

THE HISTORICAL ASPECT ON THE ESTABLISHMENT OF THE KELANTAN SYARIAH COURT

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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

I hereby declare that the work in this academic project is my own except for quotation and summaries, which has been duly acknowledged.

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أما بعد...

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ABSTRAK

Kajian ini adalah bertujuan untuk mendedahkan kepada masyarakat Islam terutama yang berurusan dengan Mahkamah Syariah bagi mengetahui dengan lebih dekat dan jelas lagi tentang objektif, fungsi serta tugas-tugas yang di jalankan oleh Mahkamah Syariah di negeri ini dalam menyelesaikan permasalahannya yang dihadapi oleh mereka terutamanya dalam hal-hal kekeluargaan. Selain itu, kajian ini juga menekankan aspek awal penubuhan Mahkanah Syariah Negeri Kelantan sebelum dan selepas merdeka serta bidangkuasa dan juga prosidur perbicaraan di Mahkamah Syariah. Dalam rangka penulisan ini, penulis mengguna method kajian ke perpustakaan dengan merujuk kepada beberapa buah buku mengenai perkembangan undang-undang Islam serta beberapa rujukan lain sebagai rujukan tambahan. Jelasnya apa yang kita dapati undang-undang yang dijalankan di Mahkamah Syariah telah menepati dengan kehendak hukum syarak berdasarkan kepada kehendak ulamak dan pakar undang-undang di Negeri Kelantan yang di corakkan oleh sejarahnya. Oleh itu untuk memahami sistem undang-undang Mahkamah Syariah Negeri Kelantan yang ada kini, kita mestilah mengetahui tentang sejarah perkembangan negeri ini. Hal ini kerana sejarah silam merupakan faktor penentu bentuk sistem uundang-undang yang ada sekarang.

ABSTRACT

The main aim of this research is to reveal to the Islam community especially to those who are involved with Syariah Court for them to understand the objective, function and daily task run by the Syariah Court in Kelantan to solve any problems that is brought to them especially in family matters. Other than that, this survey is to emphasize on the aspect of the early establishment of Kelantan Syariah Court before and after independence and also their jurisdiction and trial procedures in the Syariah Court. In this aspect, the writer has used the library method in referring books related to Islamic law and also for further references. It clearly indicates that the law in Syariah Court solely follows the Hukum Syara' which is based from ulama' and law experts in Kelantan. As such to understand the law system in Syariah Court, we must first get to know the history as the main factor, which determines the law system that we have today.

ملخص البحث

يهدف هذا البحث إلى تقديم معلومات شاملة إلى المجتمع الإسلامي حول المحكمة الشرعية وخاصة فيها يتعلق بأهدافها وأهمياتها وسلطاتها في حل عدة مشاكل تتعلق بحياتهم وأخصها في الأحوال الأسرية، فضلا عن ذلك البحث يركز على سرد تاريخ تأسيس المحكمة الشرعية بولاية كلنتان قبل الاستقلال وبعده، وسلطاتها واجراءات التحكيم والقضاء فيها. ولإكمال هذا البحث استخدمت الباحثة المنهج المكتبي وذلك بمراجعة عدة كتب تتعلق بالقوانين الإسلامية ومراجع أخرى إضافية في مجالات متعلقة بموضوع البحث. وتبين من خلال البحث أن القوانين العاملة في هذا المحكمة تتفق مع متطلبات الأحكام الشرعية حسب ما اتفقه والعلماء والجزاء للأحكام والقوانين الشرعية في ولاية كلنتان كما هو جارى منذ أول تاريخ تأسيسها. ومن هنا لا بد علينا في دراسة أنظمة المحكمة الشرعية بولاية كلنتان وقوانينها. الرجوع إلى تاريخها أولا وتاريخ هذه الولاية عامة، وذلك لأن التاريخ الماضي هو الذي يحدد ويشكل النظمة القوانين العاملة في هذا اليوم.

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GLOSSARY OF TERM

<i>Al-Quran:</i>	The holy book revealed by Allah SWT to Prophet Muhammad SAW.
<i>A'qil:</i>	Of sound mind.
<i>Baitulmal:</i>	Public treasury.
<i>Baligh:</i>	The age of puberty.
<i>Faraid:</i>	Islamic law of inheritance.
<i>Fard Kifayah:</i>	When someone in the community performs it.
<i>Fasakh:</i>	Dissolution of marriage.
<i>Fatwa:</i>	Formal legal opinion issued by a mufti.
<i>Hadd:</i>	Offence and penalty prescribed by Allah.
<i>Hadith:</i>	The tradition of Prophet Muhammad SAW.
<i>Hukum Shara' / Islamic Law:</i>	Practical laws of Islam.
<i>I'badah:</i>	Devotion or worship.
<i>Ijmal:</i>	Consensus of opinion of all jurists.
<i>Imam:</i>	A person who lead a congregational prayer.
<i>Kadi:</i>	Judge in an Islamic Court.
<i>Khalwat:</i>	Offence of illicit proximity between members of the opposite sex who are not married to each other.
<i>Khuluq:</i>	Self- divestiture or self-redemption of a wife, through a special forms a divorce by which the wife purchases her freedom.
<i>Mujtahid:</i>	A qualified person who carries out ijihad.
<i>Nasb:</i>	Legal heirs. A nasab case involves the determination of whether a person is entitled to share in an inheritance.

