science of al-ta'dīl wal-tajrīḥ (Ḥadīth criticism) is not required.

These qualifications, Ghazālī remarks, are required in anyone who intends to embark on ijtihād in all areas of substantive law. Those who want to practice ijtihād in one area, for example, family law, or only in a single case, need not fulfil all the above conditions but are instead required to know the methodological principles and the textual material needed to solve that particular problem. [146]

Āmidī (d.632/1234) classified the mujtahid's qualifications in accordance with the ranks of ijtihād. Apart from a slight emphasis on matters of religion and belief that the mujtahid should acquaint himself with, and apart from the additional prerequisite of familiarity with the circumstances in which the Qur'ān was revealed (asbāb al-nuzūl). Āmidī also adds nothing to what others previously said. Thus anyone who is aware of the dimensions of a given problem and possesses the tools to tackle it, is entitled to work it out. [147]

Shawkānī, the last jurist discussed here, disputes the authority of Abū Da'ūd's collection of Ḥadīth which was suggested by Ghazālī and a number of later scholars and calls for a more encompassing knowledge of Sunna. He suggest that the mujtahid must be conversant with the contents of the six known collections of Ḥadīth, and must know, when needed, how to reach the opposing Ḥadīth. Aside from this Shawkānī too has nothing new to add. [148]

Shāfi'ī favoured the view that the judge is empowered to consult a learned man for understanding the law. The person consulted must be learned in al-Qur'ān, Traditions (Ḥadīth) and competent in assessing opinions. He should be intelligent enough to make correct deductions and not fall into error and pervert the truth. This function can be performed only by one who is master of the 'Arabic Language. [149]

However, Abū Ḥanīfa is reported to have opined that, as such persons were not available during his time, so even a person not capable of ijtihād might be appointed, as a measure dictated by necessity. [150]

Abū Ḥanīfa also said that the appointment of qāḍī should not exceed one year. The state should ask him to quit and acquire learning, lest in the pressure of administering justice, he may become slack in his knowledge of law. 151

These were two different points of view which represent two different stages in the development of Islamic Law. [152] The first stage was that of the early Muslim scholars at the time of the foundation of the four schools of law. The qāḍī could use his own reasoning to settle problems. At this stage, most scholars insisted that a qāḍī should be a mujtahid and if not, his decisions would not be recognized as valid. However Abū Ḥanīfa recognized a muqallid qāḍī. [153]

The second stage was the existence of the formation of the schools. The legal thought of these schools spread all over the Muslim world and each school had its own qāḍī who would adjudicate according to the tenets of one school. [154] The Muslim theorists, still insisting on a knowledge of

Islamic Law by candidates for the office of qāḍī, insisted that in light of the development of Islamic Law the ijtihād could be limited to the individual school where the qāḍī could exercise his discretion among the various opinion of his school. [155]

They held that it was impossible for a qāḍī to gain knowledge of all the legal works from each school in order to be a mujtahid outside existing schools. The theorists, in saying that a qāḍī had to content himself with the works which applied to his own school, did not mean that they no longer considered the knowledge of the Qur'ān, the traditions of the Prophet, the consensus of Muslims, and the use of analogy necessary for a candidate applying to the office of qāḍī, because the works of his own school were derived from these original sources. This meant that, subject to different opinion, his own judgment would be limited by the works of his own school, and thus they gave him the title mujtahid. [156]

The difference between these two opinions was that ijtihād in its original form did not recognize the authority of the four schools, but required a qāḍī to exercise his own reasoning without taking into consideration the former established decisions of the schools. [157] For example, al-Māwardī insisted on ijtihād as a necessary condition, saying that a ruler may appoint a qāḍī holding the legal tenets of a school other than his own. He mentioned that a qāḍī had to be a mujtahid and it did not matter to which school he belonged. This is because a qāḍī is not required to follow merely a school authority (taqlīd), but he must exercise his own reasoning also (ijtihād). [158] A qāḍī may be appointed according to the legal tenets of a school other than his own school. For example, a

qāḍī holding the legal tenets of the Shāfi'ī school is permitted to use the other schools, Mālikī, Ḥanbalī or Ḥanafī, for his judgment. This is because he is not bound to limit himself to its tenets unless his judgment leads him to do so. He may adopt the tenets he holds applicable. Thus a qāḍī had to be mujtahid and it did not matter which school he belonged to. [159] However some jurists refuse to allow an adherent of a given school to decide by tenets of another. They hold that a qāḍī should adhere to the tenets of one school and they mention that it is likely to lead to suspicion of favouritism. [160]

Shāfi'ī argues that such appointment supposes a capability of issuing decrees, and of deciding between right and wrong and these acts cannot be done without knowledge ('ilm). Al-Marghinānī concluded that in order to be mujtahid, besides being in a high degree conversant with the Ḥadīth, or having a deep knowledge of fiqh and some acquaintance with Ḥadīth, a qāḍī ought to have a knowledge of the customs of mankind, because many of the laws are founded upon them. [161]

Puberty and Sanity.

Related to these two conditions, it is unacceptable to appoint a person who is not yet adult or not sane. [162] This is due to their weakness by which they cannot distinguish between good and bad very well and their behaviour and speech is not governed by the Islamic law. Further, in order to be able to exercise good and discriminating judgment and cope with the subtle and complex problems a judge needs 'aql (sanity).

Furthermore, the child is under the responsibility of his guardian (walī) and cannot be a guardian to others. [163]

Further puberty (bulūgh), according to Māwardī, implies a sound discriminating, intelligence, enabling a man to cope with doubtful and difficult points. [164] If a child or an insane person had been appointed, their appointment was invalid and their judgment was dismissed. In addition children are not allowed to be qāḍī unless they possess the qualification of a witness. [165] So in this case to forbid judgment from children more important than to forbid them from becoming witnesses. The prophet Muḥammad said, "The recording pen is stilled in three cases: the infant until he reaches (majority), the sleeper until he awakes and, the insane until he recovers". [166] It is clear from this Ḥadīth that all these kinds of people were not allowed to be guardians (walī) but they themselves had guardians, they had no authority over themselves and should not have authority over others. [167] It is also recommended by the Prophet that those who have reached their seventies and those who are infants should not be appointed to be a judge. The prophet said, " Seek refuge with Allāh from the beginning of the seventies and from infants appointed to govern you." [168]

According to Māwardī bulūgh and 'aql were put together and so called kāmil al-aḥkām. These two requirements were needed and when these two were put together for the person, this person was responsible for undertaking any burden and honouring his word as well. [169]

The appointment of judge is not supposed to be given to those who are lacking mental capability because of their inability to understand

justice. On the other hand, it is not acceptable to appoint a judge from those who are recovered from madness. [170]

The appointment of judge is not restricted to a certain level of age, for example, caliph Ma'mūn appointed Yaḥyā bin Aktam, at the age of eighteen as judge in Baṣrah. This appointment threw some doubt among people in Baṣrah. Yaḥyā claimed that he was older than 'Attāb, who was appointed in Makka and also older than Mu'ādh bin Jabal who was sent to Yaman. [171] Possibly the conclusion could be that the post of qadā' should not be given to the old person. Although it is not a clear instruction but with regards to the Hadīth above it is clear that this post should be given to the person possessing an adequate age.

In order to practise his jurisdiction a judge should have not merely possession of the ordinary five senses, but of intelligence and discrimination (mumaiyyiz) as he was required to use his own judgment to cope with doubtful and difficult points which arose during his tenure of office. [172] This means a judge had to be a person who could use his brain effectively when necessary to enable him to deliver judgment. It could be borne in mind that anyone who reaches a certain level of age, wherein they are able to distinguish between defendant and plaintiff is eligible to conduct the office.

Other qualifications.

According to al-Andalusī a qāḍī should exercise jurisdiction alone in one place. That is, no judges are allowed to accompany him. Abū Ḥanīfa has wisely said that no judge should be appointed for more than a year, after which the ruler should ask him to go back and acquire learning, lest in the pressure of administering justice, he may forget his law. [173]

Some scholars said that sons of zinā are not allowed to be qāḍī. However, most of the scholars argue that this is not mentioned in the Qur'ān or Sunna. They further argue that sons of zinā are the same as all Muslims. If equipped with all conditions they are qualified to be qāḍī.[174] Scholars used the Qur'ān to support their view. The verse of the Qur'ān says that, " And those who believe and whose offspring follow them in faith, we unite with them their offspring and we shall deprive them of naught and their work. Every man is pledged for what he does", [175] and " And no burdened soul can bear another's burden". [176]

Footnote

1. Muḥammad ibn Aḥmad al-Khaṭīb, al-Sharbīnī, Al-Iqnā' fi Hall al-Fāz Abī Shujā', vol. 2. Cairo: Maṭba'ah Dār Ihyā' al-Kutub al-'Arabiyya, 1950, p. 297.

2. Māwardī, Aḥkām, p. 65.

3. Burhān al-Dīn Abū Ḥasan 'Alī bin Abī Bakr, al-Marghinānī, Al-Hidāya, vol. 3. Cairo: Maṭba'ah Muṣṭafā al-Bābī al-Ḥalabī wa-Awlāduhu, n.d. p.101 ; Charles Hamilton, op.cit,. p. 334.

4. Marghinānī, ibid,. p. 101.

5. Muwaffaq al-Dīn 'Abd al-Allāh ibn Qudāma, Al-Mughnī. Riyāḍ : al-Maktabah al-Ḥadīthah. 1981. p. 39.

6. Ibn Farḥūn, Tabṣirat al-Ḥukm, ('Alā Fath al-'Alī al-Mālik), vol. 1. Cairo : Maṭba'ah Muṣṭafā al-Bābī al-Ḥalabī wa-Awlāduhu, 1957, pp. 23-24.

7. Māwardī, Aḥkām, p. 65. ; Muḥammad bin 'Alī bin Muḥammad al-Shawkānī, Nail al-Awṭār. vol. 8. Cairo: Maṭba'ah al-'Uthmāniyya. 1357. p. 265. ; Fārūq 'Abd al-'Alīm, Al-Qaḍā' fi al-Shari'a al-Islāmiyya, Ḥukmuhu, wa Shurūṭuhu, wa Adabuhu. Jeddah : 'Alam al-Ma'rifah. 1985/ 1405. p. 147 ; Muhi al-Dīn Abū Zakaria' Yaḥyā ibn Sharāf, Al-Nawawī, Minhāj al-Ṭālibīn. translated into English from the French edition of L. W. C. Van Den Berg by E. C. Howard, London : W. Thacker and Company. 1914. p. 500

8. Muḥammad 'Abd al-Raḥmān al-Bakr, Al-Sulṭatu al-Qaḍā'iyya wa Shakhsiyyat al-Qāḍī, 1988, p. 304.

9. Māwardī, Aḥkām, p. 65. ; Abū Ya'lā Muḥammad b. al-Ḥusain, al-Farrā', Al-Aḥkām al-Sulṭāniyyah, Surabaya Indonesia: Maktabah Aḥmad b. Sa'ad. 1974/1394. p. 60 ; 'Ala'uddīn Abū Bakr b. Mas'ūd, al-Kāsānī, Badā'i al-Ṣanā'i fi Tartīb al-Shara'i, vol. 9. Cairo : Maṭba'ah al-Imām. p. 4079

10. Marghinānī, Hidāya, p. 101 ; Farid Muḥammad Wāṣil, Al-Sulṭatu al-Qaḍā'iyya wa Niẓām al-Qaḍā' fi l-Islām. Cairo: Maṭba'ah al-Amānah. 1983/1403. p.134

11. Muḥammad Salām Madkūr, Al-Qaḍā' fi al-Islām, Dār al-Nahḍat al-'Arabiyyah, 1384. p. 37. ; Muḥammad Wāṣil, op.cit. p. 134. ; 'Alī 'Alī Manṣūr, Nuẓūm al-Ḥukm wa al-Idārah, fi al-Sharī'a al-Islāmiyya wa al-Qānūn al-Waḍ'iyya. Beirut : Dār al-Fatḥ. 1971. p. 387.

12. Māwardī, Aḥkām, p. 65. ; Shams al-Dīn Muḥammad bin Aḥmad, al-Sharbīnī, Al-Mughnī al-Muḥtāj. vol. 4. Cairo: Muṣṭafa al-Bābī al-Ḥalabī, 1377 . p. 375. ; Fārūq 'Abd al-'Alīm, op.cit. p. 147

13. Muḥammad Wāsil, op.cit. p. 135

14. Abū al-Qāsim 'Alī bin Muḥammad bin Aḥmad al-Simnānī, Raudat al-Quḍā' wa Ṭarīq al-Najāt. Baghdad: Maṭba'ah As'ad. 1970. p. 53.

15. ibid. p.53

16. Māwardī, Aḥkām, p. 65.

17. Q , 4 : 34.

18. Abū 'Abd al-Allāh Muḥammad bin Aḥmad al-Anṣārī al-Qurṭubī, Al-Jāmi' li-Aḥkām al- Qur'ān. vol. 5. Cairo: Maṭba'ah Dār al-Kutub al-Miṣriyya. 1957. p.168.

19. 'They said that the verse was revealed in connection with what happened in the family of Sa'ad ibn Ruba'i. Sa'ad slapped his wife for her disobedience and his wife went to report this to the Prophet. The Prophet asked to retaliate but before the woman left, the Angel Gabriel revealed the verse'. Abū al-Ḥasan 'Alī bin Aḥmad, al-Wāḥidī, Asbāb al-Nuzūl. Maṭba'ah Dār al -Ittiḥād al-'Arabī, 1388. p. 100.

20. Ibn Farḥūn, op.cit. p. 24. ; Abū Isḥaq, al-Shirazi, al-Muhaẓẓab. Cairo: Maṭba'ah al-Bābī al-Ḥalabī. vol. 2. 1358. p. 298.

21. Al-Qāḍī Abū al-Walīd Sulaimān bin Khalaf b. Sa'd b. Ayyūb b. Wāris al-Bājī, al-Andalusī, Al-Muntaqā. vol 5. Cairo: Maṭba'ah al-Sā'adah. 1332. p. 183.

22. Schacht, An Introduction, p. 127. ; Shihāb al-Dīn Abū al-Faḍl al-'Asqalānī, Ibn Hajr, Fatḥ al-Bārī Bi Sharḥ al-Bukhārī. vol 16. Cairo : Maṭba'ah Muṣṭafā al-Bābī al-Ḥalabī. 1909. p. 267. ; Ibn Farḥūn, op.cit,. p. 24. ; Muḥammad bin Aḥmad, Ibn Juzaiy, Qawānīn al-Aḥkām al-Sharī'a wa Masā'il al-Furū' al-Fiqhiyyah. Beirut : Maṭba'ah Dār al-'Ilm. 1968. p. 286.

23. Al-Simnānī, op.cit,. p. 53 ; Māwardī, Adab, p. 628 ,

24. Abū 'Abd al-Allāh Muḥammad bin Yazīd, Ibn Mājah, Sunan ibn Mājah. vol 2. Cairo: Dār Ihyā' al-Kutub al-'Arabiyya, 1377. p. 776.

25. Farrā', op.cit,. p. 60. ; Qudāma, Mughnī, p. 39 ; Al-Shawkānī, op.cit., p. 263.

26. Bakr, Qaḍā'iyya, p. 356.

27. Qudāma, Mughnī, p. 39.

28. Q , 2 : 283 ; G. M. Azad, Qualification of a Qadi, Islamic Studies. vol XXIII. 1984. p. 254.

29. Ibn Farḥūn, op.cit,. p. 24.

30. Qudāma, Mughnī, p. 39. ; Al-Shawkānī, op.cit., p. 224.

31. Bakr, Qaḍā'iyya, p. 355.

32. Fārūq 'Abd al-'Alīm, op.cit,. pp. 147-148.

33. Ḥumaidan 'Abdullāh al-Ḥumaidan, The Islamic Theory of the Administration of Justice, al-Qaḍa', and the Early Practice of this institution up to the end of the Umayyad period. (132 A.H. / 750 A. D.) Ph. d. thesis 1973. University of St. Andrews. pp . 21-22.

34. Abū Muḥammad 'Alī bin Aḥmad bin Sa'īd ibn Ḥazm, Al Muḥallā. vol.9 . Cairo : Idārah al-Ṭibā'ah al-Munīriyyah. 1351. p. 429-430.

; Farūq 'Abd al-'Alīm, op.cit,. p. 150. ; Zafir al-Qasimi, Nizam al-Hukmi fi al-Shari'a wa Ta'rikh al-Islami. vol. 2. Beirut; Dar al-Nafa'is. 1983. p.250.

35. Madkur, op.cit., p. 38.

36. Al-Simnani, op.cit,. p. 53.

37. Kamaluddin Muhammad b. 'Abd al-Walid, Ibn Hammam, Al-Fath al-Qadir. vol 5. Cairo: Matba`ah al-Kubra al- Amiriyya, 1316. p. 485.

38. Marghinani, Hidaya, p. 101. ; G. M. Azad, op.cit,. p. 249.

39. Sharbini, Iqna', 297. ; Mawardi, Adab,. p. 628.

40. Sharbini, ibid,. p. 297.

41. Ibn Qayyim, op.cit,. p. 95.

42. G. M. Azad, op.cit,. p. 256.

43. Mawardi, Ahkam , p. 65. ; Farra', op.cit,. p. 61.

44. Q , 4 : 141.

45. Mawardi, Ahkam, p. 65. ; Farra', op.cit,. 61

46. Muhammad bin Idris al Shafi'i, Al - Umm. vol 7. Cairo: Sharikah al-Fanniyya al-Muttahada, 1961. p.42. ; Choucri Chardahi, 'Conflict of Law', in Law in Middle East, ed. Majid Khadduri and H.J Liebesny. op.cit,. p. 338.

47. Ibn Hazm, op.cit., p. 363.

48. Shafi'i, Umm, p. 42. ; F. A. Klein, The Religion of Islam. London : Curzon Press. 1906. p. 202.

49. Q , 5 : 42-45.

50. Mawardi, Ahkam, p. 65.

51. Q , 4: 141.

52. Mawardi, Ahkam, p. 65. ; Muhammad Wasil, op.cit,. p. 126.

53. Q , 5 : 41

54. Kāfir dhimmī, It is often called 'engagement', 'obligation', 'responsibility', because the Muslims undertake to safeguard the life and property of the non-Muslim.

55. Madkūr, op.cit., pp. 38- 39.

56. ibid,. ; Muḥammad Amīn ibn 'Ābidīn, Hāshiyah. vol 4. Cairo: Maṭba`ah Muṣṭafā al-Bābī al-Ḥalabī. n.d. p. 329.

57. Fārūq 'Abd al-'Alīm, op.cit,. pp. 113-114.

58. Māwardī, Aḥkām, p. 65.

59. Abū 'Abd al-Allāh bin Ismā'īl bin Ibrāhīm al-Bukhārī, Ṣaḥīḥ al-Bukhārī, vol 2. Cairo : Maṭba'ah Muṣṭafā al-Bābī al-Ḥalabī. p. 117.

60. Māwardī, Adab, pp. 662-633.

61. Bakr, Qaḍā'iyya, p. 318.

62. Madkūr, op.cit., p. 40.

63. Bakr, Qaḍā'iyya, pp. 318-319.

64. Fārūq 'Abd al- 'Alīm, op.cit,. pp. 111-112.

65. Q , 6 : 98.

66. Q , 4 : 116.

67. Kāsānī, Bada'i, p. 4092.

68. Andalusī, Muntaqā', p. 182. ; Farrā', op.cit,. p. 61. ; Qudāma, Mughnī, p. 39 ; Ibn Farḥūn, op.cit,. p. 24. ; Nawawī, op.cit,. p. 500.

69. Māwardī, Aḥkām, p. 65.

70. Māwardī, Adab, p. 629.

71. The slave who has concluded the contract.

72. a slave who has been manumitted by tadbir.

73. Māwardī, Aḥkām, p. 65 ; Māwardī, Adab, p. 629 ; Ibn Abi -l-Damm, op.cit,. p. 21.

74. Schacht, An Introduction, p. 127.

75. Andalusī, Muntaqā, p. 183. ; Ibn Juzaiy, op.cit,. pp. 289-290.

76. Q, 1 : 282.

77. Al-Qurṭubī, op.cit., vol. 3, p. 389.

78. Māwardī, Aḥkām, p. 65, ; Bakr, Qaḍā'iyya, p. 335.

79. Ibn Ḥazm, op.cit., p. 430.

80. Q , 4 : 58.

81. Māwardī, Aḥkām, p. 65.

82. Māwardī, Adab, p. 629.

83. Andalusī, Muntaqā , p. 183.

84. ibid,. ; Sharbīnī, Iqnā' , p. 299.

85. Qudāma, Mughnī, p. 40 ; 'Abd al-'Āl 'Uṭwah, Muhādarāt fi Nizām al-Qaḍā' fi al-Islām. Cairo: Maṭba'ah al-Aḥkām, 1969-1970, p. 5.

86. Māwardī, Aḥkām, p. 66.

87. Sharbīnī, Iqnā', p. 299. ; Madkūr, op.cit,. p. 43.

88. Andalusī, Muntaqā, p. 183.

89. Fārūq 'Abd al-'Alīm, op.cit,. p. 159. ; Qudāma, Mughnī, p. 40.

90. Ibid., p. 159.

91. Māwardī, Adab, p. 622. ; Sharbīnī, Iqnā', p. 299. ; Madkūr, op.cit,. p. 43.

92. Māwardī, Adab , p. 623.

93. Sharbīnī, Iqnā', pp. 298-299. ; Bakr, Qaḍā'iyya, p. 331. ; 'Alī Maḥmūd Qirā'ah, op.cit,. p. 237.

94. Sharbīnī, Iqnā', p. 299.

95. Māwardī, Adab, p. 624.

96. Madkūr, op.cit,. p. 42.

97. Māwardī, Adab, pp. 624-625.

98. Māwardī, Aḥkām, p. 66.

99. Sharbīnī, Iqnā', pp. 298-299.

100. Ibn Manẓūr, Lisān al-'Arab, vol XIII. Beirut : Dār Sader. n.d. pp. 431-432.

101. 'Abd al-Ra'ūf al-Misrī, Mu'jam al-Qur'ān, 1948, pp. 137-138 : Majid Khadduri, Islamic Conception of Justice, London : The Johns Hopkins Univ. Press, 1984. p. 6

102. Ibn Manẓūr, op.cit,. pp. 431-432.

103. Māwardī, Aḥkām, p. 66. ; Sharbīnī, Iqnā', p. 297. ; Qudāma, Mughnī,. p. 40. ; Nawawī, op.cit,. p. 500. ; Wahbah Zuḥaylī, Al-Fiqh al-Islāmi Wa Adillatuhu. vol. 6. Cairo : Dār al-Fikr. n.d. p. 482.

104. Kāsānī, Badā'i, p. 4080. ; Madkūr, op.cit., p. 41

105. Kāsānī, ibid,.

106. Māwardī, Aḥkām, p. 66.

107. Khadduri, Justice, p. 145. ; Shāfi'ī, Risālah, p. 25. ; Majid Khadduri, Islamic Jurisprudence, Shafi'is Risala. Baltimore : The John Hopkins Press. 1961. pp. 70-71.

108. Māwardī, Aḥkām, p. 66.

109. Madkūr, op.cit., p. 41.

110. Kāsānī, Badā'i, p. 4080. ; Bakr, Qaḍā'iyya, p. 340.

111. Q , 49 : 6.

112. Qudāma, Mughnī, p. 40.

113. ibid,. ; Madkūr, op.cit., p.41.

114. Q , 24 : 4

115. 'Alī 'Alī Manṣūr, op.cit,. p. 177. ; Farūq 'Abd al-'Alīm, op.cit,. p. 177.

116. Bakr, Qaḍā'iyya, p. 340 ; Ibn 'Ābidīn, op.cit., vol.5, p. 356.

117. Kāsānī, Badā'i, p. 4080. ; Madkūr, op.cit., p. 41.

118. Māwardī, Aḥkām, p. 66.

119. G. M. Azad, op.cit,. p. 257.

120. Ibn Mājah, op.cit., vol.2, p.398-399.

121. Qudāma, Mughnī, p. 40. ; Bakr, Qaḍā'iyya, p. 339.

122. Kāsānī, Badā'i, p. 4080.

123. Marghinānī, Hidāya, p. 101 ; Charles Hamilton, op.cit,. pp. 613-614.

124. Māwardī, Aḥkām, p. 66. ; Qudāma, Mughnī, pp. 40-41. ; Farrā', op.cit,. p. 62.

125. Q , 4 : 59.

126. Abū Dā'ūd Sulaimān b. al-Ash'ath al-Sijistānī, Sunan Abī Dā'ūd. vol 3. Cairo: Maṭba'ah Muṣṭafā al-Bābī al-Ḥalabī, 1952,. p. 30.

127. Māwardī, Aḥkām, p. 66.

128. G. M. Azad, op.cit,. p. 259.

129. Kāsānī, Badā'i, p. 4079. ; Amedroz, op.cit,. p. 764. ; Madkūr, op.cit., pp. 41-42. ; Marghinānī, Hidāya, p. 101.

130. Kāsānī, ibid,. ; Fārūq 'Abd al- 'Alīm, op.cit,. p. 185.

131. Marghinānī, Hidāya, p. 101 ; Charles Hamilton, op.cit,. p. 615.

132. G. M. Azad, op.cit,. p. 259

133. Kāsānī, Badā'i, p. 4079. ; Marghinānī, Hidāya, p. 101. ; Charles Hamilton, op.cit,. p. 614.

134. Gibb, Mohammedanism,. pp. 73-74.

135. Shorter encyclopaedia of Islam, Art, Ijtihad and Taqlid.

136. Māwardī, Aḥkām, p. 66.

137. Qudāma, Mughnī, p. 41. ; Ibn Juzaiy, op.cit,. p. 292.

138. Māwardī, Aḥkām, p. 66. ; Amedroz, op.cit,. pp. 763-764.

139. Qudāma, Mughnī, p. 41.

140. Shāfi'ī, Umm, vol : 6, p. 200. 87. ; Māwardī, Aḥkām, p. 66.

141. Māwardī, ibid,. ; Farrā', op.cit,. p. 61.

142. Qudāma, Mughnī, p. 41. ; G. M. Azad, op.cit,. p. 251.

143. Māwardī, Aḥkām, p. 67. ; Farrā', op.cit,. p. 63.

144. Sharbīnī, Iqnā', p. 298. ; Nawawī, op.cit,. p. 501. ; Muḥammad bin 'Alī al-Shawkānī, Irshād al-Fuḥūl ilā Taḥqīq al-Ḥaqq min 'Ilm al-Uṣūl, Cairo : Maṭba'ah Muṣṭafā al-Bābī al-Ḥalabī. 1937. p. 251. ; Taqiuddīn bin Fatḥ, Ibn Daqīq al-'Īd, Iḥkām al-Aḥkām Sharh 'Umdat al-Aḥkām. vol 3. Damascus : Idārah al-Ṭibā'ah al-Munīrah. 1342. pp. 176-177.

145. Abū Ḥamīd al-Ghazālī, al- Mustaṣfā min 'Ilm al-Usūl. ed. Muḥammad Muṣṭafā Abū al-'Ilā'. Cairo : al-Maṭba'ah al-Fanniyya al-Muttaḥada. 1971. pp. 479-481.

146. ibid,.

147. Al-Āmidī, Al-Iḥkām fi Uṣūl al-Aḥkām. ed. Sayyid Jumailī. Cairo : Dār al-Kitāb al-'Arabī. 1984. p. 180.

148. Shawkānī,. Irshād, p. 251.

149. Shāfi'ī, Umm, p. 207.

150. 'Arnūs, op.cit,. pp. 78-79.

151. A. A. Fyzee, op.cit,. p. 409.

152. Ḥumaidān, op.cit,. p. 28.

153. Kāsānī, Badā'i, p. 4079. : Māwardī, Aḥkām, p. 66. ; Amedroz, op.cit,. p. 764.

154. Ḥumaidān, op.cit,. p. 29-28

155. Amedroz, op.cit,. p. 766.

156. Ḥumaidān, op.cit,. . 29 ; Ibn Abi -l-Damm, op.cit, p. 28.

157. Ḥumaidān, ibid,. p. 30

158. Māwardī, Aḥkām, p. 67. ; Amedroz, op.cit,. pp. 765-766.

159. Farrā', op.cit,. p. 63. ; Māwardī, ibid,. ; Amedroz, ibid,

160. Al-Ṭarābulsī, Mu'īn, p. 26. ; Amedroz, ibid,. p. 766.

161. Marghinānī, Hidāya, p. 101. ; Charles Hamilton, op.cit,. pp. 614-615.

162. Sharbīnī, Iqnā', p. 297. ; Farrā', op.cit,. p. 60. ; Ibn Farḥūn, op.cit,. p. 24.

163. Māwardī, Adab,. p. 619.

164. Māwardī, Aḥkām, p. 65. ; Farrā', op.cit,. p. 60.

165. Māwardī, Adab, p. 619. ; Muḥammad Wāṣil, op.cit,. p. 131.

166. Ibn Mājah, op.cit,. vol. 2 p. 658.

167. Māwardī, Adab, p. 619.

168. Muḥammad Wāṣil, op.cit,. p. 131. ; Al-Shawkānī, op.cit,. pp. 263-265.

169. Māwardī, Adab, p. 619. ; Bakr, Qaḍā'iyya, p. 323.

170. 'Alī 'Alī Manṣūr, op.cit,. p. 137.

171. Muḥammad Wāṣil, op.cit,. pp. 132-133.

172. Māwardī, Aḥkām, p. 65.

173. Andalusī, Muntaqā, p. 182. ; Ibn Farḥūn, op.cit,. p. 26.

174. Andalusī, ibid,. ; Fārūq 'Abd al- 'Alīm, op.cit,. p. 169. ; Ibn Farḥūn, op.cit,. p. 26.

175. Q , 35 : 18.

176. Q , 52 : 21.

Chapter III

Judiciary Function

The qāḍī is an arbiter who settles disputes between persons who appeal to him, and who pronounces sentence of law on delinquents against whom charges are brought. He is competent to make decisions on questions affecting community life that may have been dealt with by the Sharī'a, these include: marriage, dissolution of marriage, the care of orphans, successions, contracts of various kinds, and criminal punishment. [1] As new societies gradually came into being, people required and needed protection from any wrong doers, life, property needed to be protected, social and personal disputes needed to be settled. From the beginning, judges were required to take into consideration equity, humanity and fairness so that the rights of the weak-women, orphans, and slaves would not be abused. [2]

The job of qaḍā' is not to be sought and obtained but is one of the heavier vocations affecting all life in the world and in the after-life. The powers and functions of the qāḍīs were voluminous and their responsibilities grave. This is why some Muslim scholars refused to accept the post of qāḍī. For example Abū Ḥanīfa, the founder of the Ḥanafī school, refused to accept this post during the reign of the second 'Abbasid caliph al-Manṣūr (who had proposed him for the judgeship of Baghdad); despite being punished he chose to endure suffering rather than accept the appointment. [3]

Abū Bakr al-Rāzī, who died in 370/980, also refrained from accepting the post after having been asked several times. This is because some caliphs, in order to give their actions a legitimate nature, compelled their judges to pass judgment in cases that might further their own ambitions. For these reasons, many judges abstained from accepting the post in the fear that the caliphs might compel them to give legal consultation (fatwā) that was not in harmony with the principles of the Muslim Law.[4]

The qādīs, as indeed the whole community of scholars ('ulamā'), were considered as the heir of the prophet and as he has inherited his knowledge from the prophet he also inherited from him his judicial power and the custody of religion and law after the Prophet. [5]

The main function of a judge was to preside over the Sharī'a Court and hear the complaints of litigants. A qādī could settle the dispute by reaching a settlement acceptable to the parties concerned as long as this settlement did not contravene the law in any way. [6] Indeed, the authority of the qādī was extensive and his responsibility very great, especially in terms of the Islamic approach which considers the acts and behaviour of the qādī as spiritual. In this way his qadā' influences not only his position in the community but also his position in the after-life.

