

LAMPIRAN 1: GAMBAR FOTO MB HOOKER



Peta 1

Wilayah Pengguna Perbilangan

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Wilayah pengguna perbilangan

or any regulations made pursuant to this Enactment'. It was contended that the word 'or' was used disjunctively, thus allowing for the exclusion of the Enactment. Again the argument was rejected. As was said by Good J.:

It seems to me that what the draftsman is trying to express, in order to give effect to the intention of the legislature, is that the liability to pay fitrah imposed by Muslim law is recognised and declared but the machinery for giving effect to the principles of Muslim law is to be provided by regulations made under the Enactment. I think that the section is fairly capable of this construction and that what it really means is that payment of fitrah is to be made when it falls due . . . according to Muslim law *subject*²²⁷ to the provisions of any regulations made pursuant to the Enactment for prescribing the detailed mode of payment.

No doubt this statement of principle would find ready acceptance in the Majlis and Courts of the other Malaysian States. To hold otherwise would not only bar existing regulations but raise yet again the spectre of 'Muhammadan law is foreign law . . . it must be proved in evidence . . .'. In fact, the decision in *Ramah v. Laton*²²⁸ and the provisions of the Muhammadan Law and Malay Custom (Determination) Enactment²²⁹ were referred to by Good J. who (with relief!) concluded that there had been 'an integration of Muslim law with the law of the land', the scope and extent of which did not exclude the possibility of taking judicial notice of Muslim law.²³⁰

The effect of the legislation, it seems safe to say, is to declare the application of principles of Muslim law if these are the subject of specific provisions²³¹ and, if they are not, then to allow evidence as to the content of Muslim rules. Islamic precepts are in no way excluded or diminished because they do not find a place in the legislation; the function of the latter is to organize the administration of the Muslim law which is a part of the law of Peninsular Malaysia.

The fact that Muslim law is only part of the laws of the State of Malaysia is the key to understanding its nature. Its efficacy really depends upon secular legislation and (secular) past precedent. Further, its application in a particular case is conditioned by the requirements of secular laws; finally, its scope or area of application is restricted by custom.

Islamic Law and Malay Custom (Adat)

'The law affecting Muslims is the Muslim law as modified by Malay custom',²³² on the other hand it is '*adat* [custom] varied by the adoption of part of the Mohammedan law'²³³ . . . or 'the personal law of the Malays . . . is a mixture of Malay Custom and Mohammedan law'.²³⁴ These propositions represent not just a difference of emphasis but quite disparate views of law. The former looks to a tradition of written law which is certain in content and philosophy (at least in its formal presentation) whilst the latter is seemingly inchoate yet rational when looked at in the light of agricultural reality.

These preliminary remarks indicate that any discussion of Islam in Malaysia has to take account of earlier theories as to the nature of Malay

law and its relation to Islam. While these theories still colour much of the discussion about indigenous legal culture²³⁵ they do not explain the present-day relationship between Islam and *adat*. As we shall see, this is a function of precedent and statute. There are two forms of the relationship between *adat* and Islam in Malaysia, (i) one of opposition of principle which does not, however, exclude some practical accommodation, and (ii) a mixing or incorporation of rules so that the distinction between systems is blurred at least at the practical level. These two modes of relationship correspond to the main line of division in the Malay *adat*, i.e., between the *adat perpatih* where opposition to Islam is formalized, and the mass of local *adat* where an 'internalization' of Islam has blurred the disparities of principle. It should be remembered, however, especially in respect of the latter, that the formal legal system posits a distinction between *adat* and Islam; while this distinction may or may not be reflected in local peasant practice,²³⁶ it does exist in the formal legal machinery and so is always liable to be imposed on peasant litigants.

(i) ADAT PERPATIH AND ISLAM: THE OPPOSITION OF LEGAL PHILOSOPHIES

The ideal Islamic harmony in life, thought, and relation with God, fragments into a number of dissonances in the face of this *adat* form. As is well known²³⁷ the *adat perpatih* is posited on the basis of matrilineally-structured clans, it contains an elaborate set of rules and principles, some of which (those relating to land tenure) have been incorporated into legislation, and it has political and constitutional significance in the State of Negri Sembilan. It is an alternative system to Islam in three respects.

First, the *adat* inheritance rules depart in important aspects from the Islamic rules. The *adat* singles out land as a special category of property, certain sorts of land (the so-called 'ancestral' or *pesaka*) are only inheritable by designated females and male ownership and inheritance rights are severely restricted. Legislation²³⁸ and judicial precedent,²³⁹ as well as distribution proceedings in District Offices,²⁴⁰ confirm the exclusion of Islamic rules.

Second, *adat* is an alternative system in a philosophical sense though it by no means completely excludes Islam. The traditional verse form (*perbilangan*) in which *adat perpatih* is expressed constitutes a coherent and internally consistent narrative system. It explains the nature of the real world, the nature of Man and his relationship with that world, and provides detailed rules of conduct and standards for conduct which enable life to go on. The range of precepts in *perbilangan* varies widely; from the most abstract to the most detailed prescriptions for daily life. Considered solely as an explanation of the ethical imperative, the *adat perbilangan*

universal systems. However, this accommodation, which is freely admitted to be rather sophistic, does not dispose of the fact that an alternative philosophy of law exists. It does, on the other hand, allow for a rationalization of detailed differences in such areas as the rules of inheritance.

Finally, the *adat* has a constitutional aspect in Negri Sembilan; the *adat* system has a hierarchy of authority culminating in the Undang,²⁴¹ of whom there are four and who together help to constitute the 'Ruler' of the State.²⁴² The State Constitution, which defines their function on the model of a constitutional monarch, also makes them responsible for the protection and administration of the religion of Islam in the State.²⁴³ This can and does bring them into conflict with their duty toward the preservation of *adat*. This conflict of function has taken on a political aspect and the political dimension is a constant feature of the *adat*-Islam nexus in Negri Sembilan.

(ii) ADAT AND ISLAM, THE INCORPORATION OF RULES

The status of *adat* in judicial proceedings outside Negri Sembilan is much less lofty. In the other Peninsular Malaysian States it functions only as a rule of custom which may, if the evidence is sufficient, vary the rules of Muslim law as to distribution of a deceased estate. In addition, it may also operate so as to give a divorced wife a share in property jointly acquired during coverture.²⁴⁴ This at least is the formal position established in precedent, but not uncommonly in the distribution process on death or divorce, the strict rules of Islam and (judicially) established custom are used as a basis for an agreement (*pakat*) suitable to the parties. The canons of Malay peasant life place a high value on consensus and the Islamic ethic with its insistence upon harmony and unity of feeling amongst Muslims reinforces this value. The result is that many, perhaps the majority of such arrangements, are compromises in which the strict rules from both systems are mingled and diffused.

Recent Developments

The history of Islamic legal administration in Malaysia has been one of a continuing development toward a more direct and exact implementation of Islamic precepts. The colonial legal administration was concerned to implement only those precepts which were immediately required so as to avoid offending the religious susceptibilities of the Malay peoples. In effect this limited Islamic law to a 'Muslim family law' and the latter was further restricted in some places and for some subjects by local custom.

Since Malaysian independence, however, there has been a move toward