<i>Nazir</i>	Inspector, superintendent, supervisor, trustee.
<i>Nazr:</i>	An expressed vow to do any act or to dedicate property for any purpose allowed by Islamic law.
<i>Qadi al-Qudah:</i>	Chief Justice.
<i>Qiyas:</i>	Analogical deduction of Islamic law.
<i>Ramadhan:</i>	One of the months in Islamic calendar when Muslims are obligate to fast.
<i>Rujuk:</i>	Return to conjugal union or repudiation of divorce.
<i>SAW:</i>	Abbreviation of “Sallallahu ‘alaihi wassalam” meaning “peace be upon him”. It is compulsory for a Muslim to utter this blessing whenever he hears the Prophet Muhammad’s name being mentioned.
<i>Surau:</i>	Building used for purposes of religious worship, smaller than the mosque.
<i>Syariah:</i>	The sacred law of Islam.
<i>Syarie Judge:</i>	Judge presiding in Syariah Courts.
<i>Talaq:</i>	Divorce.
<i>Ta’lik:</i>	Divorce by the breaking of condition or divorce under stipulation.
<i>Tauliah:</i>	Authority.
<i>Wakaf:</i>	Commonly a property donated for a charitable purpose but which yields an usufruct and of which the owner surrenders his power of disposal with a stipulation that the income yielded from the property be used for specific purposes for which the waqf was establishment or for other general and permissible charitable purposes in accordance with the Islamic law.
<i>Wali:</i>	Guardian for marriage.
<i>Zakat Fitrah:</i>	Legal alms.
<i>Zina:</i>	Offence of fornication and adultery.

**ARABIC WORDS TRANSLTERATION SYSTEM
TRANSLERATION TABLE**

1. ALPHABET

<u>Arabic</u>	<u>Latin</u>	<u>Example</u>	<u>Transliteration</u>
ء	,	فأر	fa`r
ب	b	برد	burd
ت	t	تل	tall
ث	th	ثوب	thawb
ج	j	جدار	jidār
ح	h	حليب	halīb
خ	kh	خادم	khādim
د	d	ديك	dīk
ذ	dh	ذهب	dhahab
ر	r	رفيق	rafīq
ز	z	زميل	zamīl
س	s	سلام	salām
ش	sh	شعب	sha'cb
ص	s	صخر	sakhr
ض	d	ضيق	dayq
ط	t	طالب	tālib
ظ	z	ظالم	zalim
ع	c	عقل	aql
غ	gh	غلام	ghulam
ف	f	فيل	fil
ق	q	قلب	qalb
ك	k	كلام	kalām

ل	l	لب	lubb
<u>Arabic</u>	<u>Latin</u>	<u>Example</u>	<u>Transliteration</u>
م	m	مال	māl
ن	n	نجم	najm
ه	h	هول	hawl
و	w	ورق	waraq
ي	y	يم	yamm

2. Short Vowel

<u>Arabic</u>	<u>Latin</u>	<u>Example</u>	<u>Transliteration</u>
_____	a	كتب	kataba
_____	i	علم	alima
_____	u	غلب	ghuliba

3. Long Vowel

<u>Arabic</u>	<u>Latin</u>	<u>Example</u>	<u>Transliteration</u>
ى	ā	عالم، فتى	Ālim, fatā
ي	ī	عليم، داعي	Alīm, dāī
و	ū	علوم، ادعو	Ulūm, Adū

4. Diphthong

Arabic	Latin	Example	Transliteration
و	aw	نوم	nawm
ي	ay	ليل	layl
يَا	iyy	شافعي	Shafi'iyy (ending)
وَ	uww	علو	'uluww (ending)

5. Exemptions

5.1 Arabic letter ء (hamzah) found at the beginning of a word is transliterated to the letter “a” and not to ‘.

Example: أكبر transliterated to: akbar (not ‘akbar)

5.2 Arabic letter ة (ta’ marbutah) found in a word without ال (al), which is coupled with another word that contains, ال (al) at the beginning of it is transliterated to the letter “t”.

Example: مكتبة الإمام transliterated to: maktabat al-imām

However if the Arabic letter ة (ta’ marbutah) found in a word with ال (al), in a single word or in the last word in a sentence, it is transliterated to the letter “h”.

Example: المكتبة الأهلية transliterated to: al-maktabah al-ahliyah

قلعة

qalah

دار وهبة

dār wahbah

ABBREVIATION

Abd.	Abdul
Art	Article
B	Bin
Dlm	Dalam
Dr.	Doctor
Hj.	Haji
Ibid	Ibidem (pada tempat yang sama)
JKSNK	Jabatan Kehakiman Syariah Negeri Kelantan
KUIM	Kolej Universiti Islam Malaysia
Mohd	Mohammad
n.a.	No author
n.d.	No Date/year
n.pb.	No publisher
No.	Nombor
P	page
S.A.W	Sollallahu Alaihi Wassalam
S.W.T	Subhanahu Wa Ta'ala
Sdn.Bhd.	Sendirian Berhad
Sec	Section
Vol.	Volume
&	And/dan

INTRODUCTION

INTRODUCTION

The judiciary is an important institution in a country to ensure justice. In Islam justice must be done without regarding the colour of skin, races, religions, families and also ourselves. Islamic law is wide and it covers the entire way of life. It is the way and method to settle all problems. As such to carry it out is based to this Islamic law; it requires the needs of the judgment institution known as the Syariah Court. The main reason of the Syariah Court being set up is to settle any discrepancies between the parties involved in accordance to the sentence that has been passed by Allah S.W.T.

The Syariah Court was established according to the administration of Islamic law that has been enforced in Kelantan. This law is inherited from colonists who tried to minimize the functions of Islamic law, which is wide and complete and it is the basic law at that time.

It clearly shows that the law system in any country is made by its own history. The past history is the main factor and the law system is what we have now. So, to understand the law system in Kelantan at present, we must get to know the history of Kelantan itself.