Those who apply for judgeship should not be accepted as it is an honour conferred upon those whose reputations make them worthy of it. In Islam the purpose of life is not simply to affirm but to actualize, not simply to profess belief in God but to realize God's will and to spread the message and law of Islam. Other functions relate to women. The

Sharī'a has stipulated that women should be represented in the marriage contract by the next-of- kin, father or brother. In Islamic Law, this next-of-kin gave the women's consent as well as his own consent to the marriage. However, if a woman had no guardian (walī), the judge was required to be the woman's guardian and act in her interest in choosing a suitable candidate and giving her away in marriage. Another function of the qāḍī was to supervise and protect the properties of the disabled and the lunatic. The qāḍī is empowered to control the acts of their guardians, and if such persons have no guardians, then the qāḍī may appoint one for the safe custody of the person and property in question, should he himself be unable to look after their personal interest .[7]

The qāḍī has also to appoint an administrator for dividing and looking after the property of a deceased person. The Sharī'a has laid down in great detail the rules of succession. It also permits benefit by will (waṣiyya) of the deceased. And the Sharī'a has decided that a will (waṣiyya) may dispose of no more than one-third of the estate. So it was also the duty of a judge to see to the division of the estate according to the wishes of the deceased. Further, the qāḍī should look through the wishes carefully to ensure that the wishes did not contravene the Sharī'a. If the deceased person had specified the names, he had to ensure that the inheritors received what have been given to them under the waṣiyya. If he had not left any specific instructions as to the way in which he wanted his waṣiyya distributed, then the judge had to use his own judgment and discretion in deciding the right way. [8]

If the deceased had appointed an executor (waṣī) to execute the bequest under the supervision of the judge, then the judge had only to

give general supervision. In this case the wasi is supervised by the qadi who may, if necessary, himself appoint a wasi or remove him if he is incapable or dishonest. [9]

In the Maliki school, the qadi possessed an additional jurisdiction which was called al-Siyasa al-Shar'iyyah under which he allowed equitable solutions in the adversary process. Ordinarily the judge's function was only at the request of an interested party who brought the suit, to decide it. It was expanded from its original position and, in addition to private complaints, public rights were attracted to cognizance automatically by the qadi's initiative. In hadd cases, the court may act, though the point is disputed. In exercising convenience jurisdiction (local ihtisab case) for example, cases of violation of municipal regulations, some jurists, following Abu Hanifa, held that the qadi could not take personal initiative, but otherwise in the Maliki law. [10]

In Shari'a, there are certain types of penalties for certain types of crime. Hadd is one of the punishments provided for persons involved in wrongful doing as stated by the Qur'an and Sunna. It was the responsibility of the qadi to settle the problem. In Shari'a a breach of religious prohibitions or omission of religious duties was regarded as a wrongful act or criminal act in the same way as a crime against the public.[11]

The important of a qadi and the judicial system in Islam is clearly mentioned in the Qur'an. The verses of Qur'an often refers to the qadi who does not adjudicate in accordance with the Islamic law as a fasiq, sometimes as a zalim and sometimes as a kafir. [12] Al-Qur'an also regards

judgeship as the task of prophets, when it says "O Dā'ūd, We have indeed appointed thee a viceroy in the earth, so judge with justice". [13] The Qur'ān orders all these who hold the position of a qāḍī to be just. It says "Surely Allāh commands you to make over trusts to those worthy of them, when you judge between the people that you judge with justice". [14] It is clear from the verse that it is required to give amāna to the right person with the right judgment. These duties cannot be done unless by a qāḍī.

These duties may tempt him to error, and therefore expose him to the risk of hell-fire. A judge whose decision is influenced by his own interest, internal or external, is as one who slays himself. The Ḥadīth remarked about this situation, it said that "he who is entrusted with the position of qaḍā', is slaughtered without a knife". And it states again "to perform his duties is to have one's throat cut without the use of a knife". [15] "Judges were in three classes: one class comprised those who knew the truth and decided accordingly. These judges will attain eternal happiness and felicity. In the other two categories are judges who gave decisions against the known truth, and those who failed to seek the truth, but gave decisions in ignorance". [16]

All these verse and Sunna indicate the great prestige and dignity of a qāḍī in Islam. It is also as a warning to a qāḍī not to exercise judgment in wrong manner. Although some people took the above Ḥadīth as an obstacle to solicit the office, in the real sense it emphasises to be fair in giving judgment. However the Ḥadīth that "If the judges exercise Ijtihād, and arrive at the correct decision he is doubly rewarded, and if he arrives at a wrong decision, he is still rewarded singly provided he exercise

Ijtihād", [17] encouraged the people to be a qāḍī. If he administers justice according to the sources of Islamic law and makes a mistake, God forgive him and reward him. Some people erroneously put forward the case of imam Abū Ḥanīfa who refused to accept the position of judge on account of his personal piety. But they forget that although Imām Abū Ḥanīfa refused to be a judge he did not stop his companion and disciple Abū Yūsuf to render the same services to the people. The fear of committing error must not deter the qāḍī from the qaḍā', because if he exerts himself yet commits error, no sin is laid upon him. [18]

Although the fact is that great and pious fuqahā' abstained from judgeship, even at the cost of torture, imprisonment and exile, it does not mean that those who accepted it were less virtuous. We know that it is farḍ kifāya to accept judgeship and we should be concerned that the fulfilment of juridical duties amounts to the performance of a religious obligation and worship. [19] Al-Sarakhsī (d. 482/1090) describing qaḍā' as the best form of worship has stated, 'after faith in God, there is nothing more obligatory than a just decision'. Al-Kāsānī believes it to be one of the most important duties after belief in God. [20]

Al-Māwardī in discussing the function of the judge, enumerates that judges have to secure; [21]

1) the settlement of disputes between litigants.

2) the enforcement of rights established in court,

3) supervision, management and protection of rights and obligations in the case of those incapacitated by lunacy, or infancy or interdict by weakness of intellect or insolvency,

4) supervision, management and administration of waqf property. The qāḍī must administer if the appointed manager (mutawallī) failed to do so.

5) giving effect to testamentary dispositions, if legal, in the case of persons ascertained by giving possession, and in the case of persons described, after judicially ascertaining them with due regard for the executor (waṣī)

6) the providing for unmarried women who have no kin (auliyā'), by giving them in marriage to suitable candidates (kufū'). Abū Ḥanīfa held that women can act for themselves in the matter of marriage

7) the application and infliction of fixed penalties (ḥudūd) in respect of divine matters, where the liability is established by admission or proof, without any claim. In addition, in respect of human matters a qāḍī can act after claims have been made.

8) protecting the district under his jurisdiction by checking encroachments on roadways and public areas and policy on building although without previous complaint.

9) supervision, choosing and inquiring into the character of any witness or official of the court and the choice of proper deputies to act relying on them if trustworthy, and dismissing or changing them if otherwise.

10) to deal equal justice to both the weak and the strong, and to the high and the low.

Ikhtiṣāṣ al-Qāḍī.

Generally the appointment of a qāḍī may be restricted to a certain jurisdiction or to a certain time or month or days. For instance a qāḍī has a right of deciding cases on admission only not on proof, or in matters of debt but not of marriage. In such cases the qāḍī must not exceed the limit powers given to him. To discuss this topic it is better to divide it into;

1) al-ikhtiṣāṣ al-makānī,
2) al-ikhtiṣāṣ al-zamānī,
3) al-ikhtiṣāṣ 'inda ta'aduddihim,
4) al-ikhtiṣāṣ al-nau'ī,
5) al-ikhtiṣāṣ bi qadiyyah mu'ayyanah,
5) al-ikhtiṣāṣ bi madhab mu'ayyan,
6) al-ikhtiṣāṣ bi miqdār mu'ayyan.
7) al-ikhtiṣāṣ bi ashkhāṣ mua'yyanah.

Al-Ikhtiṣāṣ al-makānī.

Al-Ikhtiṣāṣ al-makānī means that the qāḍī has jurisdiction over a place or district prescribed to him. He is empowered to hear and determine disputes in his district, but has no power to intervene in disputes outside his jurisdiction. [22] According to Māwardī, however, if a qāḍī has been appointed to a certain district he is empowered to try any disputes between residents in his area but not between those coming in from outside nor strangers. [23]

Al-Ikhtiṣāṣ al-Zamānī.

With reference to this concept, a qāḍī has powers of jurisdiction to settle disputes restricted to certain days only. For instance, if a qāḍī has permission to hear cases on Monday and Tuesday, he can pass judgment only on those days. Ikhtiṣāṣ then bases the qāḍī's jurisdiction on time, place and case.[24] Whether the appointment of a qāḍī is to specific cases, he is still empowered to try any disputes between litigants, but is restricted to specific days which end at sundown. [25]

Ikhtiṣāṣ al-qāḍī 'inda ta'aduddihim.

Within this concept two or more qāḍīs may be appointed to one place. A question has arisen whether this is valid or not, and on this subject different opinions have been given;

1) Some scholars hold this is valid if the appointments are specific in distinct districts. Every qāḍī has different jurisdiction and divergences of opinion needed to be avoided.

2) Others have said that the appointment of two or more qāḍīs to one place is valid so as long as there are distinct branches of business. For example, one qāḍī can hear and determine cases related to marriages, while another relates to mu'āmalah, and a third to criminal questions.

3) A question arises on the appointment of two or more qāḍīs to one place without restricted powers. Again there are varied opinions:

a) Mālik and some followers of Shāfi'ī maintain that this is not valid. They argue that such appointments encourage disputes between litigants, which makes further disputes between litigants more likely in the choice of the preferred qāḍī. If the appointment of two or more qāḍīs

is made at the same time this appointment is invalid. Where appointments are staggered, the first is valid.

b) Ḥanbalī, Ḥanafī and some Shāfi'ī scholars held that these appointments were valid. They argue that the function of the judiciary is to promote peace, in solving disputes between parties and enforcing rights. They also argued that qāḍīs are permitted to appoint successors. As a qāḍī is a representative of the caliph, so, the caliph can be represented by two or more qāḍīs. In the event of litigants differing in the choice of a qāḍī, the plaintiff's choice should prevail. Where the parties stand on equal footing i.e by reason of claim and counterclaim, the qāḍī of closest territorial proximity should give judgment. Where two qāḍīs are of equal proximity, the parties must draw lots or came to agreement before receiving a hearing. [26]

Al-Ikhtiṣāṣ al-Nau'ī.

The jurisdiction of the qāḍī within this concept is restricted to specific cases. For example, qāḍīs have the right of jurisdiction in criminal cases only and not in those of marriage. In such cases, the qāḍī must not decide cases outside his jurisdiction. [27]

Ikhtiṣāṣ bi qaḍiyyah mu'ayyanah.

Māwardī argued that the jurisdiction of a qāḍī may be limited to specific litigants. He is responsible for hearing and determining one person's dispute until the end. Disputes of fresh litigants can be dealt with only under a fresh appointment. [28] It should be mentioned here, that the jurisdiction of the qāḍī is limited to hear and settle one case only.

He is not allowed to hear another case, although in the same branch of business. In all cases, the name of the qāḍī must be specified. [29]

Ikhtiṣāṣ al-qāḍī bi madhhab mu'ayyan.

A ruler may appoint a qāḍī holding the legal tenets of his own school. He has to follow the ruling of the head of the school to which he is attached. In this matter however, scholars have differing views. Some said that if he was mujtahid, he was not bound to limit himself to one school. He may adopt the opinion of other schools. In addition, he may make judgements based on al-Qur'ān, Sunna, Ijmā' and use his own reasoning (ijtihād) to settle problems. If he is muqallid, he should adhere to the tenets of one school. He is required to adhere to the school to which he is attached. A muqallid qāḍī cannot give judgment based on other schools. Abū Ḥanīfa however is reported to have agreed that the qāḍī muqallid may base his judgment on other schools. [30]

Al-Ikhtiṣāṣ bi miqdār mu'ayyan

Again the jurisdiction may be restricted to certain spheres. He may however attend a home or a mosque to facilitate his judgment. According to Māwardī, 'Abd al-Allāh ibn al-Zubair reported that at Baṣra, it was the custom for a qāḍī to construe judgment in the Friday mosque on cases to the value of 200 dirhams or 20 dīnārs, including questions of maintenance (nafaqa), but nothing beyond this. [31]

Ikhtisās al- qādī bi ashkhās mu'ayyanah.

This method of jurisdiction of the qādī is restricted to certain litigants only. For instance, judgment is passed either for women or for men, and not allowed for both of them. [32]

Hukm al-Qadā'.

Actualiy this job is not a job to be sought and obtained but is offered for the competent and qualified person. If nobody fit for the office is available, those whose qualifications are close are eligible to be appointed. Most Muslim scholars discussed widely this situation. In general there are five situations. These situations are discussed below: [33]

1) Fard 'Ain (obligation)- if there was only one qualified person. He should apply for the job as judge, otherwise he was a sinner. His appointment to the office of qādī was obligatory .

2) Sunnah (recommended)- if a number of people were qualified, the most learned and most capable person among them, who possessed the qualification of a qādī should accept the office because he was eligible for office.

3) Mubāh (permissible)- if a number of people are qualified but had the same degree of knowledge in all aspects, anybody could be appointed to the office. He was able to refuse or to accept it without committing a sin.

4) Makrūh (Indifferent)- if a number of people were qualified but there was one more qualified person among them, the others would

refrain from accepting the office. Thus any qualified person should give the job to the most qualified person among them. It is also makrūh to select a person who suspects that he is not capable of performing his duties and who is not confident of being able to act with a strict regard to justice. If we select them it will cause the propagation of evil. In fact, the acceptance of the office with an intention to maintain justice is approved, although it be more commendable to decline it, because it is a great undertaking notwithstanding a person may have accepted it from an opinion that he could be able to maintain justice. He may have erred in this opinion and afterwards stand in need of the assistance of others when such assistance is not to be had. Although it is most commendable to decline it if there be no other person so capable of discharging the duties, so it becomes a duty to mankind to accept it in order to preserve the right and to reject injustice. [34]

However al-Marghinānī maintains that one is neither to seek the appointment nor to desire it with asking because the Prophet has said, "Whosoever seeks the appointment of qāḍī shall be left to himself, but to him who accepts it on compulsion an angel shall descend and give directions". [35]

5) Harām (forbidden)- if a person knows he is unable to undertake the responsibility and to exercise the office perfectly.

Al Māwardī, while discussing this aspect of whether or not it is permissible to seek office states: [36]

1) if candidates for the office of qāḍī are not from the Mujtahidīn (ahl al-ijtihād), application is forbidden.

2) If candidates are from the Mujtahidīn and meet the full requirements of being a judge, there are three different situations:

a) if it appears apprehensive that the job of qāḍī will fall to an ignorant person (jāhil) or to a tyrant, anyone who was qualified for the office was allowed to apply for the job to prevent an ignorant person or a tyrant holding the office and this is allowable as preventing a moral wrong.

b) while office was being held by the qualified qāḍī, it was forbidden and discreditable for others to emerge with the motive of dismissing or sacking the qāḍī. In addition, it was forbidden for any application to be made with the intent of making money.

c) if the post of qāḍī was vacant, it was permissible for the qualified person concerned with the welfare of the Muslims generally and with the prospect of the job being held by an unfit person to apply for the office. Furthermore it was also permissible for a candidate to apply for the job out of need of money to survive or a desire for the stipend from the treasury. However, scholars argued about the case of a candidate applying for the job for the reason of dignity, pride or seeking honour in the world. Some scholars mention that it is makrūh (deplored) as shown by the verse of Qur'ān "That abode of the Hereafter, we assign it to those who have no desire to exalt themselves in the earth nor to make mischief. And the good end is for those who keep their duty". But other scholars mention that it is permissible to seek dignity and they hold that the prophet Yūsuf sought office from Fir'aun and stated his qualifications. The prophet Yūsuf told him "Make me a treasurer in your land". Al-Māwardī also proclaimed that it was forbidden for any person to use his money to obtain the job. This attitude is a part of bribery and it throws discredit both

on giver and receiver. The prophet condemned all those who engaged is such a transaction. [37]

In the case where the qualified person refused the offer, the government should choose one of the suitable candidates for the judicial function. If the latter refused to be appointed, the government must force him to take office. Faḍl Allāh quotes the views of various Shāfi'ī scholars. In their view if he who was qualified for the office of qāḍī was manifest, there being no other qualified person, he was to make himself known to the sulṭān and if selected must accept office. If he refused the sulṭān must force him to take office. He was not excused on the grounds that he feared (that the government would commit) extortion and peculation. [38] Discussing this matter of whether the one chosen should be forced to take the office or not, Faḍl Allāh mentions three possible cases.

1) If there was in a town only one qualified person, his appointment was obligatory to ensure the protection of the rights of the people and the execution of the ordinances of the Sharī'a, so much so that if he refused, he must be forced to accept.

2) If a number of persons in a town were qualified, should one of them refuse he did not commit sin and should they all refuse, similarly they did not commit sin provided the sultan personally judges case, but if this was not so then they did. If all those who were qualified refused office and an ignorant person was appointed they all shared in sin. From this Faḍl Allāh deduces that if the sulṭān could decide cases personally it was not incumbent upon him to appoint a qāḍī, but, he continues, following the custom of the orthodox caliphs and the early ancestors, the Sunna was that he should appoint a qāḍī. This being so, if there were in a town several persons who were qualified, it was fitting that the sulṭān

should select the most capable, most learned and the most pious among them. Fadl Allāh then asks the question whether the sulṭān could force such a person if he refused office, there being others qualified, to accept office, and answers that he apparently could do so. He adds the caveat "God knows best" because the choice of the most capable was in accordance with the interest (salāḥ) of the Muslims and it was for the one in charge of affairs (ḥākim) to act upon what was in the public interest.

3) If in a town there was person qualified to hold the office of qāḍī, the sulṭān must on no account appoint someone who used bribery to obtain office or who was of bad character, but, according to Hidāya, once a person of bad character had been appointed, his exercise of office was valid. After mentioning various views on the problem of whether a qāḍī who became bad of character after his appointment ought to be dismissed or not, Fadl Allāh states that it was clear that the appointment of a person of bad character was valid and that a qāḍī did not forfeit office on account of bad character. [39]

Hukm al-Qaḍā' for Community

Muslims scholars also defined this case by giving their opinion. In looking at the community, most scholars proclaimed that it is farḍ kifāya, or a collective duty for the community to undertake the responsibility for this post or in another way it was incumbent upon those involved. Farḍ kifāya means that when anybody turned up to the office no farḍ (obligation) remained for the rest of community but if nobody appeared the whole community was innocent. This situation was important because for the imām alone it was impossible to oversee all the disputes

between the people, so if nobody took care of the administration of qaḍā' and left everything to the imām, there would be more disputes in the community because mankind is so easily involved in bad things. [40]

According to the theory the Qur'ān points to the necessity of justice in administrating the office of qaḍā', and says that: "If you judge between the people do so with justice". [41] Muslim scholars understood from this verse that it is the duty of all Muslims to submit their disputes to Islamic law. [42]

In conclusion there is farḍ (obligation) for the whole community to take care of the office of qaḍā' and there are clear explanations in the Qur'ān as stated above. And it also farḍ kifāya because the whole community are required to command the truth and prohibit wrong doing. Consequently, the entire Muslim community is responsible for the administration of justice. Faḍl Allāh recognises that the pious were reluctant to accept office but states his opinion that they should overcome their reluctance because it was a farḍ kifāya for a duly qualified person to accept the office of qāḍī since it concerned the welfare of the Muslims generally and enjoining of the good and forbidding of evil. [43]

Appointment of Qāḍī

When the candidates met the requirements to be a judge they will be appointed in three ways. A qāḍī may be appointed by words or by message or writing from a distance, but with the latter there must coexist evidence sufficient to identify both the appointee and the district over

which he is appointed. There had to be an authorized body who would act on behalf of the community, that is to say of the judicial and executive power which (according to the system of Islamic government) rested in the hands of the caliph as the head of the Muslim state. His appointment can be either ṣarīḥ or kināyah. The words ṣarīḥ consist of four words and kināyah may express seven words. [44]

While to make an appointment completely valid it is further requisite that the appointee (candidate) acquaint the appointer of his fitness, and that he do this before his appointment, otherwise it must be made afresh. The appointer on the other hand must possess the knowledge that his appointee is duly qualified and has accepted the office. Further the appointment must be specified. The appointee must know whether he be appointed a qāḍī, or a Governor, or administrator of land-tax. That means he should know his authorities and his duties before entering the office. Finally the appointee should know its locality, and to make it binding it must be promulgated so the people may submit to jurisdiction. If the appointee knows nothing about authorities, duties and locality, his appointment was invalid. [45]

This way will make the administrations of these post not ambiguous. According to the scholars the caliph could ascertain the standard of the candidate either from his reputation or by subjecting him to a special examination. They cited two instances to support their argument: the Prophet had given Mu'ādh an oral examination before sending him to Yaman as a judge, and 'Umar had relied on the reputation and intelligence of Shurayḥ when appointing him as a judge in Kufah. It is incumbent upon appointer to select the person who is

capable of discharging the duties and dispense jurisdiction. The Prophet has said, "Whoever appoints a person to any office, while there is another amongst his subjects more qualified, does surely commit an injury with respect to the right of God, the Prophet and the Muslims". [46]

According to Islamic law, the caliph or his representative is required to appoint a qāḍī. Nobody is allowed to appoint himself to the office of qāḍī. In discussing the appointment from the caliph or the sulṭān, questions arise whether the appointments from tyrants and non-Muslims are allowed. Al-Māwardī quoted that scholars have two different opinions. Some scholars said that the appointment is valid on the ground that the qāḍī could exercise his rightful duties without interference from the caliph. They mention that the Prophet Yūsuf was appointed during the reign of Fir'aun. The ruler appointing need not be a Muslim. They cited that the appointment of a qāḍī is an obligatory duty on the authority concerned. Some scholars disagree with the appointment. They suggest that the candidate should refuse or reject the appointment. For them, the Prophet Yūsuf 's appointment was not relevant in the field of qaḍā', he was merely appointed to administer property. [47]

If the sulṭān was not just, there were two possibilities; either he was a tyrant or he was a rebel against the true imām. Faḍl Allāh states that, in the former case, acceptance of the office of qāḍī from him was, according to the Ḥanafīs and Shāfi'īs, permissible. The latter held that he who had taken possession of the regions of Islam by force was sulṭān, his writ ran, whether he was just or tyrannical and consequently it was permissible to accept from him the office of qāḍī. [48]

According to Muḥammad Salām Madkūr, the appointment whether from tyrannical caliph or not is still valid, on condition that the caliph do not interfere with this institution. [49] The appointment of qadis by the caliph did not mean that qāḍīs were obliged to obey the command of the caliph. The qāḍī before his appointment had certain criteria for judgment and nobody, not even the caliph, had any right to interfere with his decision or to tell him what should he decide.

The best example was given by caliph 'Alī. It is reported that 'Alī in the days of his rule saw his coat of mail in the hands of a Christian 'Arab and took him to the qāḍī, Shurayḥ ibn al-Ḥārith, to decide about it. 'Alī told the qāḍī that the coat belonged to him, and he had neither sold it or nor given it to anyone as a gift. The qāḍī asked the Christian what he had to say about the caliph's argument. The Christian said that the armour was his own and that at the same time he did not believe the caliph to be a liar. Qāḍī Shurayḥ asked 'Alī whether he had any witness to prove his claim. 'Alī did not have a witness. Qāḍī decided the case in favour of the Christian. [50] This shows that the qāḍī although appointed by the caliph can dismiss his claim.

Adab al-Qāḍī.

The term "adab al-qāḍī" consists of two words, adab which means literally civility, decorum, etiquette, and refinement of manners. It indicates modes of behaviour and discipline of mind and manner in the conduct of one's life by which a man is trained in the excellence of any profession. It implies praiseworthy qualities and dispositions in a man in

great profusion and demands of him to shun those aspects of conduct that are evil. [51] The word adab is fascinating in its rich variety of meaning. It comes from a root which means to be well bred, or to invite people to a repast. As an abstract noun it expands its significance into a discipline of the mind, culture, good qualities, polite accomplishments, good manners and mode of conduct, and finally "rule of discipline to be observed in the exercise of a function". [52]

Accordingly, the term "adab al-qāḍī" contains the etiquettes and the rules of discipline, the code of conduct, which a judge who adjudicates according to the Sharī'a and whose decision is binding, has to maintain in the performance of his office. The code of conduct for the qāḍī as seen by the Prophet is given in the tradition concerning the appointment of 'Alī, cousin and son-in-law of the Prophet, as judge. Muḥammad advised him to be slow in giving judgment, to listen to both parties, to refrain from giving judgment when angry, not to accept a visit from just one of them. [53] Further, Muḥammad's frame of reference in arriving at judgments was provided by revelation, the Qur'ān instructing " not to let hatred of the people incite one to unjust action, to be just is next to piety".[54]

In connection with adab al-qāḍī account must be taken of two messages said to have been sent by 'Umar during his caliphate to two of his qāḍīs. The shorter message is addressed to Shurayḥ, the judge of Kufah. If a case were to come before him in which he has to give judgment then he is required, first to refer to the Qur'ān, and then to act according to it in giving judgment. If it does not provide the answer, judgment should be given according to a decision that the prophet gave. If

it does not provide the answer, then the decision of the righteous and those distinguished for justice should be considered. If the answer is not found there, then the qāḍī has the choice of making his own decision. If he wish to follow his independent reasoning he may do so, and if he wish to consult he might profitably do that also. [55]

The second letter is addressed to Abū Mūsā al-Ash'arī containing instructions for the administration of justice. His message known as risālat al-qaḍā (Epistle on giving judgment) and it is given here in full. [56]

Now the office (of qāḍī) is a definite religious duty and a generally followed practice. Understand the depositions that are made before you, for it is useless to consider a plea that is not clearly understood. Consider all the people equal before you and your court and your attention, so that the humble will not despair of justice from you. The claimant must produce evidence: from the defendant, an oath may be exacted. Compromise is permissible among Muslim, but not agreement through which something forbidden would be permitted, or something permitted forbidden. If you give judgment yesterday, and today upon reconsideration come to the correct opinion, you should not feel prevented by your first judgment from retracting: for justice is basic, and it is better to retract than to persist in error. Use your intelligence about matters that perplex you and to which neither the Qur'ān nor the Sunna seems to apply. Study similar cases and evaluate the situation through analogy with similar cases. If a person brings a claim, which he may or may not be able to prove, set a time limit for him. If he brings proof within the time limit, you should allow his claim, otherwise you are permitted to give judgment against him. This is a

better way to forestall or clear up any possible doubt. All Muslims are acceptable as witnesses against each other, except such as have received a punishment provided for by the law, such as prove to have given false witness, and such as are suspect (of partiality) on the ground of client-status or relationship. God, concerns Himself with your secret character, and leaves you to follow appearance. Avoid fatigue and weariness, and annoyance for the litigants.

For establishing justice in the courts of justice, God will grant you a rich reward and give you a good reputation. Farewell.

The adab al-qāḍī will be discussed below:

1). The place of the court.

The qāḍī should sit and exercise his powers at a place accessible to the public. It should be in the middle of the town, there should be no barrier, nor should people be terrified by the pomp and glory of the state officials. So it may be convenient for the public to attend the court. Thus the convenience of the litigating public is the prime consideration. [57]

The place of the court should be wide enough, so that all the parties can gather therein. A qāḍī ought to conduct his day's business in open maḥkamah (court). Al-Māwardī suggested that a qāḍī before entering the court-room for the hearing of the cases, should perform two or four raka'āt as voluntary prayers (nāfila). [58] And he should request Allāh to guide him aright and protect him from committing wrong. It is recommended that the seat of the qāḍī should face the qiblah. [59] However

other opinions recommended that the qāḍī's seat be arranged so as to have the face to the litigants toward the qiblah. "The best of the seats is facing the qiblah". [60]

A qāḍī should exercise his judgment in the mosque according to some opinions. And it is reported that caliphs 'Umar, 'Uthmān and 'Alī gave judgment in the mosque. They hold that the caliphs (al-Rāshidūn) sat in the mosque for the purpose of hearing and deciding cases. Al-Marghinānī stated that the Prophet has said "mosques are intended for praise of God and the passing decrees". Moreover, Abū Ḥanīfa retorted that the mosque was certainly the best place, since the rendering of justice was an act of devotion (ibādah). [61]

However Imām Shāfi'ī and Imām Mālik were of opinion that it is makrūh for a qāḍī to sit in a mosque. Shāfi'ī believed that the court should be placed elsewhere. He argues that mushrik and women during their monthly courses (ḥaiḍ) are not allowed to enter the mosque. Mushriks are declared filth in Islam, and for ḥaiḍ women are not allowed admission into a mosque. [62] Regarding the impurity of mushriks, al-Marghinānī said that they are impure because of their faith and not to their external appearance. In deciding a case involving ḥaiḍ women, a qāḍī may go out and meet them at the door of mosque or depute some other for that purpose. [63]

2.) Of equal treatment.

The Sharī'a emphasised that a qāḍī should decide cases with an equal mind. The qāḍī should show equal regard to all parties, except where

the defendant is caliph. He should rise from his seat, and make the caliph and his opponent sit together, while he himself should sit on a higher seat. The consideration to be shown to the ruler is based upon the consideration the prophet used to show to an elderly person. [64] The legal foundation of Muslim policy was the Sharī'a which was above both the ruler and the ruled. Thus the highest and the lowest were equal while appearing before the bar of Sharī'a. [65] The qāḍī should be formal and not familiar in his conversation, he should be courteous without being oily and cringing. The qāḍī should give equal seats to the disputants appearing before him. [66]

The qāḍī should not put words into the mouth of a witness, nor should he suggest answers. He should refrain from advising any of them. He should not talk in private with one party alone or speak in a language that one of them does not know. Leading questions are forbidden. The judge should not speak to one of the witnesses in a language not understood by the others. And once the qāḍī has decided a case, not even the Sulṭān can ask him to go over the case again. He must not interfere in the speech of a witness while hearing his testimony and must not lead him in the course of his testimony to something that may be to the advantage of one of the parties. He must not encourage a witness to give testimony where he hesitates to do so. [67]

A qāḍī should not frighten one of the parties, or encourage the other, he should hear both parties with patience before deciding the case. When 'Alī was appointed as a qāḍī in Yaman, the Prophet said "when two opponents sit before you, hear one as you heard the other". [68]

A qādī should not smile to anyone nor should he make jokes with one of the litigants while performing judicial work. This is to save his dignity from unnecessary suspicion. [69] Al-Māwardī has opined that the timings of the court should be the first part of the day, [70] while al-Sarakhsī has suggested that a judge should sit in the 'two parts' of the day to hear the cases. Al-Māwardī also opined that a qādī should be seated with downward eyes, deep silence, little speech, almost no movement, no gesture and with bailiffs seated before him. [71]

The qādī is also ordered not to decide cases while in anger. 'Umar is reported to have removed a qādī he had appointed on the very first day of his appointment when it was reported to him that his (qādī) voice was louder than that of the litigants in the court room. 'Umar justified the removal on the principle that any act on the part of the presiding officer which is likely to overawe a party into silence is likely to cause miscarriage of justice. [72]

Shāfi'ī laid down that the judge should not give judgment in anger or under the stress of emotion. From this it follows that whenever a qādī suffers from a mental upset which impairs his reasoning powers and judgment, he should abstain from passing orders. [73] It is also reported that the prophet said, "No judge should give judgment when he is angry". [74] For further opines that the judge should not pass judgment in the following condition:-

a. when he does not feel well,

b. when he feels sleepy

c. when he feel sad,

d when he is angry,

e when he feels over-happy,

f. when he is suffering from ailment or pain,

g. when he feels over excited (shahwat),

h. when the weather is very hot or very cold,

i. These situations are supported by a Hadīth of the prophet that a qādī should not adjudicate unless he has taken meals (food and water) that means when he feels thirsty and hungry. [75]

He must not be influenced by the feelings, aspirations or resentment of the parties concerned. When hesitant in coming to a decision in a lawsuit he should postpone his decision until his mind is definite and clear about it. [76] Another point is that the administration of justice must be without a tinge of bias or partiality. This point has greatly been emphasised in the Qur'ān. It says that " O true believers, observe justice when you appear as witnesses before God, and let no hatred towards any induce you to do wrong, but act justly, this will approach nearer unto piety, and fear God, for God is fully acquainted with what you do".[77] Again " God enjoins justice and kindness". [78]

The qāḍī should not walk during hearing and giving judgment, because he cannot distinguish between litigants properly and will make it difficult to him to understand the matter. [79] The qāḍī is also ordered not to decide cases unless there sit along with him ahl al-'ilm (learned men) and he must make his judgments in consultation with them whenever necessary. However some fuqahā' said that a qāḍī could sit in the court without ahl al-'ilm, in a case if a qāḍī worries that with the attendance of this person will lead him to less understanding. [80]

3) Of acceptance of presents.

Present means gifts from somebody to somebody without any condition or without any wish. [81] Presents can be categorised into:

1. Presents from those involved in a case. A qāḍī in this matter is strictly prohibited from acceptance of presents even from those who are his relatives or from those who were used to send him gifts before his appointment to the post of qāḍī.