The Syariah Court in Kelantan has been set up in accordance to the Federal Constitution, whereby the power has been given to the state to handle the Islamic law, which has been categorized as personal law in accordance with the ninth schedule, legislative lists (list II- state list) which states that: the constitution, organization and procedure of Syariah Courts which shall have jurisdiction only over persons professing to the religion of Islam. It is the power of the state.

Whereby, according to article 121(1A) of the Federal Constitution, the power of jurisdiction for federal shall have no jurisdiction is respect of any matters within the jurisdiction of the Syariah Courts.

CHAPTER ONE

CHAPTER ONE

ADMINISTRATION OF SYARIAH COURT

1.1. Background

The Syariah Court was established in Kelantan at 1060H, which is the same as 1650M¹. The Law that was followed at that time is Islamic law. Islamic law was excellently practised and followed under the administration of Sultan Mohamed III during 1890 until 1891 as even thieves, who pleaded guilty at the Syariah Court Kota Bharu were fined according to the hudud law. The law was continuously followed until the colonials introduced their laws into Islamic law. Their law affected the Islamic law little by little until only the Islamic law focusing on Islamic family remains. These can be seen in the 1910 enactment, which discards the authority of Kota Bharu Syariah Court that existed during that time².

In the early stages, the Syariah court was known as Kadi Court but starting from July 1998, the Syariah Court was established in Kelantan to replace the Kadi Court, which comprises of³:

- The Syariah Appeal Court, which is located at Kota Bharu and chaired by YAA Head of Judge Syarie.
- The Syariah High Court, which is managed by YA Judge of Syariah High Court
- The Syariah Subordinate Court, which is managed by Judge of Syariah Subordinate Court.

¹ Daud Mohammad, 1998, '*Sejarah Penubuhan Mahkamah Syariah Negeri Kelantan*', JKSNK. P: 1

² Ahmad Hidayat Buang, 1998, '*Undang-undang Islam di Malaysia*', Jabatan Syariah dan Undang-Undang Akademi Pengajian Islam UM, p: 25

³ Daud Mohammad, 1998, '*Sejarah Penubuhan Mahkamah Syariah Negeri Kelantan*', JKSNK. P: 4

The Kelantan Syariah court is being placed under the department of Syariah justice in Kelantan to give full attention to the Syariah law and also to implement and enforce law throughout the methods below⁴:

- a- Enactment administration of Syariah Court, No. 3 on 1982.
- b- Enactment Criminal Syariah, No. 2 on 1985
- c- Enactment Criminal Act Syariah, No. 9 on 1983
- d- Enactment Criminal Act Syariah, No. 5 on 1984
- e- Enactment Islamic Family, No. 1 on 1983
- f- Enactment Statement of Syariah Court, No.1 on 1991
- g- The Kelantan Council of Religion and Malay Custom Enactment, No. 4 on 1994
- h- Kaedah hukuman Sebat 1987
- i- Kaedah Syarie Lawyer 2000

Furthermore, some of the positions have been changed, whereby the General Kadi of Kelantan is replaced by the Head of Judge Syarie as Head of Department and the position of General Kadi has been terminated. The Deputy General Kadi also has been terminated and being replaced by two judges at Syariah High Court. Besides that, the judge for Syariah Subordinate Court has been established by combining two Special Kadi Courts and all districts under the administration of judge of Syariah Subordinate Court. It is as follows:

- 1- The small court Kota Bharu (1 judge)
- 2- The small court Gua Musang (1 judge)
- 3- The small court Tanah Merah and Jeli (1 judge)
- 4- The small court Kuala Krai and Machang (1 judge)
- 5- The small court Pasir Puteh and Bachok (1 judge)
- 6- The small court Pasir Mas and Tumpat (1 judge)

⁴ Ibid, p: 4

1.2 The Functions and Objectives of the Kelantan Syariah Court.

The court is one of the Judiciary institutions known as an important agency in a country. Its job is to manage and to carry out justice for all types of people in their lives. So, with the existence of this court, justice can be carried out⁵.

Justice is not solely determined by one factor but it is closely connected with other factors. For example the implementation of law cannot guarantee that justice has taken place if the court itself cannot handle cases fairly.

So, to see how effective a court is in handling cases it should strictly follow its functions and the objectives of the court itself.

The Functions ⁶:

- 1- To enforce and implement Islamic law within the power that has been strictly given.
- 2- To ensure the administration and the management of Islamic law is in order and effective.
- 3- To manage the application of heritage property.
- 4- To accept, listen and handle the case that is brought to the Syariah Court with justice and follow the current legislation.
- 5- To develop human resource that is practiced and suffices.
- 6- To give consultation services.

⁵ Abdul Monir Yaacob, 1993, '*Struktur, Taraf, Kedudukan Kakitangan Mahkamah Syariah*', Jurnal IKIM, vol.1. July/December, p: 73

⁶ Abdul Monir Yaacob, 2001, '*Sistem Kehakiman Islam*', IKIM, p: 65

The Objective⁷:

The objective of establishing a Syariah Court is the same as the objective of establishing a civil court, which is to enforce justice and punish the offenders as to educate them to be good and honoured persons in a community.

In addition, the objective of the establishment of Syariah Court is also related to implement Islamic law and to be fair, efficient and effective.

Furthermore, it is to ensure that the Syariah Court is one of the agencies implementing hukum Syara' (Islamic law) to all Muslims at Kelantan based on the complete Islamic law according to al-Quran, al-Hadith, Ijma' and Qiyas.

1.3 The Mission of the Kelantan Syariah Court.

The mission of the Kelantan Syariah Court is to have uniformity in Kelantan to implement the court management and support service as an effective, systematic professional way particularly in handling the appeal cases.