2. Presents from those who do not have a case to decide in the court. This kind of present can be divided as below:

a) a qāḍī can accept a present from close relatives in strengthening of family relations or from friends provided that the present is not more than usual.

b) a qāḍī is strictly prohibited to accept a present from those who never gave gifts before his appointment to the post of qāḍī. [82]

However Al-Māwardī is very strict and insisted that a qāḍī is not allowed to accept gifts from the public whether from those who have a case to decide or not. [83] Acceptance of the present from the public would render him a target of doubts, suspicions and criticism. This will makes one inclined to him who offers and and make the qāḍī to judge a bias judgment. From the case of 'Umar b.'Abd al-'Azīz who rejected a present; it is clear that it is prohibited to qāḍī to accept the presents; when somebody asked him if the prophet used to accept a present. 'Umar replied that "it was a present for him, while for us it is bribery". The prophet can accept a present because he is ma'sūm and the purpose of the present is to have a close relationship with the prophet. [84]

In discussing the gifts from the government, some scholars mention that the qādī can take the presents. On the other hand some scholars suggest that acceptance of presents from any source is strictly prohibited. Al-Māwardī supports this opinion and quote the Ḥadīth, "present from government is a fetter". [85] Lastly it is better not to accept any present from any person. [86]

Finally acceptance of presents from any source is strictly prohibited for a judge because the Prophet Muḥammad said "Acceptance of gifts by the functionaries of public affairs gross misappropriation", and is vehemently condemned in the Qur'ān. [87]

4) Of attending feast.

Attending feasts can be general or limited. Limited feast means the feast attended by five to ten people. Otherwise it will count as general. [88] Some scholars said that limited feast also means that the judge becomes a special guest. If a qādī before his appointment used to attend the feast, he is allowed to attend provided that the feast is not done more than usual. For instance if the feast was once a month after his appointment it should not be more than that. So in this case judges are not supposed to attend such feasts. [89]

As regards invitations, a general invitation, such as to marriage feast or death ceremonies, can be accepted, but special or private invitations should be refused. Some scholars however permit the invitations of close relations to be accepted without any condition.

Moreover a qāḍī should not attend feasts except those that are general. [90] A qāḍī should not attend any litigants' marriage feast. [91]

If one of the litigants is a stranger or a traveller, the qāḍī may invite him as a guest to dinner, but it is incumbent upon the qāḍī to invite the adversary of his guest because caliph 'Alī is reported to have said that the Prophet prohibited us to entertain a party to the case unless the opponent is also invited along with him. [92]

5) Of Bribery.

The subject of bribery is an interesting one. Bribery is a curse and the most abominable act that gives birth to all kinds of corruption and injustice. Rishwah (bribery) according to the writer of Iqnā' is an act that leads to annulment of right, or establishment of a wrong. [93] Bribery is strictly prohibited for the judiciary. The prophet Muḥammad is reported to have said, "Allāh hath cursed him who gives bribe and him who takes it in respect of judgment". [94] And in another ḥadīth it is narrated "the bribe giver and the bribe taker both are in hell". [95]

6) Of hearing the case of the relatives.

A qāḍī cannot pass an order in favour of his father, his mother, his child or his wife, but he can lawfully find against any of these relatives.[96] Similarly evidence against them is accepted. A qāḍī may give evidence in favour of, but not against a personal enemy. A qāḍī should not contest his own case but appoint someone as his attorney to act on his behalf. A qāḍī's decree in his own favour, or in that of his slave, or

of his partner in the same firm has no legal effect; Similarly with a judgment in favour of his ascendant, or descendant. In such contingency the qāḍī is to transfer the case to another qāḍī. [97] The standard of justice was so high that it was to work even against one's own personal interest. The Qur'ān instructing "O you who believe! be the upholders of justice, bearers of witness for God's sake, even though it may be against your ownselves, or parents, or relatives". [98]

7) Of the dress of Qāḍīs

Ibn Farḥūn says that the judge should always be clad in the best, becoming of his position, because it is more dignified, more beautiful for his apparel and more indicating his wisdom and honour. If he is not well dressed it will decrease his dignity. [99] The qāḍī should dress properly. Al-Māwardī says that a judge should put on dress that distinguishes him from others. Qāḍī Abū Yūsuf is of the opinion that a judge should put on a black gown while presiding in the court. Black turban or gown was used by the prophet Muḥammad on some occasions. Al-Māwardī recommends that those who appear as witness should put on dress that distinguishes them from other people, and that there should be a particular place in the court for the witnesses. [100]

8) A qāḍī should not indulge in trade.

The qāḍī interested in trade is unfit for judicial duty. This desire will occupy his mind even more than anger or lust. [101] A qāḍī must not purchase or sell anything personally, since he would be recognised and given discounts out of favour, which amounts to receiving a kind of bribe.

A qāḍī should not involve in any commercial activity, unless it was necessary for him to earn his living, because he received no salary from the state or because the amount he received is not sufficient. The reason given is that he would spend so much of his time on his commercial business that he would neglect his legal duties. However the majority of scholars agreed that if the qāḍī found it necessary to engage in commercial business, he had to do so only through an agent who would run this business for him, or through a friend or relative (whom he could not unjustly favour, as he was not allowed to judge cases involving such a person). [102]

9) First come first heard

A qāḍī should be scrupulous not to give precedence to any litigants because of position, wealth, friendship and relationship. The scholars opine that those who come first should be heard first. [103] But there are special exceptions for strangers, witnesses who come from different places and for women. Travellers and person hailing from far-off places may be given precedence. For women it is solely into the discretion of the qāḍī to fix the day or the best time to hear the case. [104]

10) Not prolong the case.

In the process of deciding a case a qāḍī should not either delay nor act in haste. Haste affects adversely the defendant's defence, while delay prejudices the plaintiff. The procedure and time should be as far as possible evenly balanced between the contesting parties. On the occasion of a party taking oath, the qāḍī must counsel him properly. He must, for the

purpose, appoint an appropriate place such as the court-room, or a mosque. He should administer the special oath only after offering high praise to God in a manner that the party taking the oath may be impressed with the solemnity of the occasion and the majesty of God, and may thereby find the path of truth. [105]

11). Court Officers

A qāḍī has to appoint a kātib (court scribe), to assist him. The kātib's duties consist in making a full written record of the statements of the parties in the lawsuit, the claims of the plaintiff, the defence of the defendant and the deposition of witnesses. At the trial he will read into the record all documents submitted in evidence by both parties. [106] A qāḍī should ensure that a kātib should not be infant, slave, or dhimmī. A kātib is not required to know aḥkām al-Sharī'a but he has to know aḥkām al-Kātib. This makes it easier for a qāḍī to refer to a previous case or evidence. [107]

During the hearing some litigants or witness might not know the language of the court, thus a qāḍī should provide a translator. According to Shāfi'ī, the translator should consist of two men or a man and two women. [108] Thus the translator acted as legal aid in charge of translating for the judge statements made by litigants. Certain authors, treating translations as testimony, insisted that the qāḍī have two translators at his disposal at the same time, but this was always an isolated opinion and according to the time-honoured practice established by prevailing opinion, a single interpreter sufficed. [109]

12). Financial

A qāḍī had the right to demand a salary from public funds and is entitled to living expenses and maintainance. Although some scholars expressed the view that the qāḍī is performing a moral and religious duty,[110] if the qāḍī is poor, he should be given a salary from bait al-Māl. The qāḍī must be well provided with the necessities of life, so that he does not fall prey to corruption. [111]

Footnote

1. Gaudefroy-Demombynes, op.cit,. p. 148.

2. 'Alī Ḥasan 'Abd al-Qadir, Nazrah 'Ammah fi Ta'rikh al-Fiqh al-Islāmi. Cairo: Maṭba'ah al-'Ulūm. 1942. p. 22.

3. 'Arnūs, op.cit,. pp. 71-72. ; 'Alī 'Alī Manṣūr, op.cit,. pp. 371-372. ; for further example see N. J. Coulson, Doctrine and Practice in Islamic Law: one aspect of the problem. Bulletin of the School of Oriental and African Studies. vol. 18. 1958. p. 17.

4. Ḥasan Ibrāhīm Ḥasan, Judiciary System from the Rise of Islam to 567 A.H. (A.S. 1171) Islamic Quarterly. vol VII. 1963. pp. 306-307.

5. Emile Tyan, "Judicial Organization" in Law In Middle East. ed. Majid Khadduri and H.J. Liebesny, op.cit,. p. 244.

6. 'Arnūs, op.cit,. p. 10.

7. Māwardī, Aḥkām, pp. 70-71. ; Schacht, An Introduction, p. 188.

8. ibid,.

9. Khaṣṣāf, op.cit,. p. 320. ; Nawawī, op.cit,. p. 502.

10. Anwar Ahmad Qadri, op.cit,. pp. 486-487. ; E. Tyan, op.cit,. p. 260.

11. Māwardī, Aḥkām, pp. 70-71.

12. Q , 5 : 44. ; 5 : 45. ; 5 : 47.

13. Q , 38 : 26.

14. Q , 4 : 58.

15. Sayyid Sābiq, Fiqh al-Sunna. vol 2.Beirut: Dār al-Kitāb al-'Arabī. 1971. p. 394.

16. ibid, . p. 398.

17. Muḥammad Fu'ād 'Abd al-Baqī, Al-Lu'lu' Wa al-Mirjān. vol 2. Cairo : 'Īsā al-Bābī al-Ḥalabī, 1949/ 1368. p. 225.

18. Abū Muḥammad Maḥmūd ibn Aḥmad al-'Ainī, Al-Binayah fī Sharh al-Hidāyah. Cairo : Dār Al- Fikr, 1981/1401. p. 3. ; 'Abdul Rahman I. Doi, Shari'a the Islamic Law. London : Ta Ha Publishers. 1984. 14.

19. ibid,. p. 3.

20. Kāsānī, Bada'i, p. 4092. ; E. Tyan, op.cit,. p. 243.

21. Māwardī, Aḥkām, pp. 70-71.

22. 'Abd al-Ḥamīd al-Shawarābī, Qawā'id al-Ikhtiṣāṣ al-Qaḍā'i fī Dau al-Qaḍā' wa al-Fiqh. Iskandariah: al-Ma'ārif. 1985. p. 12. ; 'Alī 'Alī Manṣūr, op.cit,. p. 378.

23. Māwardī, Aḥkām, p. 72. ; Amedroz, op.cit,. p. 770.

24. Shawarābī, op.cit,. p. 15. ; Muḥammad Wāṣil, op.cit,. pp. 165-166. ; Al-Ṭarābulsī, Mu'īn, p. 13.

25. Māwardī, Aḥkām, p. 72. ; Amedroz, op.cit,. p. 771.

26. Māwardī, ibid,. p. 73. ; Amedroz, ibid,. ; Mahmud Saedon, Qādī, Perlantikan, Perlucutan dan Bidangkuasa, (Qādī, Appointment, Dismissal and His Power). Kuala Lumpur : Dewan Bahasa dan Pustaka. 1990. pp. 97-100.

27. Muḥammad Wāṣil, op.cit,. p. 166. ; Shawarābī, op.cit,.p. 16. ; Bakr, Qaḍā'iyya, p. 389. ; 'Alī 'Alī Manṣūr, op.cit,. p. 378. ; Qāsimī, op.cit,. pp. 255-267.

28. Amedroz, op.cit,. p. 771.

29. Muḥammad Wāṣil, op.cit,. p. 168.

30. ibid,. p. 169.

31. Amedroz, op.cit,. p. 771. ; Māwardī, Aḥkām, p. 73.

32. Al-Ṭarābulsī, Mu'īn, p. 18. ; Muḥammad Wāṣil, op.cit,. p. 168.

33. Ibrāhīm Najīb 'Awaḍ, Al-Qaḍā' Fi al-Islām, Cairo: Dār al-Nahḍah al-'Arabiyya, 1975 p. 158. ; Fārūq 'Abd al-'Alīm , op.cit,. pp. 89-90. ; Ibn Farḥūn, op.cit,. pp. 16-17.

34. Marghinānī, Hidāya, pp. 101-102. ; Charles Hamilton, op.cit,. p. 616.

35. ibid,. p. 102.

36. Māwardī, Aḥkām, p. 75.

37. ibid,. pp. 74-75.

38. Ann K. S. Lambton, State and Government in Medieval Islam London: Oxford Uni. Press. 1981. p. 193.

39. ibid,. pp. 192-193

40. Bakr, Qaḍā'iyya, p. 83.

41. Q , 4: 58.

42. Al-Ṭabarī, Jāmi' al-Bayān, Cairo: Maṭba'ah al-Ḥalabī, 1954, vol : 5. pp. 145-146.

43. Ann K. S. Lambton. op.cit,. pp. 191-192.

44. Māwardī, Aḥkām, p. 69. ; Amedroz, op.cit,. p. 767.

45. Farrā', op.cit,. p. 63 ; Al-Ṭarābulsī, Mu'īn, p. 13

46. Amedroz, op.cit,. pp. 767-768.

47. Māwardī, Aḥkām, p. 75. ; Amedroz, op.cit,.p. 772.

48. Ann K. S. Lambton, op.cit,. p. 191.

49. Madkūr, op.cit,. p. 45

50. Sayyid Sābiq, op.cit,. pp. 416-417.

51. Lane , vol 1. op.cit,. p. 34.

52. ibid,. ; A. A. Fyzee, op.cit,. p. 406

53. Farrā', op.cit,. p. 63. ; Sayyid Sābiq, op.cit,. p.391.

54. Q , 5 ; 9.

55. Ibn Qayyim al-Jawziyya, op.cit,. p. 84.

56. Ibn Khaldūn, The Muqaddima. An Introduction to History, translated by Frank Rosenthal. vol. 1. New York: Princeton Uni. Press , 1967 pp. 453-454. ; Wakī', op.cit,. pp. 70-73.

57. Abū al-Qāsim Najm al-Dīn Ja'far Ibn Al-Ḥasan, Sharā'i al-Islām fi Masā'il al-Halāl wa al-Harām. vol. 3. ed. 'Abd al-Ḥusain 'Alī. Cairo : Maṭba'ah al-Adab. 1969. p. 72. ; Sharbīnī, Iqnā', p. 300. ; Shāfi'ī, Umm, vol; VI pp. 198-199. ; A. A. Fyzee, op.cit,. p. 411. ; Ibn Farḥūn, op.cit,. p. 35.

58. Māwardī, Adab , p.243. ; Manṣūr Yūnus, op.cit,. p. 312. ; Khassāf, op.cit,. p. 85.

59. Muḥammad Wāṣil, op.cit,. p. 194. ; Sharbīnī, Iqnā', p. 301. ; Manṣūr Yūnus, ibid,. p. 311.

60. Khassāf, op.cit,. p. 86. ; G. M. Azad, Conduct and Qualities of a Qadi, Islamic Studies, 1985. vol: 24. p. 53.

61. Marghinānī, Hidāya, p. 103. ; Charles Hamilton, op.cit,. p. 620. ; Muḥammad al-'Ainī, op.cit,. p. 23. ; Khassāf, op.cit,. p. 85.

62. Andalusī, Muntaqā , p. 184. ; E. Tyan, op.cit,. p.244. ; Marghinānī, Hidāya, p. 103. ; Shāfi'ī, Umm, p. 198. ; F. H. Ruxton, Mālikī Law, London : Luzac and Company, 1916, p. 278. ; Ibn Farḥūn, op.cit,. pp. 34-35.

63. Al-Ṭarābulsī, Mu'in, p. 19. ; Marghinānī, Hidāya, p. 103. ; Aḥmad al-'Ainī, op.cit,. p. 23.

64. A. A. Fyzee, op.cit,. p. 412.

65. Khalid M. Ishaque, op.cit,. pp. 289-290. ; 'Arnūs, op.cit,. p. 22.

66. Muḥammad bin Aḥmad, Ibn Rushd, Bidāyat al-Mujtahid, Cairo : Maṭba'ah al-Bābī al-Ḥalabī, 1960, p. 472. ; Muḥammad Wāṣil, op.cit,. p. 190. ; Wakī', op.cit,. p. 31. ; Sharbīnī, Iqnā', p. 301. ; Khassāf, op.cit,. p. 96.

67. A. A. Fyzee, op.cit,. p. 413. ; Wahbah Zuḥaily, op.cit,. pp. 499-500.

68. Farrā', op.cit,. p. 63. ; Ibn Rushd, op.cit,. p. 472. ; Sayyid Sābiq, op.cit,. p. 391. ; Nawawī, op.cit,. p. 506.

69. Marghinānī, Hidāya, p. 103. ; Aḥmad al-'Ainī, op.cit,. p. 29. ; Khaṣṣāf, op.cit,. p. 96. ; Wahbah Zuḥaily, op.cit,. p. 499.

70. Māwardī, Adab, p. 244.

71. G. M. Azad, Conduct, p. 54.

72. Khalid M. Ishaque, op.cit,. pp. 288-289. ; Wakī', op.cit,. p. 31.

73. Shāfi'ī, Umm, p. 199. ; A. A. Fyzee, op.cit,. p. 412.

74. Wakī', op.cit,. pp. 81-82. ; Muslim b. Hajjaj, op.cit,. , pp. 1342-1343. ; Andalusī, Muntaqā, p. 185. ; Muḥammad Fu'ād 'Abd al-Bāqi, op.cit,. p. 226. ;

75. Mansūr Yūnus bin Idrīs al-Bahuti, Al-Rawḍ al-Murbi' 'an Zād al-Mustaqni'. vol 2. Cairo. 1352. p. 389. ; Sharbīnī, Iqnā', p. 303. ; Muḥammad Wāṣil, op.cit,. p. 208. ; Khaṣṣāf, op.cit,. pp. 95-96. ; Ibn Farḥūn, op.cit,. p. 35. ; Wakī', op.cit,. p. 83.

76. Andalusī, Muntaqā, p. 185. ; Sharbīnī, Iqnā', ibid,. ; Khaṣṣāf, ibid,. p. 96. ; G. M. Azad, Conduct, p. 53. ; Wakī', op.cit,. p. 83. ; Manṣūr Yūnus, op.cit,. p. 312.

77. Q , 5 ; 8.

78. Q , 16 :90.

79. Andalusī, Muntaqā, p. 185.

80. Al-Ṭarābulsī, Mu'īn, p. 19. ; Khaṣṣāf, op.cit,. pp. 103-104. ; Ruxton, op.cit,. p. 275. ; Wahbah Zuḥaily, op.cit,. p.499.

81. Fārūq 'Abd al-'Alīm, op.cit ,. p. 312 ; Ibrāhīm Najīb 'Awaḍ, op.cit,. p. 270.

82. Fārūq 'Abd al-'Alīm, ibid,. 316. ; Ibn Farḥūn, op.cit,. p. 29. ; Khaṣṣāf, op.cit,. pp. 111-112, 115. ; Wahbah Zuḥaily, op.cit,. p. 501.

83. Māwardī, Aḥkām , p. 75.

84. Al-Ṭarābulsī, Mu'īn, p. 16. ; Ibn Farḥūn, op.cit,. p. 30.

85. Māwardī, Aḥkām, p. 75. ; Sharbīnī, Iqnā', p. 302. ; Wakī', op.cit,. p. 59.

86. Al-Ṭarābulsī, Mu'īn, p. 16. ; Ruxton, op.cit,. p. 280.

87. Q , 3 : 161. ; G. M. Azad, Conduct, p. 56. ; Wakī', op.cit,. pp. 59-60.

88. Kāsānī, Badā'i, p. 4095.

89. Ibrāhīm Najīb 'Awaḍ, op.cit,. p. 271.

90. Charles Hamilton, op.cit,. p. 622.

91. Sharbīnī, Iqnā', p. 303.

92. Ibid,. ; Aḥmad al-'Ainī, op.cit,. p. 27.

93. Sharbīnī, Iqnā', p. 302.

94. Wakī', op.cit,. pp. 46-47. ; Al-Shawkānī, op.cit,. vol. 8. p. 276. Manṣūr Yūnus bin Idrīs al-Bahuti, Al-Rawḍ al-Murbi' p. 389.

95. Māwardī, Aḥkām, p. 75. ; Wakī', op.cit,. p. 47

96. 'Alī Maḥmūd Qāra'ah, op.cit,. p. 239. ; Muḥammad 'Āsim al-Andalusī, Tuḥfat al-Ḥukkām or Gift for the Judges. translated by Bello Muḥammad Daura. Zaria : Ahmadu Bello University Press. 1989. pp. 10-11.

97. Ibid,. ; Sharbīnī, Iqnā', p. 303. ; Ruxton, op.cit,. p. 286.

98. Q , 4 : 135.

99. Ibn Farḥūn, op.cit,. p. 29.

100. Māwardī, Adab, pp. 242-243. ; G. M. Azad, Conduct, . p. 58.

101. Muḥammad Wāṣil, op.cit,. p. 209. ; G. M. Azad, ibid,.

102. Shāfi'ī, Umm, p. 196. ; Ruxton, op.cit,. p. 280. ; Ibn Farḥūn, op.cit,. p. 31. ; Nawawī, op.cit,. p. 504.

103. G. M. Azad, Conduct, p. 58. ; Muḥammad 'Āsim, op.cit,. p. 3.

104. Manṣūr Yūnus, op.cit,. p. 58. ; Ruxton, op.cit,. p. 281.

105. Farrā', op.cit,. p. 73.

106. E. Tyan, op.cit,. . p. 255. ; Ibn Farḥūn, op.cit,. p. 32.

107. Al-Ṭarābulsī, Mu'īn, p. 16. ; Qāsim Najm al-Dīn, op.cit,. p. 76. ; Ibn Farḥūn, op.cit,. p. 32.

108. Shāfi'ī, Umm, p. 204. ; Al-Ṭarābulsī, ibid,. p. 17. ; Khaṣṣāf, op.cit,. p. 328.

109. E. Tyan, op.cit,. pp. 255-256.

110. Shāfi'ī, Umm, p. 208. ; Khaṣṣāf, op.cit,. pp. 110-111.

111. Qudāma, Mughnī, p. 37. ; Ruxton, op.cit,. p. 275.

Chapter IV

Islam in Malaysia.

A Brief History of Islam in Malaysia.

This chapter focuses on the coming of Islam to Malaysia and the position of Islam before and after Colonialism. This two approaches are relevant and important to our knowing how far Islamic law penetrated into Malaysia. According to De Jong, the coming of Islam to Malaysia has to be discussed parallel with the coming of Islam to Malay Archipelago. [1]

Historically, Malaysia was the earliest region in the Malay Archipelago to receive Islam. According to Fatimi and T.W. Arnold, however it is very difficult to fix the precise date of the coming of Islam to Malaysia. [2] Based on the latest evidence of Muslim remains that have been found in several states in peninsular Malaysia, it is possible that the presence of Islam and Muslims there began earlier than the establishment of the Malacca Sultanate in the early fifteenth century. These evidences are tombstones, one of which has been found at Tanjung Inggeris, Kedah bearing a date of the year 291 H/903 A.D,[3] and another is found at Pekan, Pahang, bearing the date of 14 Rabi'u al-Awal 419 H. Moreover, a Muslim gold coin dating from 577 H/1161 A.D has been discovered in Kelantan. [4]

'Arab traders took root in the region after a disturbance occurred in Canton in year 879 A.D, in which many were killed by rebellious Chinese. Consequently they began migrating to Kalah (possibly Kedah) and some of these traders went to Palembang. [5] Syed Muḥammad al-'Attas [6] and

Hamka [7] claim that, this is the earliest presence of Islam in Malaysia. Thus if we accept this evidence, the conclusion can be drawn that, the introduction of Islam into the Malay peninsula possibly occurred parallel and in concurrence with the arrival of Muslim traders, sailors, suppliers and missionaries in the Archipelago during the early centuries of the Hijri era. [8]

The discovery of the Terengganu stone at Sungai Teressat, Kuala Berang, is further evidence of the existence of Islam in Malaysia. This stone describes obedience to Allāh's word and His law, [9] particularly the regulations of family law and avoidance of sexual offence in Islam (zinā). [10] It was written in the oldest known variant of Malay Jāwī script.[11] The date of the stone remains questionable. According to D.G.E Hall it bears a date between 1303 and 1387 A.D. [12] While Brian Harrison claims the stone is dated between 1326 and 1386 A.D. [13] However al-'Attas claims it bears a date of 4th Rejab in the year 702 H, equivalent to February 22nd, 1303 A.D. [14]

It could be concluded that Islam arrived in Malaysia before the dates above. This is because the Islamic law which was engraved in the front of the stone indicates the strong attempts by the government to implement Islamic law. The Jāwī script shows that the letters in the Qur'ān had already been changed to suit the Malay language. Logically, these processes took time to develop. Thus we might simply accept that the existence of Islam began earlier than those dates.

Questions arise about who was responsible for introducing Islam to the Malay Archipelago. Most of the historians claim that Islam was

brought by 'Arab traders directly from 'Arab lands. [15] T.W. Arnold was of the opinion that 'Arab traders came directly from 'Arabia and during a time 'Arabs were famous for their commercial activities. [15] Al-'Attas agreed with this, on the grounds that most Malay customs were influenced by 'Arab custom. Jāwī, for example, is written according to 'Arab letters. [16] Snouck Hungronje, on the other hand, claims that Islam was brought to the Malay Archipelago from India. [18] Harrison also has the same view. He argues that most of the Indian Muslims who migrated to the Malay Archipelago were involved in commercial activities. [19] Some historians claim that Islam was introduced to the Malay Archipelago from China, which received Islam in the tenth century A.D. [20]

In conclusion it would be better to say that commercial activities themselves induced the introduction of Islam to the Malay Archipelago. It is difficult, however, to determine by which route Islam was carried to the Malay Archipelago. Possibly, that role was played by Muslim traders, especially 'Arabs, who frequently visited China during the early centuries of the Hijri era. [21]

The Law Under Islam

After Ruler of Malacca and subjects embraced the Islamic faith, the spread of Islam in the Malay Archipelago took place rapidly in the 15th century. In fact, Malacca became the centre of Islamic missionary work in the region. Attempts were made to adopt Islamic Law and to modify Malay customs to make them fall in the line with Islam. This process can be deciphered in various parts of the Laws of Malacca. The Undang-

Undang Melaka (Laws of Malacca) in their earlier version, set out only customary law but in a later version, both Islamic Law and customary law are set out. It is noted in the provision relating to the illegal sexual intercourse that; [22]

> "If a man seizes a free woman and then forces her to have sexual intercourse and the latter informs the judge, he (the offender) shall be summoned before the judge and ordered to marry her. If he refuses to marry her, he shall be fined three *tahil* and one *paha* and in addition cede a wedding gift, as is customary for a subject of the Ruler. According to the law of God however if he or she was muḥṣan, he shall be stoned to death. The meaning of muḥṣan is a woman who has a husband or in the case of a man, he who has a wife. In the case of the person who is a non-muḥṣan, he shall be sentenced to be caned with one hundred strokes".

Likewise, Malacca Law shows that the presence of Islam also brought changes in the administration system. One of the articles mentions that: [23]

> "Concerning ministries, palace officials and the army, they should act according to Allāh's word in Al-Qur'ān, and perform His order to do goodness and prevent wickedness".

The Malacca rulers not only applied the Islamic law within the bounds of their empire, but also enacted and codified it. The codification of Islamic law was known as: Undang-undang Melaka, or Undang-undang Sulṭān Melaka, or Hukm Kanun Melaka (The Canon Law of Malacca). The

Malacca Law was codified in a very comprehensive and precise manner. The later version of Malacca Law, dealt with marriage and divorce. Part of it dealt with matters pertaining to walī, witnesses to a marriage and other rules concerning khiyār and ṭalāq. Part also dealt with rules of Islamic commercial transactions, rules relating to weights and measures, the prohibition of ribā, rules governing sale of land and so on. The later version was also concerned with evidence, procedure and punishment of killing, unlawful intercourse, sodomy, bestiality, slander and the consumption of alcohol. Thus, it covers a wide area of Islamic law based on the Shāfi'ī school of thought. [24]

Subsequently Canon Law was implemented throughout the Malacca states and the other states which were within the sphere of influence of the Malacca empire. The Johore laws were modelled on the Malacca law. In addition, at the beginning of the 20th century, codifications of Islamic law which were made in Turkey and Egypt were translated into Malay and adopted. [25] M. B. Hooker claims that its content was much the same as in Undang-Undang Kerajaan and Malacca Digest. [26] The Majallah al-aḥkām was translated as Majallah Aḥkām Johore and the Ḥanafite code of Qadrī Pāshā was adopted and translated as Ahkam Shari'a Johore. In 1895, a constitution which was drafted for Johore by English lawyers, reveals some influence of Islamic law. [27]

After the fall of Malacca in the face of Western Colonialism, the Canon Law of Malacca still had great influence on the codification of Sharī'a Law in other states, such as: Undang-undang Negeri Johore (The Law of Johore), Undang-undang Negeri Kedah (The Law of Kedah),

Undang-undang Negeri Pahang (The Law of Pahang), Undang-undang 99 Negeri Perak (The 99 Laws of Perak), Undang-undang Sungai Ujung (The Law of Sungai Ujung). [28] The existence of this law practically started with the acceptance of Islam by the Muslim society especially by the Malays. Clear evidence is that we find the Muslims organising their family affairs in accordance with the law which they had previously chosen. This can be clearly seen when we study the practice prevailing in Muslim society. Examples of such are:

a) Muslims do not marry the prohibited relations such as siblings, nieces or aunts.

b) Divorce and reconciliation are also made according to the guidelines laid down by the Islamic Law.

c) Distribution of inheritance among heirs is made according to Islamic Law.

These few examples show that the Islamic Law had been implemented and practised by the Muslim simultaneously with their acceptance of Islam. [29] To summary, it would be true to say that the impact of Islam in Malaysia did not only bring new religious thought, but also Islamic law. Since 1952 most states in Malaysia have had a written Islamic Law applicable to Muslims living in those states. Such laws are found in the family law known as The Administration of Islamic Law. Selangor, for instance, preceded the other states in enacting the Administration Of Islamic Law Enactment No. 3, 1952. This was followed by other states such as Kelantan in 1953, Terengganu in 1955, Pahang in 1956, Penang and Malacca in 1959, Kedah and Negeri Sembilan in 1962, Perlis in 1963, Perak in 1965, Wilayah Persekutuan (Federal Territory) in 1974, Sabah in 1977 and Sarawak in 1978. The

Sharī'a court was established according to the Enactment in Peninsular Malaysia and according to Ordinances in Sabah and Sarawak. Under the terms of various treaties under which British influence was introduced to Malay states, the Malay Rulers agreed to accept the advice of the British in all matters except in Muslim religion and Malay custom. However Prof. Ahmad Ibrahim argued that the British did interfere with the administration of Muslim Law which resulted in curtailing and subordinating the jurisdiction of Sharī'a courts. [30]

Following independence, Islamic Law fell within the purview of the state authorities. Each state in Malaysia has its own law for the administration of Islamic Law. Although the enactments followed the same pattern and had much in common, there were differences, sometimes important differences between them. [31] Each state had its own system of courts for the administration of Islamic law and for the most part, the law was administered at state level in the state qadi courts. After independence and the passing of the Federal Constitution in 1957, the Sharī'a court became entrenched in the Malaysian system. It was decided that the Sharī'a court should be under the control of the various Majlis Ugama Negeri of each state, where the Sulṭān or Yang di Pertuan Agong, as the case may be, shall be Head of the Muslim religion. Though the latter is legally the Head of the Muslim religion, practically it is the Majlis Ugama Negeri that advises the Sulṭān or Yang di Pertuan Agong on the administration of Muslim law in their respective states.

The Position Of Islamic Law During And After The Colonial Period

As far as we are now concerned, Malaysia is a multi-ethnic and multi-religion country. In general each ethnic community has its own law, Islamic law being one of the important types of law in Malaysia. Under the Constitution, Islam is declared to be the religion of the Malaysia (Federation). Throughout Malaysia, Islamic Law is administered according to the Administration of Muslim Law Enactments or Ordinances. [32] The State of Kedah is administered according to the Administration of Muslim Law Enactment 1962. Before I write any further about these Enactments and the position of the Shari'a Court, the administration of Muslim Law and how it was developed, should be discussed first.

The Straits Settlements

The Malay states were under the administrative control of external European powers for a considerable time, beginning with the occupation of the Portuguese in 1511, followed by the Dutch, 1641 and finally the British.[33] Under the period of the Portuguese, magistrates with civil and criminal jurisdiction were appointed to settle civil disputes and to try criminal cases. [34]

The British occupation began with the occupation of Penang in 1786, followed by the cession of Malacca in 1824. English Law was introduced, consolidated through the medium of the Charters of Justice of 1807, 1826 and 1855 to the Straits Settlement (Penang, Malacca and Singapore). The first Charter of 1807 was granted by the King George 111 to

the East India Company and it is regarded as a major event in Malaya Legal history. It was the beginning of the statutory introduction of English law into this area. The Charter set up a judiciary system of courts which provided that English Law should be the law of the land and should apply to the native subjects as far as the various religions, manners and customs would permit. It also enabled the establishment of the Court of Judicature of the Prince of Wales 'Island' to exercise jurisdiction over all civil, criminal and ecclesiastical matters. [35]

The second Charter of Justice in 1826 made provisions for the administration of justice in three settlements. The third Charter of Justice in 1855 was introduced merely to standardize the law in the three Straits settlement. C.M Turnbull said that "eventually in 1855 the British Parliament granted a new Charter of justice for the Straits Settlement...otherwise the new Charter merely repeated the terms of the 1826 Charter". As a result, Islamic law was applied only in the field of family law. [36]

English law was introduced into the Straits Settlements as the general law of application by three Charters of Justice but subject to such modifications as were necessary to prevent it from operating unjustly or oppressively. As to the Islamic law, personal cases occurred. Marriage and divorce according to Islamic law were held valid although the courts faced some problems in deciding disputes which involved different schools of Islamic law. For example, in Salmah & Fatimah v. Soolong [37] the guardian of a Shāfi'ī female obtained an injunction preventing marriage between her and a Hanafī male. The court refused to disallow

the injunction on the application of the girl until she had become a Hanafī whereupon she was at liberty to marry. [38]

In 1880 the Mohammadan Marriage Ordinance of that year was introduced, and was intended to define how much Islamic law was to be recognized by the courts. It provided for the voluntary registration of Muslim marriage and divorce, the regulation of married women's property. However it did not enact the substantive law of Islam, nor did it prescribe authoritative texts, but in subsequent amendments parts of the substantive Islamic law on family matters were progressively introduced. The Ordinance and its amendments were reenacted as Ordinance No. 2 (Mohammadan) of 1920, amended in 1923 and 1934 and finally in 1936 under the title of the Mohammadan Ordinance. [39]

In some areas it is difficult to ascertain the application of the provisions of this ordinance. In the Goods of Abdullah [40] decided in 1835, it was held that a Muslim could alienate the whole of his property by will, a decision contrary to the Islamic law. The reason for this was that the court supposed the law of England to be in force to the exclusion of Islamic law in the matter of wills. [41]

Regarding the Islamic law of inheritance, it was recognized as enacted in section 27 of the Ordinance of 1880. Muslims were subject to the Islamic law of inheritance, but on intestacy the English laws were applied. This situation, however, was changed in 1923, the estate of a Muslim intestate should be distributed according to Islamic law with the qualification that Islamic law could not override any local custom having the force of law prior to 1st January 1924. [42]

The question of joint earnings by husband and wife during coverture was not dealt with by legislation but was left to the courts. In Tijah v. Mat Ali, [43] a wife sued her husband for a half share of joint earnings. A qāḍī gave evidence that according to Islamic law the wife was entitled to such a share. This is quite wrong because Islamic law does not recognize jointly acquired property as a special category. The qāḍī was following Malay adat rule. The court gave judgment for the wife but on appeal this was reversed on the basis that the Muhammadan Marriage Ordinance of 1880 did not provide for the joint earning of husband and wife. [44] The judge, therefore, applied English law.

The Malay States

The Malay States were divided into Federated and Unfederated Malay States. The Federated Malay States were Perak, Selangor , Pahang and Negeri Sembilan: and the Unfederated Malay States, Kelantan, Terengganu, Kedah and Perlis.[45] Perak and Selangor accepted British authority in 1874, Pahang in 1888 and Negeri Sembilan between 1874 and 1887. These four states formed themselves into the Federated Malay States in 1895. Within this system, each Ruler was obliged to accept a British Resident whose advice was to be sought and acted upon in all administrative matters except those concerning religion and custom. [46] The English law was applied in 1937 and the Civil Law Enactment of 1937 gave statutory authority for its application. Although English Law was not formally received until 1937, it was clearly accepted informally before that. [47]

Each state in the Federated Malay States had their own power in regulating the administration of Islamic law. However these enactments were mainly procedural without touching any points of substantive law. [48] One of the cases shows that Islamic Law was admitted by the courts. Muslims may dispose of up to one third of their property by will with the residue descending in fixed proportions to the heirs according to Islamic law. In Saeda binti Abu Bakar & anor v. Haji Abdul Rahman bin Haji Mohd. Yusup & anor [49] it was held that a will which tied up the testator's property for ten years was invalid under Islamic law. The principle, stated in Nawawī (Minhāj al-Ṭālibīn), that a bequest preferring one heir to another is invalid without consent, was given effect to in Re Ismail bin Rentah decd. [50] The rule that non-Muslim next of kin cannot inherit was also upheld. This is in contrast to the position in the Straits Settlement where it was provided from 1923 that a non-Muslim could inherit as though he were a Muslim. [51]

The Unfederated Malay States were under Siamese influence before the British took over. British influence began after the treaty 1909 and their power was extended over all the Unfederated Malay States. Kelantan and Terengganu accepted a British adviser in 1901, Kedah in 1923 and Perlis in 1930. Johor accepted a British adviser only in 1914 despite being under British influence for a long time. [52] The Civil Law Enactment of 1937 was extended to these in 1951, by the Civil Law (Extension) Ordinance in 1952 and later it was replaced by the Civil Law Ordinance 1956. [53]

Hooker simplified that in the Unfederated Malay States, Islamic law was least affected by the English law. The major statutes on Islamic law in the unfederated Malay States include the following: [54]

Johore: Muhammadan Marriage Enactment 1914, reconstituted as No. 17/ 1935 and amended by No. 2/ 1950. Offences by Muhammadans Enactment 1919, reconstituted as No. 47/ 1935.

Perlis: Muhammadan Marriage and Divorce (Registration) Enactment No. 9/ 1913.

Kedah: Sharī'a Courts Enactment No. 109/ 1934.

Terengganu: Registration of Muhammadan Marriage and Divorce enactment No. 6/ 1922

Kelantan: Moslem Marriage & Divorce Enactment No. 22/ 1938 amended by No. 41/ 1939.

After the Federated and Unfederated Malay States accepted British advisors with the signing of the treaties, it was provided that the advisor did not interfere with religious and local customs. They did however interfere directly or indirectly with Muslim law, the law of the land and its administration. The law of the land during this time was Islamic law. In Ramah v. Laton [55] the Court of Appeal held that Islamic law was not foreign law but local law and the law of the land. The court must take judicial notice of it and must propose the law. Subsequently the spread of British influence favoured the introduction of English law. Acting on the advice of the British Residents, the Malay Sultān in the States which constituted the Federated Malay states enacted the law which adopted the Indian codification of the principles of English Law. Thus, in matters concerning criminal law, rules of evidence and procedure, contract and land, legislation based on the principles of English law replaced Malay

customary and Islamic law. The effect was that Islamic law was applied only in matters concerning family and inheritance affairs and some aspects of Islamic offences. The administration of these matters too was not free from British interference. Consequently, the power of the Sharī'a courts was restricted and became inferior to those of the civil courts. [56]

Until 1948, the Courts of Qāḍīs and assistant Qāḍīs in the Malay States were part of the structure of the civil courts. In 1948, the Courts Ordinance established a judicial system for the Federation and excluded Sharī'a courts from the Federal court system. [57] The Federation of Malaya became an independent state on 31st August 1957. [58] A new Federal Constitution was introduced which became the supreme law of the new state. At this time., both Federal and States Legislatures were instituted. The new constitution sets out a distribution of legislative powers. The powers of the Federal Parliament were listed in List 1 of the Ninth schedule. Islamic law was confirmed to be administered in the States, not the Federation and was listed in List 11 of the Ninth schedule.

Malaysia After The Colonial Period

After the Federation of Malaya was formed, each state of the Federation was given its own constitution. Rulers of the states became official heads of Islamic religion within the states. [59] This was part of the state constitution and recognized in Article 3 of the Federal Constitution. [60] The nature of the new Constitution made the power and the position of the Sharī'a Court more limited. It remains as a court for Muslims only. In the event of a conflict between the Sharī'a Court and the Civil Court (English Law) the Civil Court prevails. [61] The

conclusion can be drawn that English Law has become an integral part of Malaysian law.

In general, each enactment establishes a Council of religion, of Islamic religion, for the state which is to be called Majlis Ugama Islam, for example Majlis Ugama Islam Negeri Kedah. The legislative functions of the Majlis consist in making rules in relation to administrative matters such as collection, administration and division of zakāh and fiṭr, appointing committees such as legal committee, a mosque committee and zakāh and fiṭr committee. The majlis also has the function of making the final ruling regarding fatwā in cases where the legal committee is not unanimous on the matter. To enable the Majlis to exercise its own executive function, a Department of Religious Affairs was established. With its assistance, the Majlis can administer rules relating to property, collection of zakāh and fiṭr, the administration of Bait al-Māl, waqf and naẓar. Apart from that, the Majlis also administered the mosque, religious schools and the registration of converts. The constitution, jurisdiction and procedure of Sharī'a courts are also provided under the enactments. [62]

In general there are two types of courts in Malaysia, namely civil court and Sharī'a court. The Civil courts, based on English Law, are available to all Malaysians, including Muslims. The basis law in Malaysia is the common law of England and the rules of equity in force on April 7, 1956. This provision is of limited effect in practice. It is importance, in particular the law of torts, but the greater part of law is statutory : Code based upon those of India (e.g., the Penal Code, the Contract Act and the Evidence Act); commercial law based on English Acts of Parliament

(companies , bankruptcy) ; and the Land Code and Personal law is a complicated subject. It varies according to domicile, religion and, in some cases race. [63] The Sharī'a courts, based on Islamic law, are applicable to Muslims only. One difference between the Sharī'a Court and the Civil court is that the Sharī'a court is administered by the State Assembly, while the Civil court is administered under Federal Law. The Sharī'a courts have a limited jurisdiction to include Muslims only, whereas Civil courts have unlimited jurisdiction. The legislative Assembly may make laws for the whole or any part of that state. [64] Provision for this in the Federal Constitution can be found in article 74, in subsection 2, where reference is made to the scope of each state Legislative Assembly's power to enact laws;

> "Without any prejudice to any power to make laws conferred on it by any other article, the legislative body of a state may make laws with respect to any of the matters enumerated in the state list (that is to say, the second list set out in the Ninth schedule) or the concurrent list"

The legislative authority of each state is in its state Assembly, consisting of the Ruler or Governor and one house, namely, the Legislative Assembly. The two institutions acting together enact laws. The number of elected members of the state Assembly varies according to its Constitution. Article 4 (1) of Eighth Schedule of the Federal Constitution provides that the Assembly must consist of such a number of elected members as the Legislative Assembly may by law provide. [65] The duration of the Assembly is five years. [66]

In article 75, the Federal Constitution provides that if any state law is opposed to Federal law, the decision of the Federal law prevails and the state laws become void. This article is applied not only to Islamic law but to any law made by State Legislative Assembly. In the case of City Council of George Town & Anor v. The Government of the State of Penang & Anor, [67] the Federal court of Malaysia held that a concession enacted by the Penang Legislature was inconsistent with the Local Government Election Act, 1960, a Federal law, and therefore void to the extent of inconsistency.

Before furthering the discussion about Sharī'a courts, this attempt has been made to give a brief insight into other courts in Malaysia. Civil courts comprise Privy Council, Supreme Court, High Court, Session Court, Magistrate Court, and Juvenile Court. The Privy Council was the final court of appeal in Malaysia before the establishment of the Supreme Court. During that period, all courts in Malaysia were bound by its ruling. After section 15 of the Constitution (Amendment) Act, 1983 came into force on 1st January 1985 , the Supreme court became the final court of appeal in Malaysia. There are no longer criminal and constitutional appeals from Malaysia to the Privy Council. [68]

The religious courts are qāḍīs' courts with jurisdiction over Muslims in suits relating to marriage, guardianship, succession and other like matters. [69] This topic will be discussed later.

Islam under The Federal Constitution

The purpose of this section is to demonstrate briefly the position of Islamic law in the Federal Constitution. The Federal Constitution is a body which administers all the laws in Malaysia. The earliest written constitution in Malaysia was the constitution of Johore, promulgated in 1895. Article LVII of the constitution provided; [70]

> "...the religion of the state for this territory and the state of Johore is the Muslim religion and such being the case, the Muslim Religion shall continuously and forever be, acknowledged and spoken of as the State Religion ; that is to say, on no account may any other religion be made or spoken of as the religion of the country, although all other religions are allowed and are always understood as proper to be allowed, to be practised in peace and harmony by the people professing them in all and every part of the territory and dependencies of the state of Johore."

Article 3 of the Federal Constitution provided that "Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation". [71] This provision was important to Islam itself in some matters. Firstly it related to the financial arrangements for upgrading Islamic belief. Secondly, as the Ruler, as the head of the religion of Islam, is always a Muslim, his position is unaffected and unimpaired. Thirdly the propagation of any religious beliefs to Muslims and official programmes could be countered and restricted.. [72] Clause (1), the language that "Islam....." has not been subjected to judicial interpretation. The words may impose an obligation

on the participant in any federal ceremonial to regulate any religious parts of the ceremony according to Muslim rites. [73]

Article 11 provides that every person has the right to profess and practise his religion. [74] However, article 160 does not include Islamic law in its definition of law. It provides that Islam be declared the religion of the Federation (Malaysia). But it does not state that Islamic law is the law of general application. And the Constitution does not declare that Islamic law is the one and only law in the country. [75] Although Islam is the religion of the Federation (Malaysia) the power to legislate on matters of Muslim law and the personal and family law of a Muslim individual was a matter for the state legislature. [76]

It is thus implied that the power given to the Islamic law was very limited. Islam in the Federal Constitution was given a very narrow definition. It was never adopted entirely. Islam was merely the official religion of the state. The intention in making Islam the official religion of the Federation was primarily for ceremonial purposes. It was not intended to interfere with the position of Civil law. According to Muhammad Salleh Abbas, religion in the Federation was just merely belief linking man to the highest (God). [77] This claim is supported by Prof. Ahmad Ibrahim who said that the position of Islam in the Federal Constitution was very narrow and limited. It merely provided for a relationship between man and God without consisting in other fields such as politics, economics, law and administration. [78]

As noted earlier, Islamic Law, after the first Malacca Sultān embraced Islam, was established as a formal part of Malay law. Before the

coming of the British, Islamic law ruled the land. The Shāfi'ī school of law was followed as well as local customs which did not contradict Islam. Islamic law during that period was based on the text of Abū Shujā's al-Taqrīb or its commentary Fatḥ al-Qarīb which was written by Ibn Al-Qāsim Al-Ghazzī or Ḥāshiya 'alā Fatḥ al-Qarīb, a commentary on Ibn Qāsim al-Ghazzī. [79] Another text was the Mejelle, which was produced during the Ottoman Empire and was used for some time in Johore. This text was translated into Malay and enforced in several states of Johore. [80]

Islamic law during that time was implemented in matrimonial matters, succession and serious civil and criminal matters. [81] The existence of Islamic law was well established as in the case of Shaik Abdul Latif and others v. Shaik Elias Bux. [82] The judge in this case said in his judgment; Before the first treaties, the population of these states comprised almost solely Muhammadan Malays with a large industrial and mining Chinese community in their midst. The only law at that time applicable to Malays was Muhammadan as modified by local customs.

The other topic to highlight is that in the event of any Islamic law being inconsistent or opposing the Federal Constitution (federal law) the latter prevails. The Federal law is the law of general application and the highest law in Malaysia. The Constitution provides: [83]

> "This constitution is the supreme law of the Federation and any law passed after Merdeka Day (independence) which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

According to the article 4 (1) of the Constitution, any law made by Parliament or the legislature of any state shall not be inconsistent with Federal law. If it is inconsistent with Federal law, any law made by Parliament or state legislature of any state is invalid. This clearly shows the limited power given to Islamic law. We should bear in mind that Islamic law is under state legislature, so it is clear that the Federal law at any time could dismiss any decision made by a state legislature related to Islamic law. Islamic law is not a basis or foundation of Federal law but the supreme law in Malaysia is the Constitution. Every law has to comply with it. Article 160 of the Federal Constitution, provides that Islamic Law cannot be interpreted like other laws. The interpretation made clear that law as regards the constitution includes written law, the common law, in so far as it is in operation in the federation or any part thereof, and any custom or usage having the force of law in the federation or any part thereof. [84] It can be concluded that there was no place for Islamic law in the Constitution.

The Sharī'a Court And The Civil Court.

In Malaysia, the Constitution provided and prescribed certain powers to certain courts. However according to M.B. Hooker, the acts themselves did not make clear the jurisdiction boundaries between Islamic and Civil Courts. [85] From the following case, it is shown that some sections of the article on the Muslim law are obscured. According to clause 4 the Sharī'a Courts is in the State legislature which can control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam. Non-Muslims in Malaysia are not under the Sharī'a Court. In one area we see that

persons professing the religion of Islam are bound to two courts while non-Muslims are bound only to the Civil Court.

As we know, The Sharī'a Court was established under Administration of Muslim Law Enactments or Ordinance and under State Legislature. The State legislature has no power to dispense justice over non-Muslims in Malaysia. In this case we see that the power of the Sharī'a Court is very limited. Article 8 (1) of the Federal Constitution provides that "all persons are equal before the law and entitled to the equal protection of the law". Article 8 (5) (a) states that this does not invalidate and prohibit, "any provision regulating personal law". Personal law was well described in Ninth Schedule (list 2) of the Federal Constitution. [86]

The Sharī'a Court is a body which is separate from the Majlis (Department of Religious Affairs) and its function is to decide on cases provided by the Enactment. In general, the power of the Sharī'a Court is less than that of the Civil Court. The Sharī'a Court enjoys limited power. The jurisdiction given to the State and the Sharī'a Court is limited to some matters. Even in regard to the subjects included, there are many Federal laws which extend the scope and application of Federal laws. For example, in the field of succession, testate and intestate, account has to be taken of the Probate and Administration Act and the Small Estate Act. Consequently the qādī is given the function of only certifying the shares to be allotted to the beneficiaries under Islamic Law.

In the field of criminal law in particular, the jurisdiction of the Sharī'a court is very limited. It has jurisdiction only over persons

professing the religion of Islam and it has such jurisdiction only as is conferred by Federal laws in respect of offences. Under the Muslim Court (Criminal Jurisdiction) Act, 1965 it is provided that such jurisdiction should not be examined in respect of any offence punishable with imprisonment for a term not exceeding six months or any fine not exceeding one thousands ringgit or with both. [87] However, it was amended in 1984 and the jurisdiction of the Sharī'a Courts was extended to give them jurisdiction to deal with cases punishable with imprisonment up to three years, or fines up to five thousands ringgit or whipping up to six strokes or the combination of all these. [88]

It should be noted here that the Sharī'a court in its jurisdiction is empowered to try only offences committed by Muslims, and its decisions do not affect any right of property of a non-Muslim. [89] As long as this jurisdiction is still restricted to Muslims, it means that non-Muslims who are involved with Muslims in committing an offence cannot be prosecuted in Sharī'a courts. It would better to say that the Islamic law could not develop since the restriction in the Federal Constitution has not been amended.

One should bear in mind that the Sharī'a Court and the Islamic law itself were applied widely in the field of family law. To conclude, the application of Islamic law has been limited to some areas. The application of Islamic Law was shown in the Ninth Schedule List 11 State List of the Federal Constitution. The List set out the following as among the power in the State List: [90]

"Except with respect to the Federal Territory, Islamic Law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, petitions, and non-charitable trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the state: zakāh, fiṭr and Bait al-Māl or similar Islamic religious revenue, mosque or any Islamic public places of worship; creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List: constitution, organisation and procedure of Sharī'a 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 respect 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 and Malay custom.

The jurisdiction of the Sharī'a courts and the area which should be covered by Islamic law is defined as relating to personal and family law which is very limited in scope. It should be noted here that the emphasis has been placed over and over, regarding the jurisdiction of the Sharī'a court which shall touch on matters enumerated above but never on matters already covered by Federal law. Federal law is the supreme law

and the State Legislative Assembly should pass laws as conferred and limited by Federal law. [91]

Islam, to a considerable number of the members of the Parliament, is not a way of life, but one religion among religions. They believe that Islam is merely a religion like other religions. Generally speaking, the position of Islamic law as seen in the Parliament, can be summarized as follows;

a) It is recognized as one of the laws of Malaysia. Others being the English Common law and Customary law.

b) It is reduced to the narrow confine of personal status. This can be seen from the enactments.

Civil courts in Malaysia command the Law of General Application and have limited powers over criminal or civil cases and it power is unlimited over Muslims or non-Muslims. Civil courts (except Magistrate Court, Juvenile Court and Penghulu Courts) generally have overriding jurisdiction. To show that Shari'a court has no place in Malaysia and has lost its significance, the Doctrine of Judicial Precedent is one of the best examples. The Oxford English Dictionary defines a precedent as " a previous instance or case which is or may be taken as an example or rule for subsequent cases, or by which some similar act or circumstances may be supported or justified". [92] It may be understood that the function of precedent is to provide a guide to future conduct.

The courts in Malaysia follow the English court in this doctrine and it is applied in their procedure. The Doctrine of Judicial Precedent means that the previous decisions of the same court or superior court are

binding, that is to say each court is bound by the decision of the court above it. [93] In respect of the previous decisions of the same court, was the previous decision binding? In this case, judges have liberty to choose or to reject . However there are not at liberty to follow or reject any precedent unless sufficient reasons were given. [94] Due respect was given to the Malaysian court, a court bound by its own decision and by the decisions of the superior courts. This was first manifested in Malaysian courts in 1906. [95]

Importantly, this doctrine also applied to the Sharī'a court, although the Federal Constitution provided that the civil court should have no jurisdiction in respect of any matter within the jurisdiction of the Sharī'a court. Consequently the Sharī'a court, as well as each Civil court, was bound by the decision of the court above it.

In Omar v. Public Prosecutor , [96] the point at issue here was whether a certain section of the Kedah Sharī'a Court Enactment was valid in the light of the provisions of the Courts Ordinance of 1948. The question was decided by subjecting the provisions of the former enactment to the test of repugnancy against the civil law provision. [97] It was held in the case Ainan bt. Mahmud v. Syed Abu Bakar. [98] In this case, the issue was which evidence is applicable, Muslim rules of evidence or Evidence Act 1961. This case related to the validity of succession of the infant born after less than six months of marriage. The judge was of the opinion that the requirements of the Evidence Act should prevail because the legislation was the law of general application, and thus had to be applicable to persons of all races and religions in the Federated Malay States. [99] The judge in this case refused to follow and recognize the

Islamic law of an intestate estate in favour of the infant. The importance here is that, in the event of conflict between the Sharī'a court and the Civil court, the decision of the latter prevailed. This decision shows how Islamic law has lost its significance and it clearly showed that Islamic law was not to have an independent jurisdiction, even for a person who professed the Islamic faith.

The case of Maryiam v. Muhammad Arif [100] provides a good example of the conflict between the Sharī'a court and the civil court. It was noted earlier that, in the event of contradiction between the Sharī'a court and the Civil court, the latter had overriding jurisdiction. [101] The above case was an application for the custody of two infants, a boy and a girl. The applicant, the mother of the infants, had been divorced by the respondent, their father. At the time of divorce, the qāḍī had recorded a permission order giving the custody of the two infants, a boy and a girl to the respondent. Since the divorce, the applicant had married a man not related to the infants. The Muslim Law Enactment provided that nothing in the enactment shall affect the jurisdiction of any civil court. The applicant was entitled to make the application to the Civil court, despite the permission order made by the qāḍī. Under to the Guardianship of Infants Act 1961 her application was acceptable.

According to this act, the general principle that governs the custody of infants was the welfare of the infants. Finally the custody of the infants was given to the applicant. The court in this case allowed an application for custody despite a prior consent order recorded by a qāḍī. [103] It should be pointed out that in the above case shows that Sharī'a court and Islamic

law were not fully applied in Malaysia and that the Civil court at any time could reverse the decision from Sharī'a court.

With regard to binding precedent, the Sharī'a court also was affected. In the case of the Commissioner of Religious Affairs of Terengganu v. Tengku Mariam, [103] the validity of a waqf for the benefit of the settlor's family and descendants was in question. The Sharī'a court decided that it was valid. But the judge of the Civil court (High court) ruled that the courts in Malaysia were bound by the judgment of the Privy Council in the case of Abdul Fata Muhammad Ishak v. Russmary Dhar Choundhury. [104] The High court reversed the decision of the Muftī and decided that waqf for the benefit of the settlor's family and descendants was not valid. Suffian (F.J). in his judgment said "I have examined the waqf instrument and the authorities mentioned in the learned judge's judgment and those cited before us, and I am satisfied that the waqf here was essentially for the benefit of Tengku Chik's family and that the gifts to the charity were illusory and that on the authority of Privy Council decision cited to us, the learned judge was bound and we are a bound to hold that the waqf was therefore, void, notwithstanding the Muftī's ruling to the contrary". [105] Consequently, the high court has a general supervisory and revisionary jurisdiction over all subordinate courts and can intervene at any stage in civil or criminal suits.[106]

Sources of Islamic Law

Islamic law, the law which is associated with this religion defines the will of Allāh in terms of a comprehensive code of behaviour covering

all aspects of life. The Ḥadīth according to which the Prophet sent Mu'ādh, one of his Companions, gives us three out of four major sources of law. Islam is based in the first instance on the Qur'ān; where the Qur'ān is silent on a particular point, then we have to consider Sunna, (the traditions of the Prophet) the words that he spoke, his actions on important occasions and the manner in which he acted throughout his life. These aspects taken together are considered revelation. The first is said to be direct revelation and the very word of God and the second is considered an indirect revelation, since according to the theory of law, even the actions of the Messenger of God were inspired by divine wisdom.

Coupled with two chief sources, other rules are deduced from them by doctors of authority upon which there is consensus of opinion, the so called Ijmā', which is the third source of law. The fourth is Qiyās or analogical deduction. [107] The first three sources were accepted as wholly authoritative or qaṭ'ī and the fourth as only presumptively so or ẓannī. [108] Shāfi'ī called the Qur'ān and Sunna the two principal sources and considered Ijmā' and Qiyās subordinate to them. While al-Ṭabarī recognized three uṣūl, al-Qur'ān, Sunna as expressed in traditions deriving from the Prophet, and Ijmā' which for him were absolutely decisive, beside these he places Qiyās (avoiding this technical term in relation to his own doctrine and using circumlocutions such as parallel, similarity or amounting to). [109]

However, most jurists classify the sources of Islamic law into two main categories: The first category covers the Qur'ān or the Holy Book of Islam ,the Sunna or the authentic Traditions of Muḥammad, the Ijmā' or

the consensus of opinion and the Qiyās or judgment upon juristic analogy. The second category includes. First al-Istiḥsān or the deviation on certain issues from the rule of a precedent to another rule for a more relevant legal reason. Second, al-Istiṣlāḥ, or the unprecedented judgment motivated by public interest to which neither the Qur'ān nor the Sunna explicitly refers. Third, al-'Urf, or the custom and usage of a particular society, both in speech and deeds. [110]

Al-Qur'ān.

The Qur'ān or the Holy Book of Islam, the first source of Islamic law, is regarded as the literal word of God and as the final and complete revelation of God for the solution of all human problems in all aspects of human activity. [111] The text of the Qur'ān was revealed piecemeal through the angel Gabriel during the prophetic career of Muḥammad which lasted about twenty three years. [112] The Qur'ān did not legislate all its rules on the spot but laid them down separately according to incidents. Its sanctions were graduated in the sense that it did not prohibit at once certain acts which men were accustomed to. For example, drink was permitted in the beginning of Islam, then it was prohibited during prayers and finally it was prohibited completely. [113]

The Qur'ān was initially preserved in oral and written form during the lifetime of the Prophet. Portions of the revelation were committed to memory by Companions of the Prophet as they were received, or were written down by his secretaries. [114] Abū Bakr, the first caliph ordered all original manuscripts of the Qur'ān made in the prophet's lifetime to be collected and copied after he had been counselled by 'Umar. 'Umar b. al-

Khaṭṭāb was perturbed by the fact that in the battle of Yamāma many of the readers of the Qur'ān were killed. He feared that if more of them died some of the Qur'ān would be irretrievably lost. Zaid ibn Thābit, who was entrusted with the task applied a two-fold method of verification, comparing the original manuscripts with the texts memorize by the Prophet's Companions. This method provided a double testimony for the accuracy of every injunction. [115]

The Qur'ān had been collected from pieces of papyrus, flat stones, palm-leaves, shoulder-blades and ribs of animals,pieces of leather and wooden boards, as well as from the hearts of men. [116] The Qur'ān is divided into 114 chapters, or sūras, each of which bears a name referring to some part of its contents, and contains a varying number of verses (āyāt). The ceremonial practice of reciting the Qur'ān in equal sections which is employed in Muslim ritual, was therefore not able to adhere to the division into sūras which are of unequal length and it has adopted a division into thirty sections. [117] It would be better to say that for the purpose of recitation, the Qur'ān is divided into 30 juz' of equal length to enable the reciter to complete its recitation, [118] e.g during the thirty days of Ramaḍān.

When Islam spread to other countries, there were varieties in the modes of reading the Qur'ān. During the reign of caliph 'Uthmān, he noticed and feared that if nothing was done to put a stop to the differences existing at that time, they might develop into serious distortions. 'Uthmān ordered the burning of all private copies of the Qur'ān except those in the Quraysh dialect. [119] In addition he established a committee comprising Zaid Ibn Thābit, 'Abd al-Allāh Ibn al-Zubair, Sa'īd ibn al-'Āṣ

and 'Abd al-Raḥmān Ibn Hishām to transcribe the Qur'ān. One of the principles they were to follow was that, in case of difficulty in the reading the dialect of Quraysh, the tribe to which the Prophet belonged, was to be given preference. [120] Under the instruction of Zaid Ibn Thābit, they put together a definite Al-Qur'ān and 'Uthmān sent one of the copies to each of the chief cities in Kufah, Baṣrah, Makka, Damascus, Yaman and Bahrain. One copy was retained in Madina. [121] So, the entire text of the Qur'ān was totally collected in an official, authorized version during the rule of the third caliph, 'Uthmān.

To a Muslim, the Qur'ān, being the very Word of God, is the absolute authority where from springs the very concept of legality and every legal obligation. It is also, the first and everlasting miracle of Muḥammad's Prophethood. [122] According to Gibb," But the Meccans still demanded of him a miracle, and with remarkable boldness and self-confidence Muḥammad appealed as the supreme confirmation of his mission to the Qur'ān itself. Like all 'Arabs they were connoisseurs of language and rhetoric. Well then, if the Qur'ān were his own composition other men could rival it. Let them produce ten verses like it If they could not, and it is obvious that they could not, then let them accept the Qur'ān as an outstanding evidential miracle". [123]

The Qur'ān is basically a book of religious guidance and does not constitute a comprehensive code of law. It is not an easy reference for legal studies. The injunctions in the Qur'ān which relate to the law are few in number. Legal prescriptions are comparatively few and limited. Concerning family law, they are laid down in 70 injunctions, civil law in 70, penal law in 30, jurisdiction and procedure in 13, constitutional law in

10, international relations in 25, and economic and financial order in 10. [124] In the case of family law, its form is in scattered passages, mostly in sūra 2 and 4. The main emphasis is laid on the question of how one should act towards women and children, orphans and relatives, dependents and slaves. It could be said, the Qur'ān was established to manage moral norms. Qur'ānic prescription illustrates this establishment of moral norms. The law of war and booty is primarily concerned with determining the enemies who must be fought or may be fought, how the booty is to be distributed, and how the conquered are to be treated. [125]

The Qur'ān is not enunciated with equal clarity and detail in all parts. Some measures of elaboration and interpretation are necessary. The only possible person who could do this was the Prophet to whom had been given wisdom (hikmah), the power of solving all human problems. Muḥammad's words and actions, therefore form a kind of commentary on the Qur'ān. [126] The Qur'ān declared the prophet to be the interpreter of the Qur'ānic texts. For example, Muḥammad illustrated the method of ṣalāt, which is left indefinite by the Qur'ān. [127] Ṣalāt was prescribed but not how it was to be done. So in this particular situation Sunna interpreted the method of ṣalāt.