1.4 The Vision of the Syariah Court⁸

The vision of the Syariah Court is also to become one of the state agencies which plays the role in enforcing the Islamic law based on the Al-Quran, Al-Hadith, Ijma' and Qiyas with the authority and fairness for the sake of justice and prosperity.

⁷ Daud Mohammad, 1998, '*Sejarah Penubuhan Mahkamah Syariah Negeri Kelantan*', JKSNK. p: 6

⁸ ibid

1.5 Customer Charter⁹.

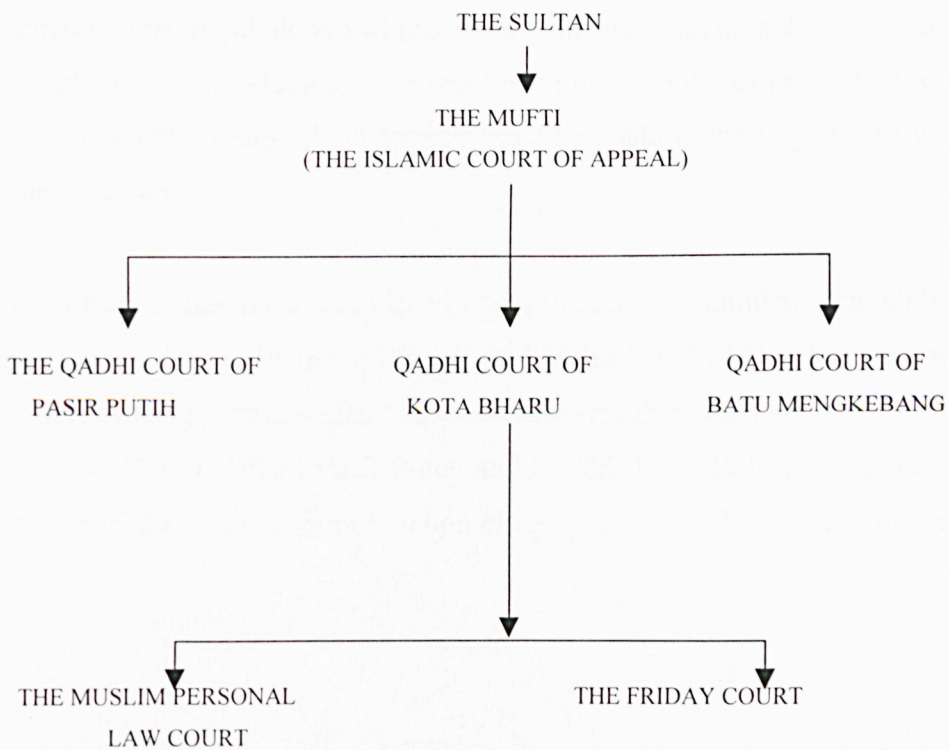
- To handle cases with caution and watchful in accordance to Islamic law and law that is related in a genuine time frame and also to take consideration of all parties involved.
- To provide the counter services and other services with trust, efficient and friendly.
- To establish professional judges and officers who have the capabilities and efficiency in Syariah Judiciary.

⁹ ibid

1.6 The Development of The Court Administration Structure

The administration or governance structure has changed until the Syariah court exists nowadays. The structure of the Syariah Court in Kelantan is as follows: -

I. Before The Establishment of Majlis



Source: The Syariah Court of Kota Bharu: 2003

The above diagram shows, the Syariah Court before the establishment of *Majlis*. The first rank is the Sultan. After that, in the second rank is the *Mufti*. The *Mufti's* powers were divided between the *Majlis*. The highlights of the establishment of the *Majlis* was removal of the *Mufti's* office to the *Majlis* and placed under the

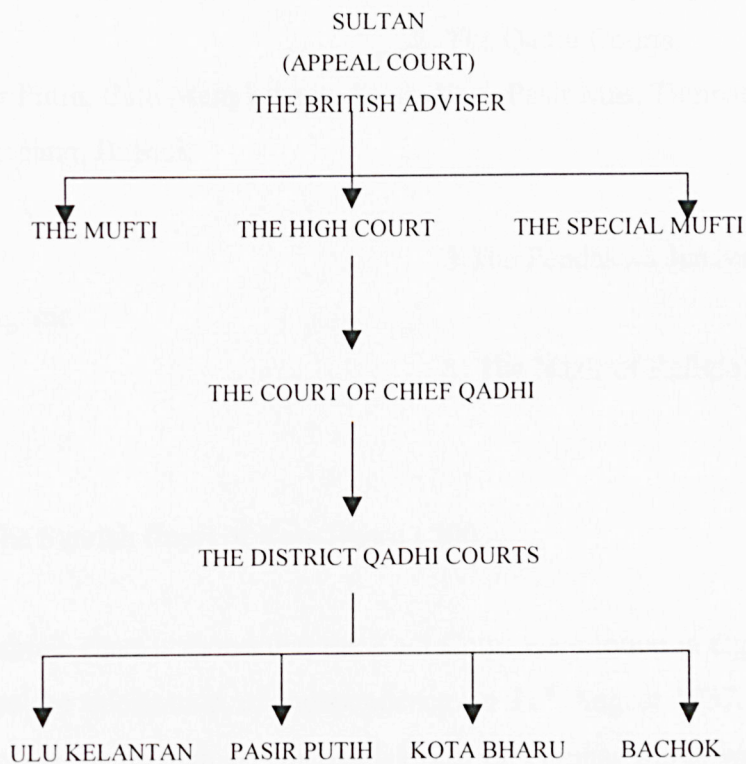
latter's bureaucracy. The *Mufti* was stripped of his executive and administration powers as well as some of his judicial authority, which he had held for the last few decades. This was by means of several notices, enactments and regulations. He had to share his judicial power as an independent Juristconsult with the Conference of *Ulama'*, after it was a set up on 24 January 1918. He was given the authority to deliver legal rulings and answer any queries on Islamic laws or on other religious matters.