Sunna

The second source of Islamic law was Sunna. Sunna is an 'Arabic word which literally means method. Sunna includes what the Prophet said (sunna qawliya), what he did (sunna fi'liya) and those actions that he permitted or allowed (sunna taqrīriya). [128] The authority of the sunna derives from the Prophet Muḥammad, as expressed and defined in the

Qur'ān. His mission is stated in the Qur'ān, [129] "And We have revealed to thee the reminder that you mayest make clear to men that which has been revealed to them, and that haply they may reflect". There is no doubt that this statement implies the Prophet's supreme authority in the interpretation of the Holy Book, by word or action. Moreover this authority is binding on all Muslims [130] as is clearly mentioned by the Qur'ān, "O you who believe, obey God and His Messenger," [131] and "whoever obeys the Messenger, he indeed obeys God". [132]

The Sunna was not written at the time of Prophet, in order to avoid a possible confusion of his ḥadīth with Qur'ān and for fear that the supreme authority of the Qur'ān might be impugned. Although discouragement of writing down the Sunna led to difficulties later on, it helped to keep the text of Qur'ān unquestionably authentic and unique.[133] The codification of the Qur'ān after the death of Prophet Muḥammad gave the chance for more activity in the field of Sunna. The background of its committal to writing is mentioned by Gibb, "The characteristic religious activity, then, of the first century was the collection and transmission of details about the life and actions of Muḥammad. In view of the profound impression which the personality of Prophet had left on his adherents, this activity was a spontaneous growth, owing nothing to outside influences. The natural centre of these studies was Madina, where most of the Companions continued to live and where first-hand information was most securely to be found". [134]

The learned men of Islam, in the ninth century undertook detailed research and verifications of the Ḥadīth in order to establish the authentic Ḥadīth of the Prophet. Six collections in particular came to be accepted as

authoritative, these are the Jāmi' al-Ṣaḥīḥ of al-Bukhārī (d.870) which has been often published in the East and has had added to it numerous commentaries, of which the best known are 'Umdat al-Qārī' of al-'Aynī (d.1451) and the Irshād al-Sārī of al-Qasṭallānī (d.1517). The second compilation is the ṣaḥīḥ of Muslim (d.875). Four other works were essential, these were the four "sunan" of Ibn Mājah (d. 896), Abū Dā'ūd (d. 888), Tirmidhī (d.892) and Al-Nasa'ī (d. 915). [135]

Not all the traditions are of equal value and there are even some traditions which have been fabricated. Recognition of these led to the development of the science of tradition criticism (mustalah al-Hadīth) . To counter-balance the forgery, the Muslim scholars did great work in the field of compilation and authentication of the Sunna. A science of Hadīth was built up, where each Hadīth prefaced by a chain of authorities (sanad) could be traced back to the Prophet himself and the process was called isnād or backing. According to Gibb, "The specific application of this biographical material to the purpose of Hadīth criticism was the object of a special branch of study called the science of impugnent and justification. This investigates the bona fides of the guarantors of tradition, their moral character, truthfulness and powers of memory". [136]

The process also requires detailed biographical information about narrators, where and when they were born, where they lived and travelled and so forth. Such information might support or refute the authenticity of a narrator. For example, it might be shown that a reputed narrator could not have received a Hadīth from his predecessor because they did not live at the same time or because they neither lived nor travelled near each other. [137] The outcome of all these investigations is that traditions

are grouped into three classes according to the nature of their proof and completeness of the chain of narrators. They are Mutawātir, (widely transmitted) Mashhūr, (widespread) and Aḥād (isolated). [138] Regarding the transmitters, they could be categorized as Ṣaḥīḥ (correct), Ḥasan (good) and Da'if (weak). [139]

There are no divisions among Muslims regarding the supremacy of the Qur'ān as a source of Islamic law. The Sunna however, invited more divergence of opinion. Al-kalām (theologians) said the Sunna was not a source of legislation. [140] Some jurists said the Sunna had authority only if derived from the Qur'ān. [141] A third opinion was that the Sunna was a source of law, although secondary to the Qur'ān. This approach is the most useful in that it explains or amplifies some matters in the Qur'ān, while providing for circumstances, conditions, or events not taken into account in the primary source. [142]

Traditions derived from the Prophet could not be invalidated by reference to the Qur'ān. Shāfi'ī mentions that the Qur'ān did not contradict the traditions and that the traditions explained the Qur'ān. The Qur'ān had therefore to be interpreted in the light of the traditions, and not vice versa.[143] In his Risālah, he claims that the Sunna provides details for the completion of the Qur'ān, clarifies the problems, which the Qur'ān raises or leaves unanswered and gives specific application for its generalizations. [144] For Shāfi'ī, the Sunna is not the idealized practice as recognized by representative scholars, it is identical with the contents of formal traditions from the Prophet, even though such a tradition is transmitted by only one person in each generation. [145]

According to al-Shāfi'ī, the Sunna coming direct from the Prophet in the form of Ḥadīth through a reliable chain of narrators is a source of law, irrespective of whether it was accepted by the community or not. He emphasised the authority of the Ḥadīth from the prophet in preference to the opinion or practice of the Companions. Ḥadīth for him must take priority over the practice and opinion of the community, the Companions and the Successors. Al-Shāfi'ī here attempted to overrule the argument, advanced by Imām Mālik that the Madinese practice was more authoritative than Ḥadīth. [146]

Ijmā'

Ijmā' is the verbal noun of the 'Arabic word ajma'a which has two meanings, to determine and to agree upon something. [147] The authority for consensus as a fourth source of law is usually derived from a saying of the Prophet, "the community of Muslims would never agree on an error". [148] Ijmā' is defined as the unanimous agreement on any matter of the mujtahidūn of the Muslim community of any period following the demise of the Prophet. [149] The exact definitions of Ijmā' has always remained controversial. The Mālikīs, for example, besides having the general consensus of the scholars, have the consensus of the ancient school of Madina (Ijmā' ahl al-Madīna). [150] The Imāmiyyah accept only the consensus of the members of the Prophet's family. [151] Abū Ḥanīfa was reported to have introduced by himself a definite conception of Ijmā' with a definite legal bearing. [152] Aḥmad b. Ḥanbal is known to have said that it is no more than a lie for any man to claim the existence of Ijmā'. Whoever claims Ijmā' is telling a lie. [153]

The consensus of the schools, which expressed the living tradition of each ancient school, also became irrelevant for al-Shāfi'ī. He almost always denies the existence of any such consensus, because he could always find scholars who held divergent opinions and he holds the general consensus of all Muslims as essential to such claims. [154] Al-Shāfi'ī appears to have widened the scope of Ijmā' to the agreement of the whole Muslim community rather than to the consensus of the jurists. [155] He held that, whatever the extent of the knowledge of individual scholars, the community of Muslims, as a whole, preserved the traditions from the prophet in their totality, so that none of them were lost and the consensus of Muslims could not contradict the Sunna. [156] In conclusion the jumhūr 'ulamā' said that Ijmā' is possible and had occurred in the past, adding that those who deny it are only casting doubt on the possibility of something which has occurred. For example, the Ijmā' of the Companions on the exclusion of the son's son from inheritance where there is a son; and Ijmā' that the land in the conquered territories may not be distributed to the conquerors. [157]

Ijmā' is divided into two types, al-Ijmā' al-ṣarīḥ (explicit ijmā') in which every mujtahid expresses his opinion, either verbally or by action, and al-Ijmā' al-sukūtī (tacit Ijmā') wherein some of the mujtahidūn of a particular age give an expressed opinion concerning an incident but the rest remain silent. According to most scholars Ijmā' ṣarīḥ is definite and binding but in Ijmā' sukūtī , the scholars have differed over its authority as a proof. The majority of 'ulamā' including al-Shāfi'ī held that it is not a proof and that it does not amount to more than the view of some individual mujtahidūn. The Ḥanafīs considered Ijmā' sukūtī to be a proof, provided it is established that the mujtahid who has remained

silent had known of the opinion of other mujtahidūn and then had ample time to investigate and to express an opinion but chose to remain silent. If it is known that the silence was due to fear or taqiyyah (hiding one's true opinion), or inviting disfavour and ridicule, then the silence of a mujtahid on an occasion where he ought to express an opinion when there was nothing to stop him from doing so would be considered as tantamount to agreeing with the existing opinion. [158]

Ijmā' in the classical theory is the agreement of the qualified legal scholars (mujtahidūn) in a given generation. Ijmā' is also the term used to denote the universal acceptance by all Muslims of the fundamental tenets of the faith, such as belief in the mission of Muḥammad and the divine nature of the Qur'ān. [159]

Consensus did not develop as a sources of law until after the death of Muḥammad, with the consequent loss of his direct guidance in legislative matters. It began as a natural process for solving problems and making decisions. One followed the majority opinion or the consensus of the early community as a check on individual opinions. According to Esposito, two kinds of consensus came to be recognized. The consensus of the entire community was applied to those religious duties, such as pilgrimage to Macca, practised by all Muslims. But despite al-Shāfi'ī's attempt to define the fourth source of law as this general consensus, classical Islamic jurisprudence defined the community in a more restricted sense as a community of legal scholars or religious authorities who act on behalf of and guide the entire Muslim community. [160]

Ijmā' played a pivotal rule in the development of Islamic law and contributed significantly to the corpus of legal interpretation (fiqh). If questions arose about the meaning of the Qur'ānic text or traditions or if revelation and early Muslim practice were silent, jurists applied their own reasoning (Ijtihād) to interpret the law. [161]

Qiyās

The fourth source of Islamic law is reasoning by analogy or Qiyās. Individual reasoning in general is called ra'y or 'opinion' with the particular meaning of 'sound, considered opinion'. When it is directed towards achieving systematic consistency and guided by the parallel of an existing institution or decision it is called Qiyās. The use of individual reasoning in the elaboration of the law is termed Ijtihād, of one's judgment. When it reflects the personal choice and discretionary opinion of the lawyer, guided by his idea of appropriateness, it is called Istiḥsān (juristic preference). [162] Qiyās means 'to measure', 'to compare'. [163] Qiyās is defined as accord of known thing with a known thing by reason of equality of the one with the other in respect of the effective cause or 'illah of its law. [164]

Qiyās does not have the same authority as the Qur'ān or the Sunna. The essential characteristic of a rule based on Qiyās is that its authority is merely presumptive (ẓannī). [165] A recourse to Qiyās is needed only if the solution of a new case cannot be found in the Qur'ān, the Sunna or the definite Ijmā'. [166]

This source of law is still drawn on today, allowing jurists to apply to novel cases a ruling made to fix analogous cases. Analogy was used by the Prophet himself. It is reported that a woman (Khath'amiyyah) asked the prophet if she could perform the pilgrimage instead of her dead father. The Prophet replied that if her father had died with debts outstanding she would have settled them. The Prophet advised the woman saying, 'The debt owed to God deserves even greater consideration'. [167] The first time it was used with a direct legal import was during the lifetime of Muḥammad on the instruction which he is supposed to have given to Mu'ādh. He was said to have ordered Mu'ādh to act according to the Qur'ān and Sunna but whenever these two gave no ruling, then according to his own best judgment. The Ḥadīth did not specify any form of reasoning in particular, analogical reasoning fell within the meaning of this Ḥadīth. [168] It is also reported that 'Umar b. al-Khaṭṭāb asked the Prophet whether kissing vitiates the fast during Ramaḍān. The prophet asked him in return; What if you gargle with water while fasting, 'Umar replied that this did not matter. The prophet then said that the answer to your first question is the same. [169]

Muslim philosophers who use the term Qiyās for 'syllogism' say that Qiyās in the terminology of fiqh is merely a comparison (tamthīl). According to Snouck Hurgronje the 'ulamā' of the four sunnī schools are entirely unanimous on the principle of its use and in practice their schools show no fundamental disagreement of their interpretation of Qiyās. The peculiarity of Abū Ḥanīfa was not that he used Qiyās more than traditional data, but that he used Qiyās in its old general meaning professionally as a practising lawyer, and not as a teacher of traditions. Mālik was such a teacher, but this did not prevent him from using Qiyās

very widely in its technical meaning as well, as is clear from many passages in his collection of traditions. He speaks there repeatedly of his own ra'y, a term which was later so much to be abhorred, and a very competent author of the third century of the hijra mentions him side by side with Abū Ḥanīfa among the supporters of ra'y. [170] Aḥmad b. Ḥanbal allowed a very narrow scope to the doctrines of agreement and analogy and initially the Ḥanbalīs rejected it. [171]

According to Schacht, the final admission of Qiyās to the classical group of four usūl is the result of compromise, on the lines envisaged by Shāfi'ī between the old unrestricted use of ra'y or Istiḥsān and the rejection of all human reasoning in religious law. [172]

In his Risālah, Shāfi'ī does not differentiate between Qiyās and Ijtihād. According to him, they are two expressions of the one concept. For every issue concerning a Muslim, there is either a binding text that rules or there is a guidance that may indicate the way to truth. If there is a text, then the Muslim has to follow it. In case there is no text directly applicable, then he has to seek guidance to the truth by Ijtihād, and Ijtihād is Qiyās. [173] The Companions were unanimous on the validity of Qiyās. Abū Bakr, the first caliph, for example drew an analogy between the father and grandfather in respect of their entitlements in inheritance. [174]

The Qur'ān [175] for example, forbids selling or buying goods after the last call for Friday prayers till the end of the prayer. By analogy this prohibition is extended to all kinds of transactions, since the effective cause, that is diversion from prayer, is common to all. [176] The Prophet is reported to have said, "The killer shall not inherit (from his victim)". By

analogy this ruling is extended to bequests which would mean that the killer cannot benefit from the will of his victim either. [177] In another example, if certain rules of taxation formulated in the sources were applicable in Madina to barley and dates and were applied to wheat elsewhere, this was Qiyās. Both kinds of grain were indeed the 'staple diet' of the lands concerned, which explains the extension of the tax on the first foodstuff to the second as well. [178]

Footnote

1. De Josselin, P.E. De Jong, Agama-agama di Gugusan Pulau-pulau Melayu. (Religion in the Malay Archipelago). Kuala Lumpur: Oxford University Press. 1965. p. 73. ; Abu Bakar Abdullah, op.cit,. p. 1.

2. S. Q. Fatimi, ibid,.p. 26. ; T. W. Arnold, The Preaching of Islam, Lahore : Sh Muhammad Ashraf. 1968. p. 367.

3. Mukhtar Shafie, "Batu Nisan Kurun ke 5 H / 10 A. D. di Pekan Pahang" in Tamaddun Islam di Malaysia, Kuala Lumpur. 1980. p. 15.

4. Saad Shukri Hj. Muda, Detik-Detik Sejarah Kelantan, Kota Bharu. 1971. p. 28.

5. Rita Rose di Meglo, " Arab Trade With Indonesia and The Malay Peninsula From 8th to The 16th Century", in Islam And The Trade of Asia. ed. D.S. Richards, Philadelphia: Univ. of Pennsylvania. 1970. p. 109.

6. Syed Muhammad al-Attas, Preliminary Statement on a General Theory of the Malay-Indonesia Archipelago, Kuala Lumpur : Dewan Bahasa dan Pustaka. 1960. p. 11.

7. Hamka, Sejarah Umat Islam. (The History of Islamic Society). Kuala Lumpur: Pustaka Antara. 1965. pp. 433-434.

8. T. W. Arnold, op.cit,. p. 367.

9. Andaya B. W. , A History of Malaysia, New York : St Martin's Press. 1982. p. 7. ; K. G. Tregoning, A History of Modern Malay, Singapore : Eastern Univ. Press. 1964. p. 28.

10. K. G. Tregoning, ibid,.

11. M. A Rauf , A Brief History of Islam With Special Reference to Malaya, Kuala Lumpur : Oxford Univ. Press. 1966. p. 103

12. D. G. E. Hall, The History of South-East Asia, London : Mc Millan, 1955. p. 177.

13. Brian Harrison, South-East Asia, A Short History, London : Mc Millan Press Ltd. 1968. p. 54.

14. S. N. al-Attas, The Correct Date of the Terengganu Inscription, Kuala Lumpur: Muzeum Negara. 1970. p. 24.

15. Syed Farid al-Attas, Muslim World, 1985. p. 163.

16. T. W. Arnold, op.cit,. p. 367.

17. Syed Muhammad Naquib al-Attas, Islam Dalam Sejarah dan Kebudayaan Melayu, Kuala Lumpur : Univ. Kebangsaan Malaysia. 1972. pp. 34-37.

18. Hamka, op.cit,. p. 439. ; Abu Bakar Abdullah, op.cit,. p. 4

19. Brian Harrison, op.cit,. p. 52.

20. S. Q. Fatimi, op.cit,. p.p. 55-69. ; S. M. Naquib al-Attas, op.cit,. pp. 34-37.

21. T. W. Arnold, op.cit,. p. 367.

22. Liaw Yock Fang, Undang-Undang Melaka. The Hague : Martinus Nijhoff. 1976. pp. 31-32, 85. ; Ahmad Ibrahim and Ahilemah Joned, op.cit,. p. 52.

23. Liaw Yock Fang, ibid,. p. 163.

24. ibid,. pp. 33-35.

25. Richards Winstedt, Malaya and Its History. London : Hutchinson's Univ. Library, 1948. p. 102.

26. M.B. Hooker,. Adat Laws in Modern Malaya. Kuala Lumpur : Oxford University Press. 1976. p. 81.

27. Ahmad Ibrahim and Ahilemah Joned, op.cit,. pp. 53-54.

28. Winstedt, Malaya, p. 100. ; Salleh b. Buang, The Law of Real Property in Malaysia : Prospects for Islamization, in Law Seminar Kulliyyah Of Laws : International Islamic University, 26-27 July 1986. p. 3.

29. Abdullah b. Abu Bakar and Nadzim Abdul Rahman, The Recent Development in Muslim family Law : The Malaysian Experience, in International Shari'a Conference, Kuala Lumpur : Malaysia, 3-5 August 1990. p. 1.

30. Ahmad Ibrahim and Ahilemah Joned , op.cit,. p. 55.

31. Ahmad Ibrahim, Recent Legislation on Islamic Family Law in Malaysia, in Law Seminar Kulliyyah of Laws : International Islamic University, 26-27 July 1986. p. 1.

32. Ahmad Ibrahim and Ahilemah Joned, op.cit,. p. 59.

33. Kenneth Roberts-Wray, Commonwealth And Colonial Law, London : Stevens and Sons, 1966. pp. 715-716. ; Carlo Cardalora, Religions and Societies: Asia and the Middle East, New York ; Mouton Publisher. 1982 pp. 447-448.

34. Abdul Monir b. Yaacob, An Introduction to Malaysian Law, Bangi : Univ. Kebangsaan Malaysia, 1989. p. 40. ; Winstedt, Malaya, op.cit,. p. 96.

35. ibid,. p. 41. ; Wu Min Aun, An Introduction to The Malaysian Legal System. 2nd edition. Kuala Lumpur : Heinemann Educational Books, 1978. pp. 6 -7.

36. C. M. Turnbull, The Straits Settlements 1826-1867. London : The Athlone Press, 1972. pp. 44-46.

37. (1878) 1 Ky. 421.

38. M. B. Hooker, The Personal Laws of Malaysia. Kuala Lumpur : Oxford Uni. Press, 1976. p. 19. ; Azizan Abdul Razzak, The Law in Malacca Before and After Islam. in Tamadun Islam di Malaysia. Kuala Lumpur : Persatuan Sejarah Malysia. 1980 . p. 43.

39. ibid,. p. 20. ; Ahmad Ibrahim,, Ke Arah Penyelarasan Undang-Undang Islam di Malaysia. Journal Hukum, Vol. V (2), Jun 1987. p. 242.

40. (1835) 2 Ky. Ecc. Rs. 8.

41. Hooker, Personal,. p. 20. ; Azizan A. Razzak. op.cit,. p. 44.

42. ibid,. p. 21.

43. (1890) 4 Ky. 124.

44. Hooker, Personal,. p. 22.

45. Kenneth Roberts-Wray, op.cit,. p. 716. ; D. G. E Hall, op.cit,. p. 489.

46. ibid,. ; Wu Min Aun, op.cit,. p. 10. ; Carlo Cardalora, op.cit,. p. 448.

47. Monir Yaacob, op.cit,. p. 41. ; Wu Min Aun, ibid,. p. 11.

48. Hooker, Personal,. p. 22

49. ibid,. ; (1922) 1 F.M.S.L.R. 61.

50. (1940) M./L.J. 98. ; (1939) F.M.S.L.R. 230.

51. Hooker, Personal, pp. 22-23. ; Azizan A. Razzak, op.cit,. p. 45.

52. Kenneth Roberts-Wray, op.cit,. p. 716.

53. Wu Min Aun, op.cit,. p. 12.

54. Hooker, Personal,. p. 24. ; Azizan A. Razzak, op.cit,. pp. 46-47

55. (1927) 6 F M S L R. 128.

56. Ahmad Ibrahim and Ahilemah Joned, op.cit,. p. 55.

57. ibid,.

58. Kenneth Roberts-Wray, op.cit,. p. 717.

59. Carlo Cardalora, op.cit,. p. 468.

60. F. C. Art. 3.

61. Hooker, Personal,. p. 47.

62. Ahmad Ibrahim and Ahilemah Joned, op.cit,. p. 60.

63. Kenneth Roberts-Wray, op.cit,. pp. 717-718.

64. F .C. Art. 74 (b)

65. F. C. Art. 4 (2) Eight Schedule.

66. F. C. Art. 9 (3)

67. (1967) 1 M.L.J. 170.

68. F. C. Art. 121 (2). ; Monir Yaacob, op.cit,. p. 157.

69. Kenneth Roberts-Wray, op.cit,. p. 717.

70. Laws of the Constitution of Johore, Malayan Constitutional Documents. vol. 2. Kuala Lumpur, 1962. ; Monir Yaacob, op.cit,. p. 194.

71. F. C. Art. 3.

72. F. C. Art. 3 (2).

73. L. A Sheridan and Harry E. Groves. The Constitution of Malaysia. Singapore : Malay Law Journal. 1979. p. 37.

74. F. C. Art. 11.

75. F. C. Art. 160.

76. Ahmad Ibrahim, The Administration of Muslim Law in South-east Asia, Islamic Culture, vol : 46, 1972, p. 248

77. Muhammad Salleh Abbas, Prinsip Perlembagaan dan Pemerintahan di Malaysia. Kuala Lumpur : Dewan Bahasa dan Pustaka. 1968. p. 344.

78. Abu Bakar Abdullah, op.cit,. p. 275.

79. Liaw Yock Fang, op.cit,. pp. 34-35.

80. Ahmad Ibrahim, Towards a History of law in Malaysia and Singapore, Singapore, 1970. p. 71.

81. Wu Min Aun, Pengenalan System Undang-Undang Malaysia. (An Introduction to Malaysian Legal System). p. 51.

82. (1915) 1 F. M. S. L. R. 204.

83. F. C. Art. 4 (1).

84. F. C. Art. 160.

85. Hooker, Personal, p. 47.

86. F. C. , Ninth Schedule. List 2.

87. Ahmad Ibrahim and Ahilemah Joned, op.cit,. p. 58.

88. ibid, p. 59. ; Muslim Court (Criminal Jurisdiction) Act, 1965 amended by the Muslim Court (Criminal Jurisdiction Amendment) Act 1984.

89. Mahkamah Shari'a Enactment. 1983. s. 26.

90. F. C. 9th Schedule. List 2.

91. F. C. 4 (1, 3)

92. The Oxford English Dictionary, Vol. XII. p. 311.

93. Wu Min Aun, op.cit,. p. 34.

94. Monir Yaacob,, op.cit,. p. 155.

95. Ahmad M. N., Stare Decisis and Its Development in Malaysia, Journal of Malaysian and Comprative Law. 1975. p. 67.

96. (1952) M. L. J. 167.

97. Hooker, Personal,. p. 47.

98. (1939) 8. M. L. J. 209. ; (1938) F. M. S. L. R. 91.

99. Hooker, Personal,. p. 53.

100. (1971) 1 M. L. J. 265.

101. Hooker, Personal,. p. 47.

102. ibid,. p. 48.

103. (1969) 1 M. L. J. 110. ; (1970) 1 M. L. J. 222.

104. (1894) 22 I.A. 76.

105. Monir Yaacob, op.cit,. p. 159.

106. Hooker, Personal, p. 151.

107. Patrick Bannerman, Islam in Perspective, London: Routledge, 1988. p. 49. ; H. R. Abdul Majid, (1911) op.cit,. p. 41. ; A. A. Fyzee, Law and Culture in Islam. Islamic Culture. vol:17. 1943. pp. 424-425.

108. J.N.D. Anderson, Law Reform In the Muslim World. London. 1976. p. 6.

109. Schacht, An Introduction, p. 60.

110. Said Ramadan, Islamic Law, Its Scope and Equity, London: Mc Millan Ltd. 1961. p. 23.

111. Ann K. S. Lambton, op.cit,. p. 5. ; Ahmad Hasan, op.cit,. p. 45.

112. Gibb, Mohamedanism, p. 35. ; Mohammad Hashim Kamali, Principles of Islamic Jurisprudence, Petaling Jaya : Pelanduk Publications. 1989. p. 19.

113. Ahmad Hasan, op.cit,. p. 44. ; Hashim Kamali, op.cit,. p. 19.

114. Esposito, Islam,. pp. 24-25

115. Watt and Bell, op.cit,. p. 40. ; Said Ramadan, op.cit,. p. 40. ; Gaudefroy-Demombynes, op.cit,. p. 63. ; Rahim M.A, op.cit,. p. 19.

116. Watt and Bell, ibid,. p. 40.

117. Said Ramadan, op.cit., p . 31. ; Gaudefroy-Demombynes op.cit,. p. 64.

118. Esposito, Islam,. p. 25. ; Gaudefroy-Demombynes ibid,. p. 64.

119. Hashim Kamali, op.cit,. p. 21. ; Said Ramadan, op.cit,. p. 32. ; Abdul Rahim M. A, The Principles of Muhammadan Jurisprudence, Lahore : All Pakistan Legal Decisions. n. d. p. 20.

120. Watt and Bell, op.cit,. p. 42. ; Said Ramadan, ibid,. p. 32.

121. Watt and Bell, ibid,. p. 42.

122. Said Ramadan, op.cit,. pp. 32-33.

123. Gibb, Mohammedanism, pp. 40-41.

124. 'Abd al-Wahhāb Khallāf, 'Ilm Usūl al-Fiqh, 8th edition, Kuwait: Dār al-Qalam, 1361/1942. pp. 32-33.

125. Schacht, An Introduction, p. 12.

126. Ann K. S. Lambton, op.cit,. p. 5. ; Ahmad Hasan, op.cit,. p. 48.

127. Ahmad Hasan, ibid,. pp. 44-49. ; Q , 16 : 44.

128. Said Ramadan, op.cit., p. 33. ; Esposito, Islam,. p. 81. ; Wahhab Khallaf, op.cit,. p. 36. ; Abu Zahrah, op.cit,. p. 105.

129. Q , XVI : 44.

130. Said Ramadan, op.cit,. p. 34.

131. Q , VII : 20.

132. Q , IV : 80.

133. Said Ramadan, op.cit,. p. 34

134. Gibb, Mohammedanism, . p. 73.

135. ibid, pp. 78-81. ; Esposito, Islam,. p. 82. ; Gaudefroy-Demombynes, op.cit,. p. 66.

136. Gibb, Mohammedanism, pp. 76-77. ; Rahim M. A, op.cit,. p. 21.

137. Esposito, Islam,. p. 81.

138. Coulson, A History, p. 64.

139. Esposito, Islam,. p. 81 ; Gibb, Mohammedanism, p. 77.

140. Hashim Kamali, op.cit,. p. 61. ; Khudari, op.cit,. p. 201.

141. Muṣṭafā al-Zarqa, Al-Madkhal al-Fiqhi al-'Āmm. vol 1. Damascus : Maṭba'ah al-Jami'ah. 1952. p. 50.

142. Khudari, op.cit,. pp. 35-40.

143. Schacht, An Introduction, p. 47. ; Schacht, "Pre Islamic Background and Early Development of Jurisprudence". in Law in Middle East. ed. Majid Khadduri And H. J Liebesny. Washington : The Middle East Institute. 1955. p. 55.

144. Al-Shāṭibi, Ibrāhīm bin Mūsā, al-Muwāfaqāt fi Uṣūl al-Aḥkām. vol 3 . Cairo : Maṭba'ah al-Salafiyyah. vol. 3. p. 246.

145. Schacht, An Introduction, p. 47.

146. Hashim Kamali, op.cit,. p. 60. ; Abū Zahrah, op.cit,. p. 109.

147. ibid,. ,. p. 213.

148. Ibn Mājah, Sunan, vol ;2 1303, Hadith no.3950.

149. Wahhāb Khallāf, op.cit,. p. 45. ; Abū Zahrah, op.cit,. p. 199. ; Hashim Kamali, ibid, p. 213.

150. Hashim Kamali, ibid,. p. 230. ; Schacht, An Introduction, p. 61.

151. Hashim Kamali, ibid,.

152. Said Ramadan, op.cit,. p. 94

153. Hashim Kamali, op.cit,. p. 231. ; Al-Āmidī, Ihkām, vol:1 p. 198. ; Said Ramadan, ibid,. p. 94.

154. Schacht, An Introduction, p. 47.

155. Shāfi'ī, Risālah p. 471-472. ; Khadduri, Jurisprudence, p. 285.

156. Ibid,. 486. ; Schacht, An Introduction, p. 47.

157. Abū Zahrah, op.cit,. p. 201.

158. Hashim Kamali, op.cit, . pp. 233-234. ; Abū Zahrah, ibid,. pp. 205- 206.

159. Coulson, A History, p. 77.

160. Esposito, Islam. p. 84.

161. ibid.,

162. Schacht, An Introduction, p. 37. ; Coulson, A History, pp. 59-61.

163. C. Snouck Hurgronje, Selected works of C. Snouck Hurgronje, edited in English and French by G. H Bousquet and J. Schacht. Leiden: 1957. p. 283.

164 J.N.D Anderson, op.cit ,. p. 5.

165. ibid,. p. 6.

166. Hashim Kamali, op.cit,. p. 248.

167. Ibn Qayyim al-Jawziyya, op.cit,. p. 200.

168. Wahhāb Khallāf, op.cit,. p. 56. ; S. Hurgronje, op.cit,. p. 285.

169. Ibn Qayyim al-Jawziyya, op.cit,. p. 200. ; Wahhāb Khallāf, op.cit,. p. 57.

170. S. Hurgronje, op.cit,. 286.

171. Rahim M.A. op.cit,. p. 29.

172. Schacht, An Introduction, p. 60.

173. Shāfi'ī, Risālah, p. 477. ; Khadduri, Jurisprudence, p. 288.

174. Hashim Kamali, op.cit,.p. 276.

175. Q , 162 ; 9.

176. Wahhāb Khallāf, op.cit,. p. 52.

177. Ibn Qayyim al-Jawziyya, op.cit,. p. 242. ; Wahhāb Khallāf, op.cit,. p. 53.

178. S. Hurgronje, op.cit,. p. 283.

Chapter V

Kedah Shari'a Court

In general there are two types of Kedah Shari'a Court, Court of Qadi and Court of Appeal. Each court will be discussed further. Both courts are very similar to those found in the civil courts. In Shari'a Courts, procedure is based solely on English procedure, except in the law of evidence, where the court follows the Islamic law of evidence, although the court will also have regard to the law of evidence for the time being enforced in the state. [1]

Kedah Qadi Court.

The Court of Qadi is established under the commands of the Ruler of the State of Kedah (sultan). The court should have legal power in the district which is presided over by a qadi decided by the sultan. The jurisdiction of this court is restricted to the qadi in certain areas. The sultan, after hearing the advice of the 'Majlis'[2], approves anybody qualified and suitable to be qadi for a certain district. The Enactment reads; [3]

> "His highness the Ruler (sultan) may, on the advice of the Majlis, appoint any fit and proper person to be a qadi for the prescribed district".

That means the Court of Qadi has jurisdiction within the district assigned to it by the Ruler. The court has no power and authority over

attend prayers on Friday, non payment of zakāh and fitr, and failure to fast during the month of Ramaḍān;

e) offences relating to conversion of religion such as failure to report and register conversion; and

f) miscellaneous offences not provided for under any of the above categories.

With reference to inheritance a Civil Court or authority or any person having an interest in the administration or distribution of the inherited property of the deceased to be distributed according to the Islamic law, the court of Qāḍī, may under the request of any Civil Court, authority or any person, issue a statement called 'farā'iḍ statement' concerning the distribution of the property, and the people who have the right over the property. [7]

Before releasing a statement as prescribed the court of qāḍī should base its statement on the facts as given by the Civil Court, authority or the person, and on any fact obtained by the court from its own investigation. Provided that, if the Court of Qāḍī thinks appropriate before making such statement, and hearing the views of any parties involved on any questions relating on oaths or affirmation. And the qāḍī court can, if appropriate, charge on each statement issued under this enactment. [8]

The Court of Qāḍī also has jurisdiction in the following matters:[9]

1. The power to suspend any court session except the proceeding in the district where:

a) the cause of the action originates;

b) the place, where the defendant is living or has his place of business;

c) fact where any action occurs or is said to have occurred,

d) for any other reasons such proceeding be continued in the interest of justice;

2. Powers, when requested or in its own right, transfer any proceeding to another Shari'a Court,

3. Power, subject to any other written law, to order the process of the service to any place or at any time and in any manner and to order that such service be deemed to be served within the time .

4. Power to compel, by notice addressed to prison officer to produce any person in the prison before it for a purpose.

5. Power to bring out and use, for any purpose office copies or certified copies of any proceeding in the court and copies of documents, and to accept any issued by any other court room.

6. Discretionary power to direct as to the cost of the proceedings including those proceedings which are suspended, subject to any provision by the written law to the contrary.

7 (1) Power of court officers to enter any house or premises for the purpose of investigation carrying out the court order. Power to investigate any safe, cupboard or other boxes found in that house or premises.

(2) Power to examine anybody covering his properties or properties of another, or with regard to any disposal of any such property.

(3) Power, in relation to the execution of any order of attachment of property before judgment, and to impose terms and conditions with regard to its management, damage and compensation.

8. Power to enlarge or abridge the period prescribed by any written law, concerning any author, even though there is no application for the purpose within that particular period of time.

9. Power to impose any payment or fees concerning any court action under this enactment.

10. Power to impose penalty for any action, omission or conduct which is deemed contempt of court.

11. Subject to the power of the court of Appeal, the power to produce method or regulations relating to the practice and procedure in any proceeding before itself.

12 Other powers as provided at the present or in the future by any other written law.

The Procedure of Sharī'a Court

Every court i.e, qādī court and appeal court has its own seal or stamp provided by the sulṭān. Malay is the national language of Malaysia and is the language of the Sharī'a Courts. The judges are admonished to use only Malay in the courts and not to resort to use of another language which would not be understood by all the participants in the case. When Malay is not a language understood by the litigants, it is the court's responsibility to arrange for translation in court. [10] All documents or records of proceeding are kept in either the Jāwī or Rūmī script. Every court keeps and maintains full and proper records of all proceedings, and account for all the financial transactions in the manner provided by law.

The advocates and solicitors are allowed to appear in any court on behalf of a party to any proceedings on condition that their appearance is not contrary to the provisions of Muslim Law as may be decided by the Majlis. If they appear, they must plead in the language of the court or through an interpreter provided by them and approved by the court. In Kedah the Majlis may register persons learned in the Islamic law as to enable them to plead in the court, and the Majlis may at their discretion revoke such registration. [11]

There are four forms of sentence, namely imprisonment, fine, caution and binding over. If the sentence is of imprisonment, the court will send the prisoner in the custody of a police officer or one of the court officers to the prison, and deliver him to the prison officer with a warrant. If the prisoner has been in prison pending trial, the period so spent is treated as part of the period to be served under the sentence.

A sentence of imprisonment may be imposed in default of payment of a fine imposed under the enactment, but no such sentence of imprisonment is to exceed one half of the term of imprisonment. The payment of a fine can be deferred or paid by instalments.

The court may also caution and discharge the accused. In this case, instead of sentencing the accused, the court may make an order to bind him over to be of good behaviour for a period not exceeding one year, and may accept a bond in any sum of money. On breach of the terms of such a bond the court may enforce the amount as fine. [12]

Law of Evidence

The Enactments have a provision that the Sharī'a Courts are required to follow the Islamic rules of evidence. The requirements of the Islamic rules of evidence are discussed below.

a) Number of Witnesses

The number of witnesses under Islamic law depends on the cases. Generally, the testimony of a single individual is not enough to prove any fact, except the appearance of the new moon in the month of Ramaḍān. [13] The Qur'ān prescribed certain fundamentals in the domain of the legal procedure. The very important precept in the laws of evidence concerns witnesses. The Qur'ān mentioned " And do not conceal the testimony, whose conceals it his heart is sinful'. [14] In the verses of the Qur'ān, zinā or (qadhf) fornication has to be proved by four male witnesses "Those of your women as commit indecency, all four of you to witness against them...." [15] The law of evidence in Islamic criminal law is different from the laws of evidence for commerce or civil law, in which only two witnesses are necessary. [16] In homicide, theft and disputes arising out of commercial transactions, as well as cases of disputes within a family the number of witnesses required to testify is two. [17]

b) Status of Witnesses

Witnesses must be free from bias and prejudice. A person cannot depose in favour of his ascendants or descendants, though he may legally do so against them. For example a son and his descendants are not

acceptable as witnesses in favour of father, and the father's and grandfather's testimony would not be accepted in favour of a son, on the grounds that they had a mutual interest. Some scholars also rejected the testimony of a husband or wife in favour of the other on the same reasoning, but other scholars accepted it and they have distinguished between the relationship of son and father which is a permanent one, and the husband and wife which could be ended at any time. The adverse deposition of an enemy is not admissible; but the favourable deposition of such an enemy is admissible. [18]

c) Quality of Witnesses

They are certain conditions to determine who is qualified to testify before a qādī and be accepted as a legal witness with valid testimony. A witness is required to be free, adult, sane, Muslim, of 'adāla or irreproachable and serious character and not liable to suspicion. 'Irreproachable character' means that the witness must not have committed any capital sins, and must not be in the habit of committing sins of a less serious nature. By a man of serious character is meant one who models his conduct upon the respectable among his contemporaries and is not liable to suspicion; a person is said to be liable to suspicion if he allows himself to be influenced by the idea of procuring some advantage or protecting himself against some damage. [19] According to the majority of scholars non-Muslim witnesses are not accepted, and although the Ḥanafī school accepted a dhimmī witness in the absence of a Muslim witness, this was also limited. [20]

There was a distinction between men and women witnesses in proving a claim. Women are not accepted as witnesses in criminal cases but in the disputes concerning something which was entirely feminine , such as dispute concerning the period or virginity and the like women witnesses are accepted. [21]

If there was only one witness to testify to the right of the plaintiff, scholars have different opinions. According to Shāfi'ī a qāḍī had to ask the plaintiff to take the oath to support his witness. The qāḍī would accept the oath and one witness as legal since the Prophet has done so. But Shāfi'ī added that it was only in cases with a financial basis not in every case that the oath and one witness was acceptable. In the case of theft there had to be stronger evidence than the testimony of one witness and the oath of the plaintiff. [22]

Civil Procedure

The enactments also make provisions with respect to procedures to be followed by Sharī'a court in criminal and civil trials. All civil proceedings in the qāḍī court are brought either by filing a plaint or by making oral complaint to the presiding officer of the court. In either case there is a prescribed fee charged for a plaint. If the complaint is in oral form,the court shall draft a plaint for the plaintiff which shall be signed and filed by him. The plaint shall contain the names, addresses and descriptions of the parties and a short statement of the cause of action and also a statement about the nature of the relief claimed.

There may be more than one person joined as plaintiffs or defendants and more than one cause of action may be raised in the same proceeding. [23] For example, a claim of maintenance is often accompanied by a claim for mut'ah and dowry, and a claim for maintenance for children is usually made together with a claim for maintenance for a wife.

The court shall issue a summons to each defendant to appear to answer the claim at a stated place, date and time and shall warn him that, in case of his non-appearance, the court may proceed to allow the claim in his absence. A defendant may file a written defence, at the time of his first appearance. If, within the time limit fixed by the court, any defendant makes a written defence, a copy of this has to be given to each plaintiff through the court. If he wants to defend the action without filing a defence, the court then ascertains orally. The court may permit the defendant to make a counter-claim or direct him to file separate proceedings for matters counter-claimed.

At any time before judgment the plaintiff may withdraw any proceedings but he is liable to pay the cost. However, in such a situation, the plaintiff shall not bring any other proceedings on the same cause of action without leave of the court. The parties may also make any compromise at any time. However no withdrawal or settlement is permitted without having due regard to the interests of the persons represented.

If the plaintiff does not appear for the hearing, the proceedings may be struck out. If he does appear, but the defendant does not, he may then

prove his case and the court may give judgment or may adjourn the case or may deal with any counter-claim although the claim is struck out. [24]

If the defendant appears and admits the plaintiff's claim, the court may give judgment without hearing evidence. With regard to the trial process itself the enactment provides:

1) If the defendant desires to defend, then the party against whom judgment would be given on the pleadings and admissions made if no evidence were taken, shall have the right to begin.

2) Each party may address the court and may then give evidence and call, examine and cross-examine witnesses. Judgment is given in open court and every judgment is (after delivery) drawn up in writing, dated and signed by the presiding officer of the court. A judgment may declare the rights of the parties, or may order a party to do any act or thing.

3) The court may call any evidence which it considers necessary, provided that no party shall be obliged to give evidence against his will.

If any witness is unable to give evidence at the trial or hearing, written records of such evidence may be used and all the parties are to be given due opportunity to attend and cross-examine. Any party to a civil proceeding in the court of qāḍī can make an appeal against the judgment of that court to the appeal committee.

Criminal Procedure

Generally the criminal procedures in all Sharī'a courts are commenced by information. An information regarding prosecution shall be made either in writing or orally and addresseed to the presiding officer

of the court. If made orally, it shall be reduced to writing by him. In either case he shall require the informant to swear or affirm the truth of such information. In this case the court has a right to refuse taking any action on such information if there are reasons to believe that an offence has not been committed.

After receiving information, the court may issue summons to the accused persons to appear before it at stated time and place. The summons shall include the general nature of the offence charged and the section or provision of the enactment under which is punishable. If the accused fails to obey a summons, or if his offence is punishable by imprisonment, and there is good ground to believe that a summons will be ineffective, the court may issue a warrant addresseed to the Chief Police Officer and all other police officers in the state requiring them to arrest the accused and bring him to the court.

The Muslim Law Enactment also allows an police officer or Penghulu or Imām or Qādi to arrest without warrant any person who has committed or attempts to commit in his presence any offence against the Muslim Law Enactment involving a breach of the peace, or any person who has committed an offence against the Muslim Law Enactment and refuses or fails to give on request his full name and address. Such an officer may also arrest without any warrant issued under the enactment to any person against whom the warrant was issued although the warrant was not in his possession. After the arrest, it is the duty of such an officer to bring the person to the court without undue delay and within 24 hours.

When any accused person is produced before the court, the court may proceed to hear the charge, or may adjourn or postpone the case on such terms as it thinks fit and for such time as it considers reasonable and may grant bail to such accused person.

With regard to prosecution, it is provided that the prosecution shall be conducted by any person appointed by the Sulṭān or by the Majlis. It is the duty of the prosecutor of the court to frame the charge. The charge shall contain particulars of the offence alleged as are reasonably sufficient to give the accused notice of the matter with which he is charged. If there is more than one offence they may be charged in different counts but tried together if they arise out of the same transaction. If the accused are more than one they may be charged and tried together for the same or different offences if committed in the course of the same transaction. Any charge may be amended or altered or added to by the court at any time before the judgment is pronounced.

The charge shall be read to the accused and if he pleads guilty, he may be sentenced on such plea. If he claims trial or refuses to plead, it is the duty of the prosecutor to outline the facts to be proved on the relevant law, and only then shall the prosecution call his witnesses. Each witness is examined by the party calling him and may be cross-examined by the opposing party. Cross-examination may be directed to credibility. After hearing the witnesses the court may either dismiss the case or call on the accused for his defence. In making his defence, the accused may opt for one of the following:

1) giving evidence,

2) making a statement without being sworn or affirmed, in which case he will not be liable to be cross-examined,

3) the accused may also stand silent.

The accused may call his witnesses and sum up the case, and the prosecutor may also give a general reply if he wishes to do so. After hearing both parties, the court shall either convict or acquit the accused. If he is convicted the court may be informed of his previous offences and shall have regard to any plea for leniency. The court shall then pass sentence according to the law.

Court of Appeal

This court of appeal is the highest level of the Sharī'a court system. This court hears and determines any appeal against decision or order of the court of qāḍī. Its jurisdiction includes general supervisory and revisionary jurisdiction over all courts of qāḍī.[25] Generally the court of appeal consists of the Chief Qāḍī, three deputy qāḍīs and three persons appointed by the ruler, who are qualified to sit in the Court of Appeal.[26] It should be mentioned that the Chief qāḍī has power to ensure the date and the place of the Court of Appeal. The proceedings of the court should be heard by at least the Chief qāḍī, one deputy Chief qāḍī and one of the persons appointed by the sulṭān. In the absence of the Chief qāḍī, the Court of Appeal should be attended by two deputy qāḍīs which led by the more senior deputy qāḍī, and a person appointed by the sulṭān.[27] And provided the appeal is against the decision of the Chief qāḍī sitting as a qāḍī, the Court of Appeal should consist of two deputy Chief qāḍīs and should be presided over by a person appointed by the sulṭān. When

the case is brought to the Appeal Court, all decisions made by the court of qāḍī shall be stayed pending further order of the court of appeal. The judgment or decision of the Court of Appeal shall be the opinion of the majority of the members of the court. [28] Appeals are made to the appeal committee from any decision of the qāḍī court. The Court of Appeal has jurisdiction in the following matters: [29]

1) In criminal cases an appeal may be made by a person convicted and sentenced to imprisonment or to a fine of not less than twenty five ringgit. This appeal may be against conviction or sentence or both.

2) In civil appeals:

a) a civil appeal may be made by any person aggrieved by the decision if the amount is not less than one hundred ringgit.

b) in all cases involving any decision as to personal status, by any person aggrieved by the decision.

c) in all cases relating to the maintenance of his dependants, by any person aggrieved by the decisions with condition that no appeal may be made against a decision made by consent.

3) And in any other case, if the appeal committee consent to hear the appeal.

On any appeal, an Appeal Committee may quash, reduce, or enhance the sentence or order a retrial in a criminal matter. And in civil matters the Appeal Committee may confirm, reverse, or vary the decision of the trial court, exercise any such powers as the trial court could have exercised, make such orders as the trial court ought to have made, or order a retrial. [30]

Procedure Court Of Appeal

Civil Appeal.

A civil appeal shall be commenced by giving notice of appeal in the form provided. An appellant may appeal from the whole or any part of a decision. The notice of appeal should state whether the whole or part only, and what part of the decision is complained of. The court shall serve a copy of such notice on each respondent as soon as possible after the certified copy is ready. It should be pointed out here that the notice of appeal shall be accepted within 14 days, from the day on which the decision was made. This means no notice of appeal may be accepted after the expiration of 14 days.

When all the above documents are ready, the court shall give notice to the appellant. Within 14 days after receipt, the appellant shall file in court sufficient copies of record of appeal. The record of appeal should consist of relevant pleadings, a copy of the notes of evidence, a copy of petition stating the grounds of the appellant's objection to the judgment, a copy of the court's notice of the proceeding and copies of all exhibits and documentary evidence.

The Appeal Committee should fix the date for hearing the appeal and should notify the parties of the date and place of the appeal. The Committee should hear both parties and make such order as it considers appropriate in accordance with the enactment.

Criminal Appeal

Any person who is dissatisfied with any judgment, sentence or order decided by any Court of Qādi in a criminal cases may appeal to Court of Appeal. An appeal shall be brought by filing form in the court which passed the judgment appealed from, a petition of appeal addressed to the Appeal Court setting forth particulars of judgment complained of and by paying at the same time the prescribed appeal fee. This petition shall be filed not more than fourteen days from the time of judgment was given.

On receiving such petition, the court shall prepare and forward in quadruplicate to the Chairman, a record containing a copy of the petition, a copy of the charge and of the sanction to prosecute, if any, a copy of the court's note of the proceedings, copies of any relevant exhibits, and a copy of the court's judgment or order and grounds of judgment. The appellants are entitled to receive a copy of the record.

After receiving copies of the documents referred to, the Chairman shall submit them to the Appeal Committee. The Committee has to fix the date for the hearing, place of the appeal and notify the parties accordingly. At the hearing of the appeal, the Committee shall hear the appellant, and if it considers so necessary, the respondent also. The Committee then makes such an order as will be compatible with the Enactment.

The Duties And Responsibilities Of Qādī In Kedah

In Islam it would be better to say that the entire Muslim community are responsible for the administration of justice. Without the support and commitment of the entire Muslim community, the judicial function loses its significance. As we know, the main factor for the existence of the qādī in Islam is to decide and settle disputes between people. This is due to the fact that most people try to avoid disputes. Actually a qādī is the most important judicial officer and played an important part in the sphere of administration of justice. Normally the powers of qādīs are general or limited. He has authority on the class of cases and areas as specified. The qādī can exercise his jurisdiction only over the duties as specified in the letter of appointment. He can decide cases only as specified and has no jurisdiction over cases outside his power. For instance, a qādī may be appointed to hear cases arising only in a particular division .

In Kedah, qādīs play an important role concerning Islamic religion. As a qādī in the Sharī'a court, he has to settle disputes or to decide cases, he is also the Chief of administration in the Sharī'a court. Qādīs, as noted earlier, consist of Chief Qādī, Assistant Chief qādī and Qādī. In addition to the judicial duties of the court, a qādī is required to perform the following works relating to the Muslim community. In this writing I will discuss the duties of qādīs in term of their rank.

(i) Chief Qādī

He is the head of the qādīs in jurisdiction and his prime responsibilities are towards the Sharī'a Court. In addition to his judicial duties the qādī's responsibilities include: [31]

a. chairman of the Appeal Committee,

b. member of Religious Affairs,

c. supervise and control the administration of District qādīs,

d. provide a certificate (tauliyah) for a new qāḍī and other court officers,

e. chairman of the apostasy board, (murtadd)

f. chairman of the registration of converts,

g. chairman of the mosques in Kedah,

h. chairman of interview for the examination and selection of any qadi,

i. vice-chairman of the educational system for religious schools,

j. vice-chairman of the committee for examining any religious book,

k. and member of the committee to enact and examine the Islamic law in Kedah; and to enact the Criminal Islamic law ; to collect and write down the fatwā; member of the bait al-māl and waqf committees; in charge of courses for pilgrim candidates; member of the committee on Islamic Economy Fund in Kedah; member of the taqwīm committee; to select the mosque officers; member of zakāh committee and to announce the beginning of Ramaḍān and of Shawwāl.

(ii)Assistant Chief Qāḍī

He is responsible to hear and settle the ta'lik, nafaqah, haḍānah, betrothal, marriage and divorce, joint earnings (harta sepencarian), and polygamy judgment. His other functions include supervising the criminal cases under Administration of Islamic Enactment, 1962 and Family Law Enactment 1984 (47 art). He is responsible for the division of estates of

Muslims deceased (farā'id), he also the member of appeal Committee and various other duties are delegated to him. [32]

(iii) District Qāḍī

Apart from chief qāḍī and his assistant, there are district qāḍīs who are the senior religious officer in each district. His function includes supervising his district, all religious affairs such as the administration of mosques and administration of Qur'ānic classes. In matters of Islamic jurisdiction, the qāḍīs are responsible to the chief qāḍī, while in other religious matters, they are responsible to the president of the Islamic Department. The district qāḍī is the judge of Qāḍī's court and at the same time he acts as the court registrar.

He is responsible for determining the division of the deceased Muslim's property. He is also responsible for administering and supervising the Bait al-māl and waqf in the district. In regard to the Muslim marriage, the District Qāḍī is also the walī ḥākim (sulṭān) and he is also responsible for all matters of Islamic da'wah in his district. Apart from that, he is also the Chairman of the Qur'ānic contest and is responsible for the administration and supervise in all matters of Islamic celebration. He is also responsible to supervise his subordinates and various duties are delegated to him. The district Qāḍī in his jurisdiction and all other functions is assisted by the Assistant District Qāḍī. [33]

To conclude, all the qāḍīs from chief qāḍī to the district qāḍī, are not exclusively judges. Almost all qāḍīs are given other duties which are either related or not. This expansion of duties was due to the concept of delegation, since the sulṭān was the holder of power.

The Power of Qāḍī

It has been noted earlier that the power of qāḍī is very limited, and Islamic law is not strictly followed in all fields of law. It is followed only in regard to family law or personal law. In other fields such as criminal law, the law of contract, the law of tort and commercial law, English law is followed. [34] Concerning Islamic criminal law, the Islamic law does not cover all aspects of criminal law. It applies only in a very narrow field of offences. The interpretation of Islamic criminal law is restricted to the offences, stated in the beginning of this chapter.

And in criminal jurisdiction, the qāḍī as prescribed by the Enactment of Criminal law has powers as follows:

a) hear, try, determine and dispose of in a summary way prosecution for offences committed wholly or in part within the local jurisdiction of such qāḍī and cognisable by such qāḍī,

b) inquire into complaints of offences and summon and examine witnesses touching such offences and summon and apprehend and issue warrants for the apprehension of criminals and offenders and deal with them according to law,

c) issue warrants to search or to cause to be searched places wherein any articles or things with which or in respect of which any offence has been committed are alleged to be kept or concealed, and require persons to furnish security for their good behaviour according to law,

d) do all other matters and things which a qāḍī is empowered to do by any written law. [35]

Any qāḍī at any time may arrest or authorise the arrest in his presence within the local limits of his jurisdiction of any person and is competent to issue a warrant. [36]

As has been pointed out earlier, the qāḍī, in his criminal and civil jurisdiction, is empowered to try only any offences committed by Muslims and his decisions do not affect any right of property of a non-Muslim. The qāḍī may not punish an act which has not previously and explicitly been made punishable. He is likewise forbidden to impose a penalty other than that fixed by law.

The Position Of Qāḍī

The position and rank between a qāḍī and a civil court judge in Malaysia is very different. In general, a qāḍī is of a lower rank than a civil judge. Judges in civil courts such as the Supreme Court, High Court, Session Court and Magistrate Class 1 Courts are higher than the qāḍī in all matters. As has been noted earlier, in practice, a civil judge has the right to reject or to change the decision taken by a qāḍī. The judges of civil courts are appointed by the Yang Di Pertuan Agong (Chief Ruler), acting on the advice of the Prime Minister, after consultation with the Conference of Rulers. [37]

The appointment of the qāḍī is under State administration. The appointment of qāḍīs in all states is provided for in the Muslim Law Enactment. It should be mentioned here that it is within the power of the sulṭān (Ruler) on the advice of the Majlis of every state, or the Yang Di Pertuan Agong in the case of Penang and Malacca, to appoint a qāḍī for any

district in the state. As a result of this, the power of a qādī became restricted. Civil judges, however have ultimate authority throughout Malaysia, their power is unlimited in civil and criminal cases. According to the field of qadi, the ruler may from time to time confer letters of authority (tauliyah) on any qadi and may by the terms of such a letter restrict the exercise of any power which would otherwise be conferred on the chief qādīs or qādīs by enactment. [38]

In discussing the pay scheme level for a qādī, it should be noted that the pay scheme level for qādīs in Public Services is equivalent to that of a District Officer. This results in his salary as well as his power being restricted. This pay scheme actually discourages candidates who are qualified from joining the service, since other avenues open to them provide better pay.

Regarding qualifications for the appointment of judges for civil court, article 123 of the Federal Constitution stipulates that:

(1) he be a citizen;

(2) for the ten years preceding his appointment he must have been an advocate to a court or a member of the judicial and legal service of the Federation or of the legal service of a state.

It should be observed here that the article does not mention that a judge should be a Muslim or mujtahid. It follows that anyone as a citizen is entitled to hold the office and everyone has the right to solicit the job including non-Muslims. As we mentioned earlier, in Islamic law a non-Muslim judge is not allowed to dispense justice over Muslims. According to Islamic law a qādī is responsible for implementing

Islamic law in the court. If he fails to do so, he will be dismissed. The Federal Constitution does not stipulate any restrictions against women being judges. Women, as well as men, are eligible to solicit the office. The conclusion can be drown that everyone has the right to solicit the post of judge of a civil court as long as they have a certificate. As a result it is difficult to implement Islamic law in Malaysia until the Federal Constitution article 123 is amended.

Analysis of the qualification of a qādī.

Before I discuss the qualifications in Kedah I should explain in general a few related points . This will enable us to study the issue in its proper perspective and avoid some of the confusion which normally occurs before such a discussion. Briefly I would place first the conditions required by the state authority for appointing the qādī. A person is qualified to apply for this position on the following conditions;

1. that he be a citizen,

2. that he is not more than forty years old and for government officers is not more than fifty years old,

3. (a) that he has a first degree in Islamic Studies from either a local or overseas university,

(b) or that he has a first honours degree in Islamic Studies from either a local or overseas university, (for which he will receive a greater salary)

4. that he has passed a Malay language examination. [39]

After his appointment he is under observation for one to three years. He is required to attend training as ordered by the head of department and finally before confirmation in his post he must pass the general examinations conducted by the government. When these conditions are fulfilled the qāḍī becomes an officer as any other officer in government service. [40]

Muslim

According to Qur'ān, "And Allāh will by no means give the disbelievers a way against the believers". [41] It is clear that all matters relating to Muslims should be conducted by a Mu'min i.e a Muslim. This is the main condition that the committee cares about. At the beginning of the application form it states that he should be a Muslim. Obviously, one of the requirements for the appointment of a qāḍī is that he be a Muslim. Non-Muslims cannot be empowered with judicial functions. Because of the religious character of his office, the qāḍī must be specially qualified to carry out religious functions. He will supervise the safeguarding of mosques, and administer waqf properties. Sometimes he may also have to exercise the functions of mu'adhdhin al-Khaṭīb (preacher). He presides over Friday prayer, and when, in years of drought, the people go out to the country to implore Allāh's mercy, the qāḍī leads them and presides over the prayer of istisqā'. He also delivers the ritual prayer during the funeral rites. He also announces the rising of the moon, that is the opening of the fast of Ramaḍān. The abjuration of faith by a non-Muslim and his conversion to Islam takes place in the preserve of the qāḍī. [42] Thus in regard to these functions it is evident that a qāḍī should be a Muslim.

As regards Islamic law, non-Muslims are not allowed to be judges presiding over Muslim disputes, except that in certain cases they can be a witness such as in civil cases. The dhimmī cannot be involved in judicial functions. In principle, dhimmīs are under the jurisdiction of their own religious leaders. The Muslim qadī has jurisdiction in suits arising between two dhimmīs belonging to the same community only if they had agreed to bring their suit before him. [43]

The choice of a qādī should be inspired only by the desire to please God; he should be distinguished by his piety, his regular observance of religious duties, and by his belief in God. He must act in such a way as to obtain heavenly rewards and avoid the punishments of the after-life. No one must seek to obtain judicial office for its earthly reward, but one must allow oneself to be chosen solely on the basis of religious merits. [44]

Māwardī admits the possibility of a dhimmī holding even the position of wazīr, provided that the wazirate which he hold was tanfidh or executive category and that he did not have power of command, in other words that he did not exercise explicit political responsibility for major decisions, did not sit in judgment over Muslims or take the initiative in matters of Islamic concern. [45]

'Adāla

According to the definition for the appointment of a qādī, 'adāla is indeed an ideal. The committee does not scrutinise the degree of 'adāla. The most important Qur'ānic references to justice are as follows, " God

commands you to deliver trusts back to their owners, and when you judge among men that you judge with justice". [46] And " ...so judge between men justly and follow not their desires". [47] The Qur'ān has laid down, "And do not let ill-will towards any folk incite you so that you swerve from dealing justly. Be just; that is next to piety". [48] Stressing this point the Qur'ān again says, " You who believe be maintainers of justice, bearers of witness for Allāh, even though it be against your own selves or (your) parents ..". [49] The point thus made clear is that Muslims have to be just not only to their friends but also their enemies. In other words, the justice to which Islam invites her followers is not limited to the citizens of one's own country, or the people of one's tribe, nation or race, or the Muslim community as a whole. It is meant for all human beings.

The literal meaning of 'adl in classical Arabic according to Majid Khadduri is a combination of moral and social values denoting fairness, balance, temperance and straightforwardness. [50] The notion of justice, which may be said to be implied in the common usage of 'adl, has been summarized in a letter reputed to have been addressed to the Caliph 'Abd al-Malik (d. 86/705), in reply to an inquiry about the meaning of the term 'adl, by Sa'īd ibn Jubair, who said: 'Adl may take four forms ; First, justice in making decisions in accordance with God's saying, "when you judge among men you should judge with justice", (Q, IV : 61) ; secondly, justice in speech in accordance with His saying, "when you speak, you should be equitable", (Q, VI : 153) ; thirdly, justice in (the pursuit) of salvation in accordance with His saying, "protect yourselves against a day on which no person will give any satisfication instead of another, nor will on equivalent be accepted from him, nor will intercession avail him", (Q, II : 117) ; fourthly, justice in the sense of attributing an equal to God in

accordance with His saying, " yet the unbelievers attribute an equal to Him". (Q, VI : 1) [51]

Gaudefroy-Demombynes stated that knowledge of the law by a qāḍī was a matter of secondary importance and that, in addition to a few sound principles, his essential qualifications were honesty and good sense. [52] The qualities specified in chapter two are comprehensive. The reality is that only those who are competent to act as qāḍīs have those qualities. As we know, those who fulfil the requirements are few in number today. In referring this requirement to the situation in Kedah, it is very difficult to find the person who has complete 'adāla. To overcome this, 'adāla is just a basis to select the qāḍī and not a major condition. However it is very important to make sure that the man appointed qāḍī has good moral behaviour (akhlāq), is trustworthy in the community, and most important has good faith (īmān). Even though these criteria are comprehensive a person with good īmān has normally acted with justice.

Shāfi'ī in his Risālah regarding the acceptability of Khabar aḥād said that 'we say to him ; you may not, if you are 'ālim doubt in this matter just as you may not do other than judge on the basis of the witness of just witnesses, though that witness is subject to error ; you judge on that basis because of the appearance (ẓāhir) of truthfulness on their part; God is responsible for what you do not know about them.' [53]

The emphasis on 'adāla is a necessary characteristic of a person assuming public office, from that of caliph to court witnesses. In fact the mark of a 'gentlemen' in an Islamic society is the acceptance of his

testimony in court (maqbul al-Shahadah). On the other hand, if a person does something dishonourable, or morally reprehensible, let alone criminal, his testimony might not be accepted in court. It is reported that a judge in Egypt, Taubah ibn Namir (115-120 A.H/ A.D 733-738) heard an action for divorcing a woman from her husband. The judge suggested to the husband that he provide her with a separation gift (mut'ah). The man refused, but the judge did not say anything because such a gift was not thought legally obligatory. Later, the man appeared in the judge's court as a witness in another case. But the judge would not accept his testimony because, in the previous case, he had refused to be charitable and God-fearing. [54]

One factor that has to be kept in mind in this case is that even to be a witness one has to be of 'adala (of good character). Thus to be a qadi, 'adala is more needed. Apart from the definitions given in chapter two, 'adl or justice in the sense of weight and measurement means that a certain thing is equal to another in weight or size. If you did justice between two things, you did justice between so-and-so, means that you have made two things between one another, to be equal or alike. Doing justice for certain things means straightening them out. It is said that justice means rating a thing as equal to a thing of another kind so as to make it like the latter. [55]

In the Sunna, the Prophet sought to explain the meaning of the abstract maxims of justice enunciated in the Qur'an by specific examples, expressed in legal and ethical terms, to distinguish between just and unjust acts as well as to set underlying rules indicating what the scale of justice ought to be. Since the Prophet dealt essentially with practical

questions, the theologians and other scholars found in the Sunna precedents on the strength of which they formulated their theories of justice. However neither in the Qur'ān nor in the Sunna are specific measures found to indicate what the constituent elements of justice are or how justice can be realized on earth. Thus the task of working out what the standard of justice ought to be fell upon the scholars who sought to draw its elements from the diverse authoritative sources and the rulings and acts embodied in the works of commentators. [56]

In discussing justice among people or equity before law Islam gives its citizens the right to absolute and complete equity in the eyes of the law. Islam is a universal religion not limited to any particular tribe, nation, race or region. All categories of actions in the Muslim world come under the qādī's jurisdiction. In the Muslim judicial system, there are no special jurisdictions for the burghers of a city, the nobles or the commoners. [57] For example, in the case of Caliph 'Alī with his coat of mail in the hands of a Christian 'Arab, it is reported that 'Alī in the days of his rule saw his coat of mail in the hands of a Christian 'Arab and took him to the qādī, Shurayḥ ibn al-Ḥārith, to decide about it. 'Alī told the qādi that the coat belonged to him, and he had neither sold it nor given it to anyone as a gift. The qādi asked the Christian what he had to say about the caliph's argument. The Christian said that the armour was his own and that at the same time he did not believe the caliph to be a liar. Qādī Shurayḥ asked 'Alī whether he had any witness to prove his claim. 'Alī did not have a witness. Qādī decided the case in favour of the Christian.[58] In Kedah the enactment stipulates that: [59]

"Nothing in this Enactment contained shall derogate from or affect the prerogative rights and powers of His Royal Highness the Sultan as the Head of the religion of the State as declared and set forth in the law of the Constitution of Kedah Darulaman and Federal Constitution".