The establishment of the Court of Appeal was authorized by the Notice of Regulation of Matters to be heard in the Syariah Court, 1916 No. 19 of 1916 which set up new jurisdictions, regulations and procedures for the Syariah and Kadi Courts and specified certain cases in which appeals must to be made to the Court of Appeal at the *Majlis* and some other cases where appeals must be made to the High Court with the mufti as an Assessor.

The office of the mufti was placed under the *Majlis* administration. Only three Kadi Courts, administered by the *Majlis*, existed in the state in 1916. The first was the Syariah Court of Kota Bharu, which had greater powers than the other two courts. The second was the Kadi Court of Pasir Puteh and the third, the Batu Mengkabang. The administration of the courts did not function efficiently, due to the shortage of Kadis.

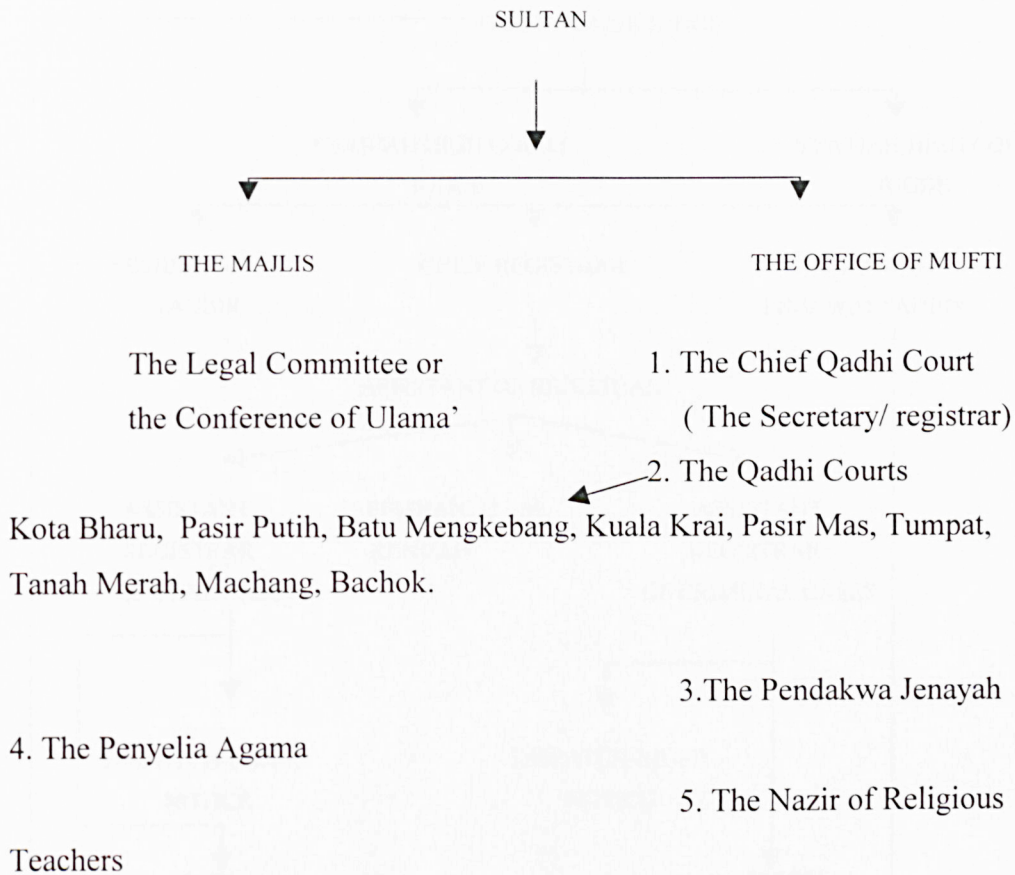
II. The Establishment Trough The Enactment NO. 31 – 1938

The diagram below shows that, the courts of Kadi and the chief Kadi has its own seal as approved by the Sultan. Even though the Kadi Courts were found in five districts in Kelantan, according to Enactment No. 23 of 1938. There are, the Kadi Court of Ulu Kelantan, the Kadi Court of Pasir Puteh, the Kadi Court Kota Bharu, the Kadi Court Bachok and the Kadi Court Pasir Puteh. The structure of Islamic Courts as established by Enactment No.31 of 1938 was as follows:



Source: The Syariah Court of Kota Bharu : 2003

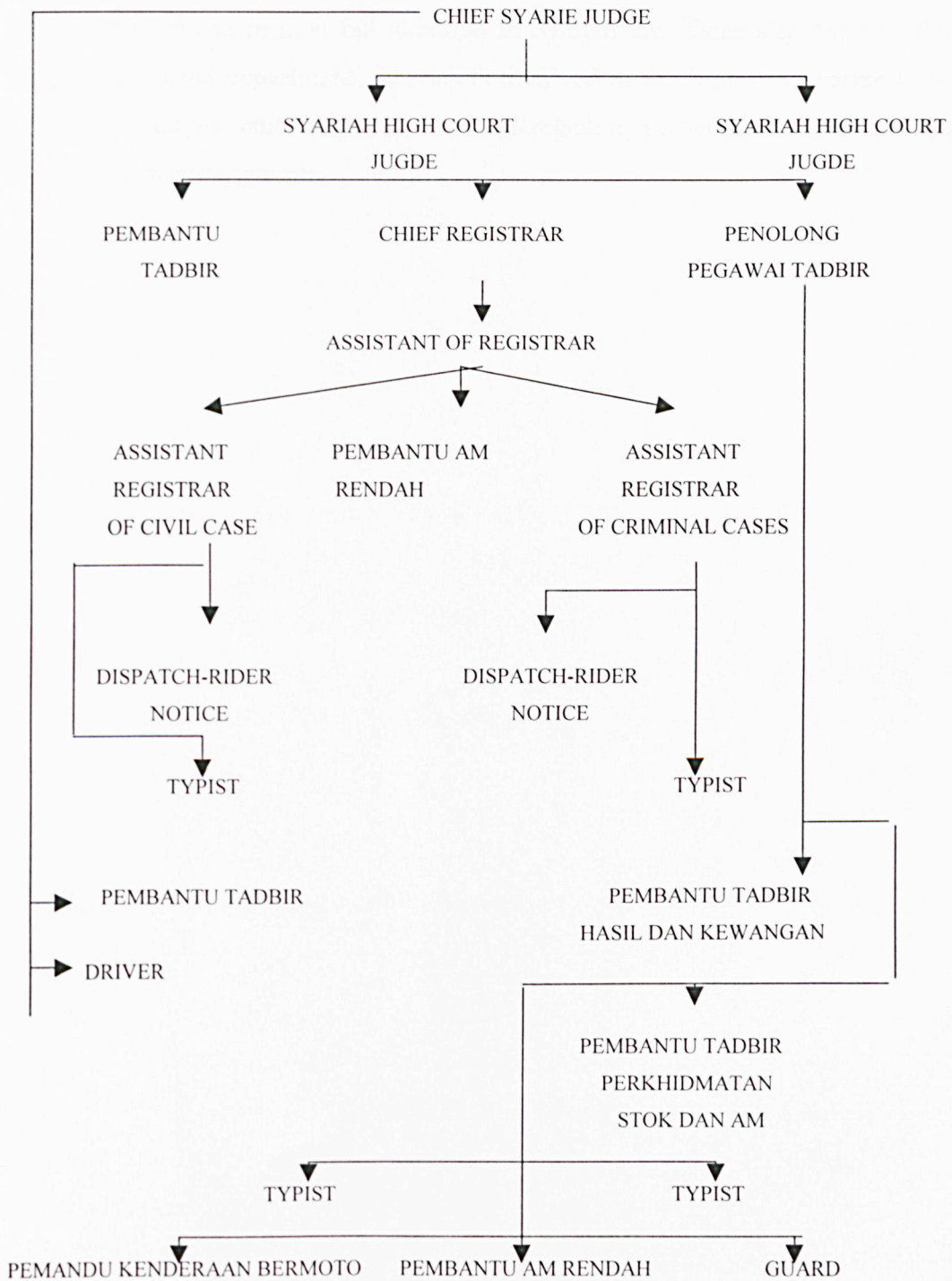
III. Before Independence To 30 MEI 1996



Source: The Syariah Court of Kota Bharu : 2003

From the above chart it shows that the Kadi Court were found in eight districts in Kelantan before the declaration of independence on 31st August 1957. The three more new courts were set up, namely, the Kadi Court of Tumpat which was founded on 28th April 1954 with Haji Yaakub bin Isa as its first Kadi, the Kadi Court of Tanah Merah which was inaugurated on 1st January 1956 and Haji Ahmad bin Hajim Idris, the Kadi of Pasir Mas, was also appointed as the first Kadi of Tanah Merah. The Kadi Court of Machang was set up on 1st August 1957 with Haji Muhammad Amin bin Haji Uthman as the first kadi of Machang besides his post as the Kadi of Ulu Kelantan. He goes to the district of Machang twice a week. i.e. on Monday and Wednesday.

IV. Started on 16 JULY 1998 to Nowadays



Source: Syariah Court of Kota Bharu : 2003

However, starting from 16th July 1998 as shown in the above diagram that the Syariah Court was established in the Kelantan state to replace the Kadi which

comprises of Syariah Appeal court, Syariah High Court and Syariah Subordinate Court. The Kelantan Syariah Court is being placed under the department of Syariah Justice in Kelantan to give full attention in Syariah law. Generally, the Chief Syarie Judge is the head department. Persons is involved in the Kelantan Syariah Court are the Syarie Judges, chief registrar, assistant registrar, prosecutor, office boy, typists, drivers and security guards.

CHAPTER TWO

CHAPTER TWO

THE HISTORY OF THE ESTABLISHMENT

2.1 The Position of The Kelantan Syariah Courts Before Independence

According to the local history, the beginning of Kelantan is still unknown. The actual date when Islamic law entered Kelantan is uncertain. Kelantan was under the command of Melaka during Sultan Mahmud Shah (1488-152). It is possible that Islam reached Kelantan at that period as Pahang was also under the command of Melaka during Sultan Muzaffar shah (1455-1458)¹⁰.

The Islamic law practiced at that time was some form of liberal accretion of Malay customary law, which was recognized as part of Islamic law in the state. The new system, introduced subsequent to the Siamese intervention, led to the abolition of Islamic law in all courts, except in the Syariah Court. The police force was set up before the introduction of Siamese advisory system in 1903 and was used to enforce Islamic laws. This was terminated by the Graham administration¹¹.

When Graham came to Kelantan in 1903, besides the Syariah Courts, the Criminal Courts, which practiced, laws based on Islamic and Malay customary principles were already established in the state. Graham inaugurated a new court system, but left the Syariah Court intact. The administration of the Syariah Court remained inefficient until the arrival of J.S.Mason in Kelantan on 15 July 1909. In his first administrative report, J.S.Mason described 'the Syariah Court as even satisfactory than other courts in the state and indicated that many complaints arose about its inefficiency. Mason took his first administrative action, notwithstanding the treaty, which restricted him from interfering in matters pertaining to the Islamic religion by writing in his annual administrative report that it will probably be necessary to take

¹⁰ n.a, n.d, '*Perundangan Islam di Negeri-Negeri Melayu*', n.pb, p: 51

¹¹ Abdullah Alwi Haji Hassan, 1996, '*The Administration of Islamic Law in Kelantan*', Kuala Lumpur, Dewan Bahasa dan Pustaka, p: 18

away the jurisdiction the court at present holds in cases of inheritance of land. Before this statement was recorded in the report, Mason had written to the king in other states, saying it had not been necessary to establish a Syariah Court, for if matters arose involving religion, they could be adequately dealt with by a Kadi and where such matters concerned inheritance, the Kadi could divide the property according to Islamic law after the determination (or advice) by the judge of a customary law court¹². But the King wanted to wait and see. In spite of the raja's passive reaction, in 1910, the Mason administration passed an enactment concerning the Islamic law of succession. The enactment, known as The Succession to Small Estates Enactment, 1910 (No. 17 of 1910), restricted the jurisdiction of the Syariah Court to land inheritance cases of properties with a maximum value of RM500 or less and removed all others to the jurisdiction of the Land Officers. This legislation altered the previous legal practice in Kelantan and led to less important disputed inheritance cases being dealt by the court. Thus western procedures were introduced to improve the court's administration and to make it more efficient but also to decrease its incompetence. In 1911, the Adviser was impressed by the improvement in the court administration but observed that delays still persisted in hearing all cases. In fact, confusion still continued even in 1915¹³.

The Siamese also ruled Kelantan, from 1899 to 1906. According to the Anglo-Siamese Treaty 1902, the Siamese appointed an advisor to advise the ruler of Kelantan about the country's administration except for the Islamic Religion and Malay Custom. On 1909 during the Bangkok Treaty has put Kelantan under the Unfederated Malay. Besides that, it accepted a British advisor for the first time. Thus, the British advisor can give advice to the ruler about the country's administration except on Islamic Religion and Malay Custom¹⁴.

The Syariah Court in Kelantan was one of the earliest courts established in Peninsular Malaysia. The court developed very well until the reign of Sultan Muhammad IV, when thereafter, the powers of the *Kadis* came under the control of

¹² Ibid, p: 30

¹³ Abdul Kadir b. Hj Muhammad, 1996, '*Sejarah Penulisan Hukum Islam Di Malaysia*', Kuala Lumpur, Dewan Bahasa dan Pustaka. p: 135

¹⁴ n.a, n.d, "*Perundangan Islam di Negeri-Negeri Melayu*", n.pb, p: 51

the upper classes, especially the royal family and the elite. This situation resulted in inefficiency and instability in the administration of the court. When J.S Mason took over the administration of Kelantan as the British Adviser from the Siamese Adviser, W.A Graham, the court was still inefficient. His attitude towards the Syariah Court remained restrained. It is probable that his motive in restraining the jurisdiction of the court coincided with his intention to improve the efficiency of not only the administration of other offices, but improve the efficiency of not only the administration of other offices, but also in the Syariah Court. Hence, his actions towards the Syariah Court decreased the powers of the court and lessened its importance in the state. In the first year of his administration, Mason included religious revenue and expenditure in the state budget. He imposed some control over religious authorities through his power over the state budget. He demonstrated this in 1910, when he listed the expenditure on two *surau* inspectors were listed in the state budget but ceased doing so in his next budget estimate. He repeated this in the case of *Jumaat* judge. In 1910, the efficiency of the court administration was still left much to be desired due to the frequent changes in the post, and the difficulty finding a suitable *Kadi*. Two changes occurred during this year. J.E Bishop who acted on behalf of Mason from 19 October 1910 and succeeded him afterwards as the British Adviser until March 1913, followed in Mason's footsteps. He reduced the size and competence of the court by placing it under his scrutiny. He abolished the post of judge of the Friday Court in 1911, which had been within the fold of the Syariah Court¹⁵.

The frequent changes in the *Kadi* post indicated the instability of the court itself. This uncertainty, which prevailed in the Syariah Court, led to Bishop's early concern. He was responsible for abolishing the power of the Syariah Court to hear all cases involving non-Muslims, which had been carried out in the court before. These cases were removed to the civil court¹⁶.

Other than that, all inheritance cases involving Muslims must be heard in the Syariah Court only. Two notices related to the administration of Syariah Court were enacted between 1910 and 1915 and another eight notices dealt with statutory

¹⁵ Abdullah Alwi Haji Hassan, 1996, '*The Administration of Islamic Law in Kelantan*', Kuala Lumpur, Dewan Bahasa dan Pustaka, p: 30

¹⁶ Ibid

measures only. It shows the extent to which the British attempted to reduce the influence of the Syariah Court and its role in the state after their arrival in Kelantan.

The Syariah Court of Kota Bharu was considered more important than its two branches: it dealt with more judicial work and administration. It had a bench with two offices, namely the office of a judge or *kadi* and the office of assistant *kadi* and was considered by many Kelantanese then as the state Syariah Court before the transfer of its authority to the other two courts.

Actually, the previous of the Syariah court has close relations with the council of Islamic religion and Malay custom of Kelantan. It was set up by Sultan Mohammad IV on 24 December 1915. However the law of council also approved on 1915, the law mostly stressed on mosque, surau, and Zakat Fitrah. But in 1919, the law that was approved was on *rujuk* and *ta'lik* in addition to marriage and divorce.

This continued until the intervention of the colony, who introduced their own law in the law system which has put in force and has gradually set aside the Islamic through the enactment that is related with the implementation of law in Syariah Courts until leaving the laws related to family law only. For example the enactment on 1911 continued the jurisdiction of Syariah Court at Kota Bharu¹⁷.