There are many such examples in the judicial history of Islam. All of which clearly illustrate the independence of a judge against the powerful and even the sovereign. This goes to show why so much importance is placed on learning, piety and the righteousness of judges because only the qualities of 'adāla can produce qāḍīs who can resist the powerful while administering justice. It should be observed from the stipulation that the sulṭān is excluded from any kind of crimes.

From this again we see that Islam clearly insists that all officials of the state, whether they be the heads of religion or ordinary employees are equal in the eyes of the law. None of them is above the law or can claim immunity from it. The best example is that of a woman belonging to a high and noble family who was arrested in connection with a theft. The case was brought to Muḥammad, and it was recommended that she be spared the punishment of theft. The Prophet Muḥammad replied, "the nations that lived before you were destroyed by God because they punished common men for their offences and let their dignitaries go unpunished for their crimes; I swear by Him (God) who holds my life in his hand that even if Fāṭimah, the daughter of Muḥammad, had committed this crime I would have her hand amputated ". 60

Ijtihād

In discussing this condition, I quote S. Hungronje, 'in order to qualify for appointment as a qādī, he must to some degree be a mujtahid'.[61] S. Hungronje raised the question of what degree of ijtihād. Humaidan defined this limitation as the requirement that he did not judge any case in any way which might contradict the regulations which had been laid down in the Qur'ān and the tradition of the Prophet, or the agreement of the majority of Muslim scholars. He would be able to use his own judgment on the points where Muslim scholars had different opinions and choose between the views of the four schools where they differed. [62]

According to the rules governing Kedah appointments, there is no such qualification. It is true that finding somebody truly mujtahid is very difficult. Accordingly, I would say that ijtihād is a necessary condition for a qādī and that a qādī has to be mujtahid. The importance of this is that a qādī during his time of office should settle problems according to the Qur'ān, Sunna, Ijmā' and by using his own judgment.

Gaudefroy-Demombynes stated that the doctrine of ancient time held that the qādīs had a perfect knowledge of Sharī'a but that, later , it was not possible to find a sufficient number of men possessing an adequate knowledge. The four orthodox cults then decided in differents ways; and so it came about that it was accepted that, after all, knowledge of the law by a qādī was a matter of secondary importance....". [63]

Ḥumaidan in his writing argued that it was not because of the shortage of men that the Muslim judge had been restricted in his discretion to his own school. Anyone who would administer justice had to possess some knowledge of the Sharī'a and a judge who was ignorant of this law could not carry out his duties. Knowledge of this law was necessary for later judges, though not on the same scale as the early judges. No one as far as the theorists were concerned had said that the knowledge which the judge was required to possess was of secondary importance, regardless of Demombynes' statement. He argued that Demombynes neither gave any clear idea of the origin of this opinion, nor did he mention any reference for further research. [64]

Generally the qāḍīs are prescribed, as noted earlier, certain powers and they have jurisdiction only on such matters. Their decisions must not contradict the Federal Constitution. The qāḍī is not an instrument for creating law but only an instrument for applying the law. In giving judgment, qāḍīs are provided with the Maḥkamah Sharī'a Enactment. Their judgments have to comply with it and they have to follow what is stated in the enactment. Any action beyond the enactment is invalid. At this stage, therefore, both the mujtahid and muqallid have to follow the rules laid down by the government. In this particular case, the Ḥanafī view is more suitable.

Ijtihād, according to Abū Ḥanīfa, is not a necessary or essential condition for the candidate for the office of qaḍā'. But Ḥanafīs still insist that the qāḍī has to posses a high knowledge of Sharī'a. This is first reasonable since that finding a mujtahid is very difficult nowadays, especially one interested in jurisdiction, secondly, the government has

laid down the procedure and the rules to be followed. It is better to say that this does not demand the high qualification of ijtihād to be a qādī. If there were very strict insistence on this qualification, it would be impossible to find the requisite number of people capable of being mujtahid. Although there exist many difficulties in finding a mujtahid, the one person who can judge any problem which might not contradict the regulations laid down in the Qur'ān, Sunna or the agreement of the majority of Muslims, and able to use his own reasoning to settle the problem, should be given the opportunity of becoming a qādī.

One important point which must be stressed here is the school (madhhab) of the qādī. As noted earlier, the Majlis and State Legal Committee are responsible for enacting the law. It is provided that in making any ruling the Majlis and the State Legal Committee shall ordinarily follow the orthodox tenets of the Shāfi'ī school. However, if it is considered that the following of such orthodox tenets will be opposed to the public interest, the majlis or State Legal Committee may, unless the ruler (sultān) otherwise directs, follow the less orthodox tenets of Shāfi'ī. If it is considered that the following of either the orthodox or the less orthodox tenets of the Shāfi'ī school will be against the public interest, the Majlis or State Legal Committee may, with the special sanction of the ruler (sultān), follow the tenets of any of the three other schools of law, as may be considered appropriate. [65]

To conclude, the qādis are restricted to the Shāfi'ī school. The other schools of thought can be referred to only in the event where the more or less authoritative Shāfi'ī school fails to solve a problem. As a matter of fact, some theories from other schools can be found to be practised

throughout the states, such as the subject of payment of zakāh al-fiṭr where a Muslim is allowed to pay in money form. According to the Shāfi'ī school such zakāt must be paid in kind, such as rice and wheat. [66]

Legal practice, as may be gathered from al-Kindi's account of the early judges of Egypt, reflected and accentuated the controversies between scholars. Some qāḍīs apparently evinced a regard for doctrines other than those of the school to which they belonged. For example, the Ḥanafī Ibrāhīm ibn al-Jarrah, qāḍī from A.D 829-826, was in the habit of noting the variant views of Abū Ḥanīfa, Mālik and others on the back of the case record and marking the one he preferred as an indication to his clerk that the decree was to be prepared on that basis. That the rivalry between the scholars could cause considerable frustration to litigants is shown by the case concerning the 'House of the Elephant', which occupied the attention of various qāḍīs of Egypt over the span of more than a century. The question concerned whether or not the word 'descendants' in a family settlement included the plaintiffs who were the issue of the settlor's daughter. Under Ḥanafī law, which recognises in many respects the importance of the cognate relationship, 'descendant' would naturally include the daughter's children, while the word would not be so construed under Mālikī law, where the agnate relationship is generally paramount. Thus the Mālikī qāḍī Hārūn dismissed the plaintiff's claim in 835. Ten years later, his Hanafī successor gave judgment for the plaintiffs, only to have his decision in turn reversed by the Mālikī al-Ḥārith in 859. Thereupon the plaintiffs appealed to the caliph who, on the advice of a commission of Ḥanafī jurists appointed to review the case, ordered the reversal of al-Ḥārith's decision and entry and made final judgment for the plaintiffs. [67]

The rules and application form state that the highest qualifications to be a qāḍī is a Bachelor Degree. No specific requirements are mentioned, such as knowledge of the 'Arabic language, the Qur'ān, sunna or the requirements needed to be a mujtahid as discussed in chapter two. However it is common for the appointment of qāḍī to be given to a person who has completed his religious studies in an 'Arabic school in Saudi Arabia or Cairo. [68] Certainly we accept that they know the 'Arabic Language, but are they suitable to be called mujtahid.

Knowledge of this law is necessary for a qāḍī although to a lesser extent than for earlier scholars. Anyone who administers justice has to possess some knowledge of Islamic law. A qāḍī ignorant of this law could not carry out his duties.

Age

With regard to the qualifying age for the post of qāḍī, the application form has set a limit of between forty years and fifty years old, although it does not mention a particular age. It is important, however, to understand that the completion of a first degree is required. In Malaysia, the education system normally ends with a first degree between the ages of twenty-three and twenty-fife years old. By that time, most people are beyond the age of puberty and sane.

Footnote

1. Ahmad Ibrahim and Ahilemah, op.cit,. p. 63.

2. 'Majlis' means the Majlis Agama Islam (Council of Religion) Negeri Kedah Darulaman constituted under section 4 of the Administration of Muslim Law Enactment 1962.

3. Mahkamah Sharī'a Enactment, (Kedah) 1983, Sec. 18 (1).

4. ibid,. Sec. 19 (2)

5. ibid,. Sec. 21.

6. Ahmad Ibrahim and Ahilemah, op.cit,. p. 62. ; Mahmud Saedon, Bidangkuasa Mahkamah Sharī'a, Journal Hukum, Jilid VII. Mac 1990. p. 11.

7. Mahkamah Sharī'a Eanactment, 1983, Sec. 22 (1).

8. ibid,. Sec. 22 (2) , (3).

9. ibid,. Second Schedule Sec. 27.

10. ibid,. Sec. 6 (1). ; Islamic Civil Procedure, 1979, Sec. 5, 227.

11. Mahkamah Sharī'a Enactment, 1983, Sec. 8 (1).

12. ibid,. Sec. 126-129, 132.

13. Nawawī , op.cit,. p. 517. ; Sayyid Sābiq, op.cit,. p. 443.

14. Q , 2 : 283.

15. Q , 4 : 15

16. Ibn Qayyim al-Jawziyya, op.cit,. p. 92.

17. ibid,. p. 91.

18. Nawawī, op.cit,. p. 516. ; Sayyid Sābiq, op.cit,. p. 436.

19. Nawawī, ibid,. pp. 515-516. ; Ruxton, op.cit,. pp. 293-295.

20. Sayyid Sābiq, op.cit,. pp. 428-430. ; Sharbīnī, Iqnā', p. 427.

21. Q , 2 : 282. ; Ṭabarī, Jāmi' al-Bayān, loc.cit,. pp. 116-126. ; Schacht, An Introduction, p. 193.

22. Shāfi'ī, Umm, pp. 254-258.

23. Islamic Civil Procedure Enactment, (Kedah) 1979, Sec. 8 (2).

24. ibid,. Sec. 116 (1).

25. Mahkamah Sharī'a Enactment, 1983, Sec. 14 (1).

26. ibid,. Sec. 10 (2).

27. ibid,. Sec. 10 (3).

28. ibid,. Sec. 13.

29. Ahmad Ibrahim and Ahilemah, op.cit,. p. 69.

30. Sharī'a Criminal Procedure Enactment, (Kedah) 1988, Sec. 148.

31. Justifikasi Menaikkan Taraf, Pejabat Qāḍī, Alor Setar. Kedah ; Carlo Cardalora, op.cit,. p. 449.

32. ibid,.

33. ibid,.

34. Hooker, Personal, p. 25.

35. Sharī'a Criminal Procedure Enactment, 1988, Sec. 8.

36. ibid,. Sec. 25.

37. F. C. 122B (1).

38. Mahkamah Sharī'a Enactment 1983, Sec. 11 (1) , (2). , 18 (1).

39. JPA Sulit (confidential) 324/14/1/Klt. 2/(38)

40. ibid,.

41. Q , 4 : 141.

42. E. Tyan, op.cit,. p. 244.

43. ibid,. pp. 337-338.

44. ibid,. pp. 243-244.

45. Ann K. S. Lambton, op.cit,. p. 206.

46. Q , 4 : 61.

47. Q , 38 : 26.

48. Q , 5 : 8.

49. Q , 4 : 135.

50. Khadduri, Justice, p. 8.

51. Ibn Manẓūr, op.cit,. vol : XI, pp. 431-432. ; Lane-Lexicon, op.cit,. vol : V pp. 1972-1973. ; Khadduri, ibid,. pp. 7-8

52. Gaudefroy-Demombynes, op.cit,. p. 150.

53. Norman Calder, Ikhtilāf and Ijmā' in Shāfi'ī's Risāla. Studia Islamica, vol. 58. 1983. pp. 60-61.

54. Nicholas Heer, op.cit,. pp. 75-76.

55. Ibn Manẓūr, op.cit,. p. 432. ; Lane-Lexicon, op.cit,. p. 1973. ; Khadduri, Justice, p. 8

56. Khadduri, ibid,. pp. 10-11.

57. E. Tyan, op.cit,. p. 242.

58. Sayyid Sābiq, op.cit,. pp. 416-417.

59. Sharī'a Criminal Procedure Enactment, 1988. Sec. 4

60. Gertrude H. Stern, Muḥammad's Bond with the Women, B.S.O.A.S, vol : 10, 1940-1942. p. 12

61. S. Hurgronje, op.cit,. p. 288.

62. Humaidan, op.cit,. p. 32.

63. Gaudefroy-Demombynes, op.cit,. p. 150.

64. Humaidan, op.cit,. pp. 31-32.

65. Ahmad Ibrahim, The Administration of Muslim Law in South East Asia, Islamic Culture, 1972, Vol : 46. p. 251.

66. 'Abd al-Raḥmān, al-Juzairy, Kitab al-Fiqh 'alā al-Madhāhib al-Arba'ah. vol. 1. Cairo : Dār al-Da'wah. 1939. pp. 627-630.

67. Coulson, A History,. pp.87-88.

68. Abdul Razzak Ahmad, op.cit,. p. 130.

Chapter VI

Problems faced in implementing Islamic Law

Before independence, as we know, Islamic Law and the office of qāḍī itself was restricted by some imposed jurisdiction. This phenomenon remained after independence. It was hoped that the sulṭān would reverse the law, but this did not happen. The British still retained their positions in the Islamic legal administration. In this chapter I will discuss the problems faced in implementing Islamic law and also the way in which these difficulties were overcome.

1. Constitution.

The first and foremost is the constitution. The Federal Constitution is likely to follow English Law although the constitution regards Islam as the religion of Malaysia, but on the other hand the legal, economic, political and administrative codes do not follow Islamic rules. Ahmad Ibrahim, accordingly suggested three solutions; that section 3 of the Federal Constitution should be abrogated, section 3 (1) of Federal Constitution should state that anything that goes contrary to Islamic Law is unacceptable and finally in deciding cases all courts should refer to Islamic law .[1]

However in Kedah and Malaysia written law (federal law) has to be followed. Qāḍīs have to follow the written law, neither their decision nor their action can be contrary to the written law. It is, accordingly, the political authority which defined the scope and nature of the qāḍī's

jurisdiction. Naturally the decisions given and actions taken by the qāḍī are subject to the approval of the constitution. One example gives clear evidence of how the written law is significant. In one case, a defendant was guilty of committing zinā and required the qāḍī to implement Islamic law, that is stoning, the qāḍī replied that, as far as the Muslim Law Enactment was concerned, there were no such punishments to be imposed. [2]

The constitution provides that Islamic law is restricted to personal law only and not to other matters. A question arises of how the Sharī'a can operate successfully when it is limited to personal status. To confine the Sharī'a to a particular area is to mutilate it. No legal system can operate successfully without the social, political, economic and administrative arrangements supporting it. For example, to create a place for the emergence of English law in Malaysia, the politics, economy, social values, educational system and even the moral concepts of English law were imported into the country. Moreover, even in the area of personal status, the Sharī'a, as we speak is not being implemented. For example, when society permits gambling, prostitution and alcoholism, it is quite clear that those who indulge in such pursuits will have unstable homes susceptible to breakdown. Thus, to create a Sharī'a court to decide cases arising from family difficulties without enforcing the social, moral and economic conditions which the law demands, means simply setting traps for individuals to fall into. So there is an obvious need to strengthen the moral, social and economic system, which means widening the scope of the Sharī'a.[3]

The Sharī'a is a complete scheme of life and an all-embracing social order where nothing is superfluous, and nothing is lacking. Another remarkable fact about the Sharī'a is that it is an organic whole. The entire scheme of life propound by Islam is animated by the same spirit and hence any arbitrary division of the scheme is bound to harm the spirit as well as the structure of the Sharī'a. In this respect it might be compared to the human body which is an organic whole. A leg pulled off the body cannot be called one-eighth or one-sixth man, because, after its separation from the living human body, the leg can no more perform its human function. Nor can it be placed in the body of some other animal with any hope of making it human to the extent of the limb. The same can be said in regard to the scheme of life envisaged by the Sharī'a. Islam signifies the entire scheme of life and not any isolated part or parts thereof. Consequently, neither can it be appropriate to view the different parts of the Sharī'a in isolation from one another and without regard to the whole, nor will it be of any use to take any particular part and bracket it with any other 'ism'. The Sharī'a can function smoothly and can demonstrate its efficacy if the entire system of life is practised in accordance with it and not otherwise. [4]

I will now proceed to give an opinion as to how to improve the status of the Sharī'a court in this country. The first and most important thing to be done is for the Federal Constitution legal system to be altered to suit the demands of Muslims. There are many ways to change it:

1) the importance and the high reputation accorded to English law in the Federal Constitution should be diminished. The fact is that English law is irrelevant to the Malaysian way of life. It is important for us as Muslims to realise that the imposition of English law upon us also means

the imposition of English morals. The only solution is to abolish the civil court and re-develop the Sharī'a court.

2) the Sharī'a court should be given more power. It cannot be denied that the power given to the Sharī'a court is very limited. Its jurisdiction is limited. The scope of jurisdiction should cover all Muslims in all cases criminal or civil. The confinement of Sharī'a to a particular area does not allow the qādī free judgment for he is required to follow the procedures laid down by the Enactment of Sharī'a Court No. 9 1962.

3) the Sharī'a should be given its rightful place in the Federal Constitution of Malaysia. The Sharī'a deserves such treatment not only because it belongs to Muslims but because as far as Muslims are concerned, it is the only system that can bring peace and harmony among people and give unity to human life. Malaysians, especially Muslims, should utilise the Sharī'a to the utmost.

4) the judiciary must also be reformed. The Islamic criteria applied to those to be appointed must be revived. These criteria must be based entirely on Islam and its commitment to justice and so forth. There must be an independent judiciary which is free to judicate without fear of interference from the government. The Federal Constitution should give the Sharī'a Court powers to apply Islamic law in deciding cases without interference.

To quote the Federal Constitution section 3 '.....but other religions may be practised in peace and harmony in any part of the Federation (Malaysia)'. [5] This peace and harmony is afforded to other religions but not to Islam. Thus, for Muslims to build mosques and other Islamic places they have to seek permission from the state or qādī. Other

religions, however, are allowed to build any place of worship without securing permission from the state. [6]

2. Muslim Individuals.

The second point concerns individual Muslims. Many Muslims are ignorant of the Sharī'a. This ignorance is a serious stumbling block to implementing Islamic law in Malaysia. For Muslims to be truly Islamic, the Sharī'a has to be applied as a complete comprehensive legal system. Submitting to another god besides Allāh amounts to the rejection of Islam. One verse of al-Qur'ān says that , "Those who judge not by the laws revealed by Allāh are unbelievers". [7]

It is widely believed that Islam is not suitable for curbing the growth of new problems. Muslim consider that the Sharī'a court is nothing and they do not respect it. There have been calls for reforming the way that the function of qadā' is used as a whole. Islam to the majority of Muslims in Malaysia consists of only the practice of prayer, zakāh and other religious duties. Thus, the root of the problem is a weak society which has facilitated the emergence of other laws which have affected Malays mentally and culturally. Finally Muslims should realise that no one can take them or their judiciary seriously if they do not take their religion seriously. Actually there are a group of people who do not bother themselves with any movements and ideology but support whatever group they believe can give them the most security.

The future of Muslim law in Kedah or in Malaysia depends on the people's government. Unfortunately the majority, including the

government, regard Islam as a religion of worship only. Development of Islam must be centred on the building of mosques, religious schools and other Islamic institutions. The attitude of the Muslim community may have been partly responsible for the type of judiciary system in Malaysia. The first question which arises regarding this refusal to adopt the Sharī'a court is how other religions can respect the Sharī'a court. Normally, most people judge a religion on the basis of those who profess it. [8] How can non-Muslims be encouraged to join Islam if Muslims themselves refuse to follow Islamic law. It is therefore mandatory for Muslims to show in their daily lives that they take Islam seriously and that they will not tolerate any form of abuse.

Apart from this, the attitudes of successive governments must also share responsibility for the situation which has arisen. They have believed in a separation of the state and Islam and in the Federal Constitution being a supreme law over everybody. [9] There are objections coming from Muslims that, as the Islamic laws were framed thirteen centuries ago in the light of the requirements of a primitive society, they cannot be of any use for a modern state of our age. The first Prime Minister in one statement believed that the introduction of such a system, which exists only in one 'Arab state, into a secular state like multi-racial and multi-religion Malaysia will be politically and economically disastrous. [10]

3. Education

English law and the English way of life has been readily accepted because of education. Most lawyers and judges today are graduates in English Law. They are trained in English Common Law and not in

Sharī'a. They, by virtue of their training, are incapable of appreciating the values which the Sharī'a upholds because they cannot see any good beyond the English Law. In Che Omar v. Prosecutors [11] the judge of the High Court stated that the word 'Islam' as stated in the section 3 of Federal Constitution, is limited to official ceremony only and does not bear on the other parts of religious life.[12]

Universities should produce lawyers and qāḍīs of high moral standards fit to fill the position of qaḍā'. Universities must produce persons of strong and dependable character who, while deciding a case in the light of Sharī'a, have their eyes fixed on God and are not at all swayed by greed, fear, personal interest or individual likes and dislikes, and who may not deviate from what they believe and know to be right out of any consideration whatsoever.

Our educational system is not based on 'aqīdah, Sharī'a and on Islamic background culture. So far our educational system is based on the colonial system. This system exists throughout all Malaysia and is impossible to uproot in a few years with only limited efforts to change it. As long as this continues, we cannot produce qaḍā' in the sense of Islamic rule. Moreover, it is no wonder that our universities nowadays produce only people who are oriented towards material achievements, position and prestige.

The educational system should be restructured to achieve our aims. At present there are two kinds of educational institution running simultaneously in Malaysia, religious schools and modern secular schools. However, these are incapable of producing people who might be able to

serve as qāḍī or magistrate. Efforts to free ourselves from the indoctrination of other systems must begin with education. The educational system should be based on Islamic rule and our background culture. To overcome this situation, the only alternative for education is to offer the subject of Sharī'a in all our universities and to oblige students to take it. It is a matter of shame for the universities that while some British and American universities teach the Sharī'a, only three universities in our country run courses on the Sharī'a. [13] This is a point which every Malaysian Muslim should realize.

I would like to bring forward the opinion given by Maudūdī on introducing Islamic law into Pakistan. I think his suggestion is not appropriate in Pakistan only but can also be applied in Malaysia and other Muslim countries as well. These suggestions are for the scholars and educationalists: 14

1) The first and basic reform is the provision for acquiring knowledge of 'Arabic in all schools and universities in Malaysia. This knowledge of 'Arabic would enable the students to study the Qur'ān, Ḥadīth and the fiqh.

2) Along with the teaching of 'Arabic, the students must also be made to study the Qur'ān and the Ḥadīth before beginning their education in Law so that they become capable of understanding the spirit and the broad outlines of the system of life envisaged by Islam.

3) The curicula of the law faculty must necessarily include the following three subjects: Principles of Islamic Jurisprudence; History of Islamic Jurisprudence ; and fiqh. Without mastering these three subjects, the students can neither gain a complete understanding of fiqh nor develop those qualities of sound reasoning which are a pre-requisite for

becoming good lawyers and jurists. They cannot otherwise become experts in law, capable of framing new rules and regulations, for our progressive state and capable of employing the correct modes of interpretation and analogous reasoning. They cannot pronounce judgments of the standard, clarity, vision, and depth envisaged by the legists. They will never be able to command the respect and whole-hearted approval of the people. Not only that, without fully understanding the principles of their own law, they cannot apply them to the new problems which will be cropping up every day and will be creating altogether new situations.

Muslim society as a whole, as well as students, should be taught the Sharī'a, and they should know that the Sharī'a is divided into the following general categories: [15]

1. 'Ibādāt (service to Allāh), as expressed in the so-called five pillars of Islam,

2. I'tiqādāt (beliefs), which consists of the six articles of Islamic faith,

3. Adab (ethics), which deal with virtues or moral excellences,

4. Mu'āmalāt (transactions), which deals with obligations between members in society, covers securities, partnerships, and transactions as well as all the details that fall under personal or family law such as marriage, dowry, divorce, guardianship, inheritance and so forth,

5. 'Uqūbāt (punishments) relating to the crime of theft, murder, adultery, slander and others.

Above all, Islam is the practical teaching of how to live one's life, and as such it seeks to embrace and direct all man's action. Everything which can happen to man, everything that he can do, falls into five

categories in Islam: Fard (obligatory), Sunna (recommended), Ḥarām (forbidden), Makrūh (disapproved) and Mubāḥ (indifferent). Every incident of daily life, manners and five daily ablutions, marital hygiene, intercourse, how to salute older people, are all covered by the five categories. [16] Islamic Law describes the relationship between a human and his God and between man and his fellow men. It is said that, 'Muslim law, in the most absolute sense, is the science of all things human and divine. It tells what we must render to Caesar and what to God, what to ourselves, and what to our fellows'. [17]

The Sharī'a should be taught to children at school. If children do not have an Islamic education and become Muslim in name only when they reach adulthood, they fail to understand and be part of Islam. They are likely to turn to other law and remain ignorant and unaware of Islam. These recommended adjustments to the system will realise the potential 'ulamā' and foster specialization in Islamic Law, learning it as a legacy for the next generation.

4. Candidates

The problem arising from the appointment of qāḍīs is that the vast majority of Muslim lawyers in Malaysia know the country's legal system but not the Sharī'a and Islamic juristic techniques. This results from their education. On the whole, Muslim lawyers received their legal education from universities which did not offer the Sharī'a system. One important factor which must be stressed here is the lack of specialized training in the Sharī'a. Consequently, some candidates suitable for judicial office, began to refuse offers of appointment and in due course it became the

practice that not only will they not seek office but that they flee from any involvement with it. It is important that in reforming the educational system, considerable importance must be given to the moral training of the qāḍī. Universities should produce lawyers and qāḍīs of high moral capacity who are fit to take the position of qaḍā'.

The attitude of the 'ulamā' may be changed. They have to observe and support the Sharī'a court. Although a changeover to Islamic Law cannot be made overnight, it is the duty of scholars to give their best thought to the problem and suggest and adopt practical steps to introduce Islamic law in a systematic way.

Suitable candidates refuse employment because of the heavy tasks and responsibility involved, and unencouraging pay scale, and the fact that service itself does not follow the rules of qaḍā' in Islam. This situation has, of course, arisen from a shortage of candidates for the post, with the result that the Public Services Department has had to appoint less competent applicants.

The second point of interest is that to be appointed qāḍī it is necessary to apply and attend an interview. This process should be altered so that the authorities can select the most capable candidates on their qualifications. This should allow for an updating of the Sharī'a court. Currently suitable people for the post do not apply, creating free access for unqualified candidates to secure the posts. It is thus, incumbent upon the sulṭān or another authoritative body to select and appoint qāḍīs who are qualified.

The other problem to arise is that there is no course or training for the newly recruited qāḍī. The newly recruited qāḍīs do not undergo the special training which is related to the court. Qāḍīs acquire administrative skills from the advice given by their senior members and through experience. Qāḍīs are lacking in training and have limited exposure to the modern techniques of administration. Thus, it is not surprising that the level of qāḍī in understanding the administration is not satisfactory compared with other government officers.

5. Not Standardised

On the question of Islamic law as practised in Kedah and other states in Malaysia we noticed it applies only to Muslim family law and some aspects of criminal law. The Muslim Law Enactment opened up the opportunity for all the qāḍīs to find out for themselves answers regarding Islamic laws. It is found that qāḍīs are obliged to give judgment in accordance with Ḥukm Shar'. Therefore, in giving any judgment the qāḍīs have to refer to the books of the Shāfi'ī school. There are no standard books used by qāḍīs. To overcome this deficiency the state legislative body should specify certain books that should be used by all qāḍīs. What is really needed is for a body of scholars to be authorised to take detailed stock of all the writings left by our ancestors and to re-edit them in the form of modern books of law.[18] These books would then be translated into our language.

6. Enactment

The enactment of Muslim law should be enacted by the right people. Currently all the laws regarding Islamic law are enacted by the state legislative assembly whose members do not fully understand Islamic law. [19] It is necessary therefore to appoint a body of Islamic scholars and experts of model legal thought, entrusted with the task of the codification of the Islamic Law

7. The Problem of Non-Muslim

The other objection is that there is a substantial non-Muslim population living in Malaysia. The questions are raised about non-Muslims in our country. Actually such questions are not from non-Muslims but from the Muslims. Many of the Muslims misunderstand the Sharī'a and although there are objections from non-Muslims, the important thing here is the Muslim community itself. They should know that in Islam, the non-Muslim has the right to live. And there are differences between the 'law of the land' and personal law which enunciated the principle that in a multinational state the personal affairs of a a man should be settled according to his own personal law. The people should know that the law with which we are concerned here is the law of the land and not the personal law of any community.

In personal matters every community is welcome to adopt its own personal law as happens now. The Sharī'a provided rules for non-Muslims residing in the Islamic state only insofar as it governed their relations with Islam, but it did not require them to conform to the Muslim

way of life while they resided among Muslims. The laws regulating prayer, marriage, divorce, and inheritance were not binding upon non-Muslims, unless they chose to conform to them. [20] Therefore no group of non-Muslims should feel afraid that we would thrust our religious laws on them in their personal matters.

In personal cases it is always preferable for non-Muslims to bring their lawsuits before a judge of their own sect who will deal with their disputes in accordance with their own faith and by the application of their own laws. Non-Muslim litigants, however, can bring their cases before a Muslim judge but his competency to hear such cases is a controversial subject among Muslim jurists. One school said that a Muslim judge must not refuse the request of non-Muslims to deal with their cases. Another school asserts that the Islamic law should be applied to non-Muslims in the same way as it is applied to Muslims. [21]

Footnote

1. Hamid Jusoh, Pemakaian Undang-Undang Islam Kini dan Masa Depannya di Malaysia, Al-Ahkam, vol 1. Kuala Lumpur : Dewan Bahasa dan Pustaka. 1990. pp. 80-81.

2. Mahmud Saedon Awang Othman, Kearah Mempertingkatkan Mahkamah Shari'a. Journal Hukum. Jilid V. Sept. 1984. p. 21.

3. Ibrahim K. R. Sulaiman , The Shari'a and The Nigerian Draft Constitution, Journal of Islamic and Comparative Law, vol : 10, 1981. pp. 42-43.

4. Ibrahim, op.cit,. p. 43. ; Sayyid Abū Al-A'lā' al-Maudūdī, The Islamic Law and Constitution, translated and ed. Khurshid Ahmad, Lahore : Islamic Publications Ltd. 1980 (7th edition) pp. 48-49.

5. Art. 3 (4) of F. C.

6. Hamid Jusoh, op.cit,. p. 77.

7. Q, 5 : 44.

8. Hamid Jusoh, op.cit,. p. 78.

9. Art. 4 of F. C.

10. Muhammad Suffian,, An Introduction to The Legal System of Malaysia. Petaling Jaya : Fajar Bakti. 1988. p.81

11. 1988 2 M. L. J. 55.

12. Hamid Jusoh, op.cit,. p. 74.

13. National University of Malaysia, University of Malaya and International Islamic University.

14. Al-Maudūdī, op.cit,. pp. 111-112

15. Cesar Adib Manjul, Problems In The Implementation of Shari'a Personal Laws in Muslim Minority Countries in The Far East, Journal Of Islamic and Comparative Law, vol : 2, 1978. p. 109.

16. ibid,.

17. Duncan B. MacDonald, Development of Muslim Theology, Jurisprudence and Constitutional Theory, London : Routledge and Sons, 1903. p. 66.

18. Al-Maududi, op.cit,. pp. 105-107

19. Art. 73 (B) of F. C.

20. Majid Khadduri, op.cit,. pp. 360-361.

21. Muḥammad 'Alā'uddīn al-Azharī, The Theory and Sources of Islamic Law for non-Muslim. Dacca : Research and Publication Madrasah Alia. 1962. pp. 60-61.

BIBLIOGRAPHY

Arabic.

'Abd al-Bāqī, Muḥammad Fu'ad,

Al-Lu'lu' Wa al-Mirjān. 3 volumes. Cairo : 'Īsa al-Babi al-Halabī. 1949/ 1368.

'Abd al-Mun'im, Fu'ad,

Ḥukm al-Islām fi al-Qaḍā' al-Sha'bi. n.p. 1973/1393.

'Abd al-Qadīr, 'Alī Ḥasan,

Naẓrah 'Āmmah fī Tā'rīkh al-Fiqh al-Islāmī. Cairo : Maṭba'ah Al-'Ulūm, 1942.

'Abd al-'Āl 'Utwah,

Muḥāḍarāt fī Niẓām al-Qaḍā' fi al-Islām. Cairo: Maṭba'ah al-Aḥkām. 1969-1970.

Abū Dā'ūd Sulaiman b. al-Ash'ath al-Sijistāni,

Sunan Abī Dā'ūd. Cairo : Maṭba'ah Muṣtafā al-Bābī al-Ḥalabī. 1952.

Abū al-Qāsim Najm al-Dīn Ja'far Ibn al-Ḥasan ,

Sharā'i al-Islām fi Masā'il al-Ḥalāl wa al-Ḥarām. 4 volumes. ed. 'Abd al-Ḥusain 'Alī. n.p. Maṭba'ah al-Adab. 1969.

Abū Zahrah, Muḥammad,

Uṣūl al-Fiqh. Cairo : Dār al-Fikr al-'Azali. n. d

Al-'Ainī, Abū Muḥammad Maḥmūd ibn Aḥmad,

Al-Binayah fī Sharḥ al-Hidāyah. Cairo: Dār al- Fikr. 1981/1401.

'Alī, Yūsuf,

The Holy Qur'ān : Text, Translation and Commentary. Lahore : Ahmadiyya Anjuman Isha'at al-Islam. 1951.

Al-Āmidī, Saif al-Dīn Abū al-Ḥasan 'Alī bin Abī 'Alī bin Muḥammad,

Al-Iḥkām fi uṣūl al-Aḥkām. 3 volumes. Cairo : Maṭba'ah Muḥammad 'Alī Ṣubaiḥ wa-Awlāduhu. 1968.

_____ . 4 volumes. ed. Sayyid Jumaili, Cairo: Dār al-Kitāb al- 'Arabī . 1984.

Al-Andalusī, Al-Qāḍī Abū al-Walīd Sulaimān bin Khalaf bin Sa'd bin Ayyūb bin Wāris al-Bājī,

Al-Muntaqā. Cairo : Maṭba'ah al-Sa'ādah. 1332.

Al-Andalusī, Muḥammad bin 'Asīm,

Tuhfat al-Ḥukkām, or Gift for the Judges. translated by Bello Muḥammad Daura. Zaria : Ahmadu Bello Univ. Press. 1989.

'Arnūs, Maḥmūd Muḥammad,

Tā'rīkh al-Qaḍā' fi al-Islām. Cairo: al-Maṭba'ah al-Miṣriyyah. 1934.

'Arslān, Muḥammad Shahīr,

Al-Qaḍā' wa al-Quḍāt. Beirut: Maṭba'ah Ma'tuq. 1967.

'Awaḍ, Ibrāhīm Najīb,

Al-Qaḍā' fi al-Islām. Cairo: Dār al-Nahḍah al-'Arabiyya. 1975.

Al-Bahī, Aḥmad 'Abd al-Mun'im,

Tā'rīkh al-Qaḍā' fi al-Islām. Cairo : Lajnat al-Bayān al-'Arabī. 1970.

Al-Bahuti, Mansur Ibn Yunus Ibn Idris,

Kashshaf al-Qina' 'an Matn al-Iqna'. Cairo: Dar al-Fikr. n.d

Al-Rawd al-Murbi' 'an Zad al-Mustaqni'. Cairo . 1352.

Al-Bakr, Muhammad 'Abd al-Rahman,

Al-Sultatu al-Qada'iyyah wa Shakhsiyyat al-Qadi. 1988/ 1408.

Al-Bukhari, Abu 'Abd al-Allah bin Isma'il bin Ibrahim,

Sahih Bukhari. 9 Volumes. Cairo : Matba'ah Mustafa al-Babi al-Halabi. 1958.

Al-Farra', Abu Ya'la Muhammad ibn al-Husain,

Al-Ahkam al-Sultaniyyah. Surabaya Indonesia: Maktabah Ahmad ibn Sa'd. 1974/ 1394.

Al-Ghazali, Abu Hamid Muhammad ibn Muhammad,

Al-Mustasfa Min 'Ilm al-Usul. Cairo : Al-Matba'ah al-Fanniyya al-Muttahada. 1971.

Hasan, Hasan and 'Ali Ibrahim,

Al-Nuzum al-Islamiyyah. Cairo : Matba'ah al-Nahdah. 1939.

Ibn 'Abidin, Muhammad Amin ,

Hashiyah. Cairo: Matba'ah Mustafa al-Babi al-Halabi. n.d.

Ibn Abi al-Damm, Shihab al-Din Abu Ishaq Ibrahim ibn 'Abd al-Allah,

Adab al-Qada', ed. Muhammad Mustafa al-Zuhairy Damascus : Majma' al-Lughat al-'Arabiyyah. 1975/ 1395.

_____, ed. Muhammad 'Abd al-Qadir Ahmad 'Ata', Beirut : Dar al-Kutub al-'Alamiyyah, 1987.

Ibn Daqīq al-'Īd, Taqiuddīn bin Fatḥ ,

Iḥkām al-Aḥkām Sharḥ 'Umdat al-Aḥkām, 4 volumes. Damascus : Idārah al-Ṭibā'ah al-Munīrah, 1342.

Ibn Farḥūn, Burhān al-Dīn Ibrāhīm,

Tabṣirat al-Ḥukkām ('alā Fatḥ al-'Alī al-Mālik). 2 volumes. Cairo : Maṭba'ah Muṣṭafā al-Bābī al-Ḥalabī wa-Awlāduhu, 1958-59.

Ibn Khaldūn,

The Muqaddimah. translated by Franz Rosenthal, abridged and edited by N. J Dawood. London: Routledge and Keegan Paul. 1962.

Ibn Hammām, Kamāluddīn Muḥammad b. 'Abd al-Walīd,

Al-Fatḥ al-Qadīr. Cairo : Maṭba'ah al-Kubrā al-Amīriyya. 1316.

Ibn Ḥajr al- 'Asqalānī, Shihāb al-Dīn Abū al-Faḍl,

Fatḥ al-Bārī bi Sharḥ al-Bukhārī. 17 volumes. Cairo : Maṭba'ah Muṣṭafā al-Bābī al-Ḥalabī. 1387/ 1959.

Ibn Ḥazm, Abū Muḥammad 'Alī bin Aḥmad bin Sa'īd ,

Al-Muḥallā. 9 volumes. Cairo : Idārat al-Ṭibā'ah al-Munīriyyah. 1351.

Mu'jam Fiqh Ibn Ḥazm al-Ẓāhirī. 2 volumes. Damascus : Maṭba'ah Jāmi'ah. 1966.

Ibn Juzaiy, Muḥammad bin Aḥmad,

Qawānīn -l-Aḥkām al-Shari'a wa Masā'il al-Furū' al-Fiqhiyyah. Beirut : Dār al-'Ilm, 1968.

Ibn Majah, Abu 'Abd al-Allah Muhammad bin Yazid,

Sunan ibn Majah. 2 volumes. ed. Muhammad Fu'ad 'Abd al-Baqi. Cairo: Dar Ihya' al-Kutub al- 'Arabiyya. 1372/ 1952.

Ibn Manzur,

Lisan al- 'Arab. 15 volumes. Beirut : Dar Sader. n.d.

Ibn Qayyim al-Jawziyya, Shams al-Din Abu 'Abd al-Allah Muhammad Ibn Abi Bakr,

I'lam al-Muwaqqi'in 'an rabb al-'Alamin. 4 volumes. ed. Muhammad Muhi al-Din 'Abd al-Hamid. Cairo: Matba'ah al-Sa'adah. 1955/1374

Ibn Qudama, Muwaffaq al-Din 'Abd al-Allah,

Al-Mughni. Riyad: Maktabah al-Riyad al-Hadithah. 1981

Ibn Rushd, Muhammad bin Ahmad bin Muhammad,

Bidayat al-Mujtahid wa Nihayat al-Muqtasid. 2 volumes. Cairo: Matba'ah Mustafa al-Babi al-Halabi. 1379/ 1960.

Al-Jundi, Khalid bin Ishaq,

Mukhtasar al-Shaikh Khalil ibn Ishaq fi al-Fiqh. Matba'ah Daulah. 1900.

Al-Juzairy, 'Abd al-Rahman,

Kitab al-Fiqh 'ala al-Madhahib al-Arba'ah. 5 volumes. Cairo : Dar al-Da'wah. 1939.

Al-Kasani, 'Ala'uddin Abu Bakr ibn Mas'ud

Bada'i al-Sana'i fi Tartib al-Shara'i. Cairo : Matba'ah al-Imam . 1968.

Khallāf, 'Abd al-Wahhāb,

'Ilm Usūl al-Fiqh. 15th edition. Kuwait : Dār al-Qalam. 1983/1403.

Al-Khassāf, Abū Bakr Ibn 'Amr Al-Shaibāni,

Adab al-Qādī. Cairo : Matba'ah al-Jablāwī. 1979.

Al-Khudari, Muhammad ,

Ta'rīkh al-Tashrī' al-Islāmi. Cairo : Matba'ah al-Sa'ādah. 1964.

Madkūr, Muhammad Salām,

Al-Qadā' fi al-Islām . Cairo: Dār al-Nahdah al- 'Arabiyyah. 1384.

Mansūr, 'Alī 'Ali,

Nuzum al-Hukm wa al-Idārah fi al-Sharī'a al-Islāmiyya wa al-Qānūn al-Wad'iyya. Beirut : Dār al-Fath. 1971.

Al-Marghinānī, Burhān al-Dīn Abū al-Hasan 'Alī Ibn Abī Bakr Ibn 'Abd al-Jalīl,

Al-Hidāyah Sharh Bidāyat al-Mubtadi'. Cairo : Matba'ah Mustafā al-Bābī al-Halabī . n.d

Al-Māwardī , Abū al-Hasan 'Alī ibn Muhammad ibn Habīb,

Adab al-Qādī. 2 volumes, Baghdad:Matba'ah al-Irshād. 1391/1971-72.

Al-Ahkām al-Sultāniyyah. Cairo: Matba'ah Mustafā al-Bābī al-Halabī. 1386/ 1966 .

Mursī, Fārūq 'Abd al-'Alīm,

Al-Qadā' fi al-Sharī'a al-Islāmiyyah, Hukmuhu, wa Shurūtuhu, wa Adabuhu. Jeddah: 'Alam Al-Ma'rifah. 1985/ 1405.

Mushrifah, 'Aṭiyah Muṣṭafa,

Niẓam al-Ḥukmi bi Miṣr fi 'Aṣr al-Fāṭimiyyin. Cairo: Dār al-Fikr al-'Arabi. n. d.

Muslim bin Ḥajjāj al-Qushairi,

Ṣaḥiḥ Muslim. 4 volumes. Cairo: Dār Iḥyā' al-Kutub al-'Arabiyya. 1955/ 1375.

Mutawalli, 'Abd al-Ḥamid.

Mabādi Niẓam al-Ḥukm fi al-Islām. n.p. : Dār al-Ma'ārif. 1966.

Al-Nawawi, Muhi al-Dīn Abū Zakaria' Yaḥyā bin Sharaf,

Minhāj al-Ṭālibīn, translated into English from the French Edition of L. W. C. Van Den Berg, by E. C. Howard, London : W. Thacker and Company. 1914.

Al-Nubahi, Abū al-Ḥasan ibn 'Abd al-Allāh ibn al-Ḥasan,

Ta'rikh Qudāt al-Andalus. Beirut : Dār al-Afāq al-Jadīdah. n. d.

Al-Qāsimi, Ẓāfir ,

Niẓām al-Ḥukmi fi al-Shari'a wa al-Ta'rikh al-Islāmi, 2 volumes. Beirut : Dār al-Nafā'is. 1983.

Qirā'ah, 'Alī Maḥmūd,

Al-Uṣūl al-Qaḍā'iyyah fi al-Murafa'āt al-Shar'iyyaah. Cairo: Maktabah Miṣr. n. d.

Al-Qurṭubi, Abū 'Abd al-Allāh Muḥammad bin Aḥmad al-Anṣāri,

Al-Jāmi' li-Aḥkām al-Qur'ān. 20 parts in 10 volumes. Cairo: Maṭba'ah Dār al-Kutub al- Miṣriyya. 1957.

Sābiq, Sayyid,

Fiqh al-Sunnah. 3 volumes. Beirut: Dār al-Kitāb al-'Arabī. 1971/1391.

Al-Sarakhsī, Abū Bakr Muḥammad Ibn Aḥmad,

Al-Mabsūt. 30 parts in 15 volumes. Cairo: Maṭba'ah al-Sa'ādah. 1324/ 1906.

Shalabī, Aḥmad,

Ta'rīkh Tashrī' al-Islāmi wa Ta'rīkh al-Nuẓum al-Qadā'iyyah fi al-Islām. Cairo: Maktabah al-Miṣriyyah. n. d.

Al-Shāfi'ī, Muḥammad bin Idrīs ,

Al-Umm. 8 volumes. Cairo: al-Sharikah al-Fanniyya al-Muttaḥada. 1961.

Al-Risālah. ed. Aḥmad Muḥammad Shakir. Cairo: Maktabah wa Maṭba'ah al-Bābī al-Ḥalabī wa-Awlāduhu. 1940.

Islamic Jurisprudence : Shafi'i's Risala, English translation and introduction by Majid Khadduri. Baltimore : Johns Hopkins University Press. 1961.

Al-Sharbīnī, Muḥammad ibn Aḥmad al-Khaṭīb,

Al-Iqnā' fi Ḥal al-Faẓ Abi Shujā'. Cairo: Maṭba'ah Dār Iḥyā' al-Kutub al-'Arabiyya. 1950.

Al-Sharbīnī , Shamsuddīn Muḥammad bin Aḥmad,

Al-Mughnī al-Muḥtāj. 4 volumes. Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1377.

Al-Shawkānī, Muḥammad bin 'Alī bin Muḥammad,

Nail al-Awṭār, 8 volumes, Cairo: Maṭba'ah al-'Uthmāniyyah, 1457.

Irshād al-Fuḥūl ilā Taḥqīq al-Ḥaqq min 'ilm al-Uṣūl, Cairo : Maṭba'ah al-Bābī al-Ḥalabī, 1937.

al-Shawārabī, 'Abd al-Ḥamīd,

Qawā'id al-Ikhtiṣāṣ al-Qaḍā'i fi Ḍau al-Qaḍā' wa al-Fiqh. Iskandariah: al-Ma'ārif. 1985.

Al-Shirāzī, Abū Isḥāq,

Al-Muhazzab, 2 volumes. Cairo: Maṭba'ah al-Bābī al-Ḥalabī. 1358.

Al-Simnānī, Abū al-Qāsim 'Alī bin Muḥammad bin Aḥmad,

Rauḍat al-Quḍāh wa Ṭarīq al-Najjāt. Baghdad : Maṭba'ah As'ad. 1970.

Al-Ṭabarī, Abū Ja'far bin Jarīr ,

Ta'rīkh al-Ṭabarī, 30 volumes. ed. Muḥammad Abū al-Faḍl Ibrāhīm. Cairo: Dār al Ma'ārif. 1960.

Jāmi' al-Bayān, 30 volumes. Cairo: Maṭba'ah al-Ḥalabī, 1954.

Al-Ṭarābulsī, 'Alā'uddīn Abū Ḥasan 'Alī bin Khalīl,

Mu'īn al-Ḥukkām. Cairo: Maṭba'ah Muṣṭafā al-Bābī al-Ḥalabī,1393.

Ṭawāna, Sayyid Muḥammad Mūsā,

Al-Ijtihād wa Madā Ḥājatina Ilaihi fi Hadhā al-'Aṣr. Cairo: Dār al-Kutub al-Ḥādithah. n.d

Al-Wāhidī, Abū al-Ḥasan 'Alī bin Aḥmad,

Asbāb al-Nuzūl. Maṭba'ah Dār al-Ittihād al-'Arabī. 1388.

Wakī', Muḥammad Ibn Khallāf,

Akhbār al-Quḍāh, Beirut : 'Alam al-Kutub. n.d.

Wāṣil, Fārīd Muḥammad,

Al-Sulṭatu al-Qaḍā'iyya wa-Niẓām al-Qaḍā' fi al-Islām. Cairo : Maṭba'ah al-Amānah. 1983.

Zuḥaylī, Wahbah,

Al-Fiqh al-Islāmi wa Adillatuhu. Cairo : Dār al-Fikr. n. d.

Abbas, Muhammad Salleh,

Prinsip Perlembagaan dan Pemerintahan di Malaysia. Kuala Lumpur : Dewan Bahasa dan Pustaka. 1968.

'Abdul Magid Kara, Mustafa,

The Philosophy of Punishment in Islamic Law. 1977. A Dissertation to the Faculty of Claremont Graduate School in partial fulfilment of the requirements for the degree of Doctor of Philosophy in the Graduate Faculty of Government.

Abdul Rahim, M. A.,

The Principles of Muhammadan Jurisprudence, Lahore: Ali Pakistan Legal Decision. n. d .

Ahmad, Abdul Razzak,

The Administration of Muslim Law in Malaysia. M. Phil. 1978. Univ. of Kent,

Ahmad Ibrahim and Ahilemah Joned,

The Malaysian Legal System. Kuala Lumpur : Dewan Bahasa dan Pustaka, 1987.

Andaya, Barbara Watson and Leonard Y,

A History of Malaysia. London : The Macmillan Press Ltd. 1982.

Arnold, T.W.

The Preaching Of Islam: A History of the Propagation of the Muslim Faith. Lahore : Sh. Muhammad Ashraf. 1968.

Al-Azharī, Muḥammad 'Alā'uddīn,

The Theory and Sources of Islamic Law for Non-Muslims. Dacca : Research and Publications. 1962.

Aun, Wu Min,

An Introduction to The Malaysian Legal System. 2nd edition. Kuala Lumpur : Heinemann Educational Books, 1978.

Bannerman, Patrick,

Islam in Perspective, A Guide to Islamic Society, Politics and Law. London: Routledge. 1988.

Bell, Richard,

Introduction to the Qur'an. ed. W. Montgomery Watt. Islamic Surveys. No. 8, Edinburgh: University Pres., 1970.

Cardalora, Carlo,

Religions and Societies : Asia and the Middle East. New York : Mouton Publisher. 1982.

Coulson, N. J.

A History Of Islamic Law. Edinbrugh: The University Press. 1964.

Crone, Patricia,

Roman, Provincial and Islamic Law. London: Cambridge University Press. 1987.

De Josselin, P.E. De Jong,

Agama-agama di Gugusan Pulau-pulau Melayu. (Religions in the Malay Archipelago) Kuala Lumpur : Oxford University Press. 1965.

Demombynes, Maurice Gaudefroy,

Muslim Institutions. translated from French by John P. Macgregor. London : George Allen and Unwin Ltd. 1950.

Doi, Abdul Rahman I.,

Non-Muslims Under Shari'a (Islamic Law). 3rd Edition. London : Ta Ha Publishers Ltd. , 1983.

Shari'ah : The Islamic Law. London : Ta Ha Publishers Ltd. 1984.

Emerson, R.

Malaysia : A Study of Direct and Indirect Rule. Kuala Lumpur. 1966.

Encyclopaedia of Islam, First edition (Leiden, 1913-1934) : Second edition (Leiden, 1960-)

Esposito, John L.

Islam The Straight Path. New York : Oxford University Press. 1988.

Fang, Liaw Yock,

Undang-Undang Melaka. The Hague. 1936.

Fatimi, S. Q.

Islam Comes To Malaysia. ed. Shirle Gordon. Singapore: Malaysian Sociological Research Institute Ltd. 1963.

Gibb, H. A. R.

Islam. A Historical Survey, Oxford University Press. 1975

Mohammedanism. An Historical Survey. Oxford : University Press. 1949.

Gottheil, Richard J. H.

The History of the Egyptian Qadis. London . 1908.

Grunebaum, Gustave E. Von,

Medieval Islam. 2nd edition. Chicago : The University of Chicago Press. 1953

Islam. London: Routledge & Kegan Paul. 1955

Hall, D. G. E.

A History of South East Asia. London : Macmillan and Company Ltd. 1955 .

Hamilton, Charles,

The Hedaya, Commentary on the Islamic Laws. New Delhi : Kitab Bhavan n. d.

Harrison, Brian,

South Esat Asia, A Short History. London : McMillan Press Ltd. 1968.

Hasan, Ahmad,

The Early Development of Islamic Jurisprudence. Islamabad: Islamic Research Institute. 1970.

Heer, Nicholas,

Islamic Law and Jurisprudence. Seattle: University of Washington Press. 1990.

Hodgson, G. A.

An Introduction to The Kedah History. Published in the Annual Reports of the United Kedah Planting Association. 1963.

Hooker, M. B.

The Personal Laws of Malaysia. Kuala Lumpur: Oxford University Press. 1976.

Islamic Law in South-East Asia. Singapore : Oxford University Press. 1984.

Adat Laws in Modern Malaya. Kuala Lumpur : Oxford University Press. 1976.

Hughes, Thomas Patrick,

A Dictionary Of Islam. London : W. H. Allen & Company. 1935.

al-Humaidan, 'Abdullah Humaidan,

The Islamic theory of the Administration of Justice, al-Qada, and the Early Practice of this Institution up to the end of Umayyad period. (132 A.H./ 750 A.D.) Ph. D. thesis, 1973. University of St. Andrews.

Hurgronje, C. Snouck,

Selected Works, Edited in English and in French by G.H. Bousquet and J. Schacht, Leiden: E. J. Brill , 1957.

Ishak, Abdullah,

Islam Di Nusantara (khususnya di Tanah Melayu). (Islam in Malay Archipelago, especially in Malay Peninsular) Selangor Malaysia : Al-Rahmaniah. 1990.

Ishak, Othman,

Fatwa dalam Perundangan Islam, (Fatwa in Islamic Law). Kuala Lumpur : Fajar Bakti. 1981.

Kamali, Mohammad Hashim,

Principles Of Islamic Jurisprudence. Petaling Jaya : Pelanduk Publications. 1989.

Khadduri, Majid,

Islamic Conception of Justice. London : The Johns Hopkins Univ. Press. 1984.

_____and Herbert J. Liebesny,

Law in the Middle East. vol:1, Origin and Development of Islamic Law. Washington: The Middle East Institute. 1955.

Khan, G. Muhammad,

History Of Kedah. 3rd edition. Penang: Premier Press Co. Ltd. 1958.

Klein, F. A.

The Religion of Islam. London : Curzon Press. 1906.

Lambton, Ann K. S.

State and Government in Medieval Islam. London: Oxford University Press. 1981.

Lane, Edward William,

An Arabic English Lexicon. 8 volumes. Beirut : Librarie Du Liban. 1968.

MacDonald, Duncan B.

Development of Muslim Theology, Jurisprudence and Constitutional Theory. London : Routledge and Sons, 1903.

Mahmud Saedon Awang Othman,

Qadi, Perlantikan, Perlucutan dan Bidangkuasa, (Qadi, Appointment, Dismissal and His Power). Kuala Lumpur : Dewan Bahasa dan Pustaka. 1990.

Maududi, Sayyid Abu Al-A'la',

The Islamic Law and Constitution, 7th edition. translated and edit. Khurshid Ahmad. Lahore: Islamic Publications Ltd., 1980.

Morgan, Kenneth W.

Islam, The Straight Path. New York: The Ronald Press Company. 1958.

Muhammad Hasan To' Kerani,

Al-Ta'rikh Salasilah Negeri Kedah. Kuala Lumpur : Dewan Bahasa dan Pustaka. 1968.

Nawawi, Razali ,

The State and the Shari'a in Malaysian Legal History. ed. M. B. Hooker, Kuala Lumpur : Malay Law Journal Ltd. 1986.

Qadri, Anwar Ahmad,

Islamic Jurisprudence in the Modern World. Lahore: Sh. Muhammad Ashraf. 1973.

Justice in Historical Islam. Lahore : Sh. Muhammad Ashraf. 1968.

Rahman, Hamoodur,

The Administration of Justice in Islam. NewDelhi: Kitab Bhavan. 1986.

Ramadan, Said,

Islamic Law, Its Scope and Equity. London : MacMillan Ltd. 1961.

Roberts-Wray, Kenneth,

Commonwealth and Colonial Law. London : Stevens and Sons. 1966.

Rosen, Lawrence,

The Anthropology of Justice, law as culture in Islamic society. Cambridge : Cambridge University Press. 1989.

Rosenthal, Erwin,

Political Thought In Medieval Islam, Cambridge: University Press. 1958.

Ruxton, F. H.

Maliki Law. London : Luzac and Company. 1916.

Ryan, N. J.

The Making of Modern Malaya. Kuala Lumpur: Oxford University Press. 1965 .

Saad Shukri Haji Muda,

Detik-detik Sejarah Kelantan. (The History of Kelantan) Kota Bahru. 1971.

Schacht, Joseph,

An Introduction to Islamic Law. Oxford: The Clarendon Press, 1966.

Sayyid Muhammad Naquib,

Islam dalam Sejarah dan Kebudayaan Melayu. (Islam in the History and Malay Custom) Kuala Lumpur : University Kebangsaan Malaysia. 1972.

Suffian, Muhammad,

An Introduction to The Legal System of Malaysia. Petaling Jaya : Fajar Bakti. 1988.

Turner, Bryan S,

Weber and Islam. London : Routledge and Kegan Paul. 1974.

Wahed Husain, B. L.,

Administration of Justice During the Muslim Rule in India. Delhi: Idarah al-Adabiyyat. 1934.

Wan Yahaya b. Wan Muhammad Taib,

Salasilah atau Ta'rikh Kerajaan Kedah. Alor Setar. 1329.

Watt, W. Montgomery,

Muhammad At Medina. Oxford : Oxford Univ. Press, 1956.

Winstedt, Richard ,

Malaya and Its History. London : Hutchinson's Univ. Library, n. d.

Yaacob, Abdul Monir,

An Introduction to Malaysian Law. Bangi : Univ. Kebangsaan Malaysia. 1989.

Articles

Abdullah Abu Bakar and Nadzim Abdul Rahman,

The Recent Development in Muslim Family Law ; The Malaysian Experience , in International Shari'a Conference, Kuala Lumpur : Malaysia, 3-5 August 1990.

Abdul Majid, H. R.,

A Historical Study of Muhammaden Law. Law Quarterly Review. vol XXIII 1912. and vol XXVII. 1911. London.

Amedroz, H. F.

The Office Of Qadi In The Ahkam Sultaniyya Of Mawardi, Journal of The Royal Asiatic Society. 1910.

The Mazalim Jurisdiction In The Ahkam Sultaniyya Of Mawardi, Journal of The Royal Asiatic Society, 1911.

Azad, Ghulam Murtaza,

Conduct and Qualities of a Qadi, Islamic Studies. vol : 24. 1985.

Qualifications of A Qadi. Islamic Studies. vol : XXIII. 1984.

'Azizan 'Abdul Razzak,

The Law in Malacca Before and After Islam, in Tamadun Islam di Malaysia. Kuala Lumpur : Persatuan Sejarah Malaysia. 1980.

Calder, Norman,

Ikhtilaf and Ijma' in Shafi'i's Risala. Studia Islamica. vol: 58. 1983.

Cardahi, Choucri,

"Conflict of Law". in Law in The Middle East. ed. Majid Khadduri and Herbert J. Liebesny. Washington : The Middle East Institute. 1955.

Coulson, N. J.

Doctrine and Practice in Islamic Law : one aspect of the problem. Bulletin of the School of Oriental and African Studies. vol: 18. University of London. 1958.

Daura, Bello ,

A Brief Account of the Development of the four Sunni Schools of Law, and Some recent Developments, Journal Of Islamic and Comprative Law, 2 (1968),

Fyzee, A.A.

The Adab Al-Qadi in Islamic Law, Malay Law Review. vol: 6. 1964.

Law and Culture in Islam, Islamic Culture. vol : 17. 1943.

Hamid Jusoh,

Pemakaian Undang-undang Islam Kini dan Masa Depannya di Malaysia, Al-Ahkam, Undang-Undang Malaysia Kini. Jilid 1. Kuala Lumpur : Dewan Bahasa dan Pustaka. 1990.

Hamidullah, Muhammad,

Administration of Justice in Early Islam, Islamic Culture. vol: 11, 1937.

Hamilton, A.W.

The Old Kedah-Patani Trade Route. J M B R A S. no. 86. 1922.

Hasan, Ibrahim Hasan,

Judiciary System From the Rise of Islam to 567 A.H (A.S. 1171) Islamic Quarterly. vol: VII, 1963.

Hooker, M. B.

A Note on the Malayan Legal Digest, J M B R A S . vol. 4. 1968 .

Ibrahim, Ahmad,

The Administration Of Muslim Law in South-East Asia, Islamic Culture, vol : 46, 1972.

The Administration of Muslim Law in South-East Asia, Islamic Culture, vol: 47, 1973.

"Custody of Children Under Islamic Law in Law Seminar", Kulliyyah of Laws : International Islamic University, 26-27 July 1986.

"Recent Legislation on Islamic Family Law in Malaysia", in Law Seminar, Kulliyyah of Laws : International Islamic University, 26-27 July 1986.

Al-Ahkam, Jil. 1. Kuala Lumpur : Dewan Bahasa dan Pustaka. 1990.

"Kearah Penyelarasan Undang-undang Islam di Malaysia".(Toward the Implementation of Islamic Law in Malaysia). in Journal Hukum. Jun. 1987.

Ishaque, Khalid M.,

Al-Ahkam al-Sultaniyyah: Laws of Goverment in Islam, Islamic Studies. Vol: IV. 1965 (September)

Jurji, Edward J,

Islamic Law In Operation, American Journal Of Semitic Languages and Literatures. 1940 (57).

Kobkua Suwannathat-Pian,

The 1839-1841 Settlements of Kedah : the Siamese Compromise, J M B R A S. vol 59. 1986.

Kumo, Suleiman,

The Rule Of Law And Independence Of The Judiciary Under The Shari'a, Journal of Islamic and Comparative Law. vol: 2 , 1978.

Mahmud Saedon Awang Othman,

Kearah Mempertingkatkan Mahkamah Shari'a, Journal Hukum. Jilid V. Sept. 1984.

Bidangkuasa Mahkamah Shari'a, Journal Hukum. Jilid VII. Mac 1990.

Majul, Cesar Adib,

Problems In The Implementation Of Shari'a Personal Laws In Muslim Minority Countries In The Far East, Journal of Islamic and Comprative Law. vol:2, 1978.

Margoliouth, D. S.

'Umar's Instructions to the Qadi. Journal of the Royal Asiatic Society. 1910.

Omer, A. I.

The Institution Of al-Hisba In the Islamic Legal System, Journal Of Islamic And Comparative Law. Vol: 10 1981

Salleh Buang,

The Law of Real Property in Malaysia : Prospect for Islamization, in Law Seminar, Kulliyyah of Laws : International Islamic Univ. 26-27 July 1986.

Schacht, Joseph,

"Pre-Islamic Background and Early Development of Jurisprudence". in Law in The Middle East. ed. Majid Khadduri and H. J. Liebesny. Washington : The Middle East Institute. 1955.

"The School of Law and later Devewlopments of Jurisprudence". in Law in The Middle East. ed. Majid Khadduri and H. J. Liebesny. Washington : The Middle East Institute. 1955.

"The law " in Unity and Variety in Muslim Civilization. ed. Gustave E. Van Grunebaum. The University of Chicago Press. 1955.

Stern, Gertrude H.

Muhammad's Bond with the Women, B S O A S. vol : 10, 1940-1942.

Sulaiman, Ibrahim K. R.

The Shari'a And The Nigerian Draft Constitution, Journal of Islamic and Comparative Law. vol: 10, 1981.

Syed Farid Alatas,

Notes On Various Theories Regarding The Islamization Of The Malay Archipelago, Muslim World. Vol: LXXV. 1985. (January)

Tyan, Emile,

"Judicial Organization" in Law in Middle East. ed. Majid Khadduri and H. J Liebesny. Washington : The Middle East Institute. 1955.

Winstedt, R.

Notes on the History of Kedah, J M B R A S. vol XIV. 1936.

Kedah Laws, J M B R A S. vol VI pt. II. 1928.

Yusuf, S. M.

The Supremacy of Shari'a Law in Islamic Society, Islamic Quarterly. vol: XX & XVI & XXII, 1978

Ziadeh, Farhat J.

"Integrity ('adalah) in Classical Islamic Law". in Islamic Law and Jurisprudence. ed. Nicholas Heer. Seattle : Univ. of Washington Press. 1990.