Lastly, the Kelantan government has approved The Council of Islamic religion and Malay Custom of Kelantan and Kadi Court No. 1 on 1953. Based on the law, the committee of the council comprised of a head, deputy head and not less than six committee members who must be Muslim which all of them are appropriately the Sultan at certain period of time¹⁸.

¹⁷ n.a, n.d, 'Perundangan Islam di Negeri-Negeri Melayu', n.pb, p: 51

¹⁸ Ibid, p: 52

2.2 The Position of The Kelantan Syariah Court After Independence.

After independence, an effort to establish the judicial system was made by the Kelantan Government for spiritual development.

The strategy had two approaches made the existing institution more Islamic and to generate new Islamic institutes, which referred to Islamic knowledge.

Following the above, the status of Syariah Court was changed to State Court. Power was given to every state to enforce the law in terms of the set-up, administration and the procedures of the Syariah Court that only has power to Muslims and what was mentioned in the ninth schedule, List II- state list of the Federal Constitution. As for criminal cases in the Jurisdiction of Syariah Court is bound under the Syariah Court Act 1965 (Criminal cases) 1965 amended by Syariah Court Act 1984.

The Kelantan Government had identified the locality in the Syariah Court administration. As such, suggestions were made to improve the situation. After that, the administration of Syariah Court was separated from *The Council of Islamic Religion* (Majlis Agama Islam) and also reshuffled the new administration. It had three stages namely Syariah Subordinate Court, Syariah High Court and Syariah Appeal Court. Besides that, the judge's status was higher and the power of Syariah Court is clearly expressed in the new enactment¹⁹.

The steps taken can be seen through a chronology development. On 4th December 2003, *The Malaysian National Council for Islamic Affairs* (Mesyuarat Majlis Kebangsaan Bagi Hal Ehwal Agama Islam) had agreed to set-up a committee chaired by the late Tan Sri Syed Nasir Ismail to do researches on the locality of Syariah Courts and the status of Kadi's throughout Malaysia in order to improve and strengthen the Syariah Court and the status of *Kadi's*²⁰.

¹⁹ Ahmad Bin Mohammad Ibrahim, 1997, '*Pentadbiran Undang-Undang Islam di Malaysia*', Kuala Lumpur, IKIM. p: xiii

²⁰ Daud Mohammad, 1998, "*Sejarah Penubuhan Mahkamah Syariah Negeri Kelantan*", Jabatan Kehakiman Syariah Negeri Kelantan, p: 3.

After that, on 30th April 1983, the same *Malaysian National Council for Islamic Affairs* (Mesyuarat Majlis Kebangsaan Bagi Hal Ehwal Agama Islam) deliberated reports from the committee in order to be approved and accepted by the states. The report mentioned the following: -

- a) The organizational structure of the Syariah Court, jurisdiction, procedure and duties of Kadi.
- b) It is Compulsory for every state to have the Syariah Court organization with structure and judicial responsibilities.
- c) The organizational structure of Syariah Court must have three stages namely the Syariah Subordinate Court, Syariah High Court and Syariah Appeal Court.
- d) Every state must have or establish a Scheme of Judicial Service and Syariah law.

On 2nd and 3rd June 1990, the Public Service and Treasury Department of Malaysia did all the checking in order to create the State Syariah Courts.

And also, on 9th June 1991, The Meeting among Planning, Financial and Recruitment Committee decided to approve this suggestion. At the same year, on 3 November *The Conference of Government* (Majlis Mesyuarat Kerajaan) discussed on MMK Bil 22/862/91(25) and agreed that certain posts have been approved to be filled in the said post would depend on the budget and however the approval must first be given by the Government Council²¹.

After that, on 16th January 1995 and 12th August 1995, the decision was announced to Public Service Department to recommend for approval from the Malaysian Treasury in line according to Article 112 of Federal Constitution, which states that:

- (1) *Subject to Clause (2), no State shall, without the approval of the Federation, make any addition to its establishment or the establishment of any of its*

²¹ *ibid*

*departments, or alter the rates of established salaries and emoluments, if the effect of doing so would be to increase the liability of the Federation in respect of pensions, gratuities or other like allowance*²².

Lastly, on 2nd May 1996, the conference of committee PAS studied the higher committee level (JKTT) and agreed on the suggestion to implement a separate appointment in the Kelantan Syariah Court and the existence Chief of the Judge Syarie Committee, the judge of Syariah high Court or Syariah Subordinate Court and support the post of Kelantan Syariah Court. Besides that, there was also approval for post No. 67 of 1996 to be enforced from 15 July 1996 about the post of Kelantan Syariah Court²³.

2.3 The History of Writing The Kelantan Enactment.

The history of writing the Islamic Administration enactment in Kelantan has a close relationship with the British arrival in Malaysia.

Theoretically, the British was not involved in the Islamic Affairs however practicality the arrival of the British as advisors to the Sultanate made them automatically involved with the religion and administration either directly or indirectly. This can be clearly seen when every enactment of Islamic Administration had to be approved before hand and endorsed by the British advisors elected in Kelantan²⁴.

²² *Federal Constitutional*, Article 112

²³ Daud Mohammad, 1998, "*Sejarah Penubuhan Mahkamah Syariah Negeri Kelantan*", Jabatan Kehakiman Syariah Negeri Kelantan, p: 3.

²⁴ Ahmed Ibrahim dan Ahilemah Jones, 1985, "*Sistem Undang-Undang di Malaysia*", Kuala Lumpur, Dewan Bahasa dan Pustaka, p: 49.

Nevertheless, this enactment has close relations with the history of British's arrival in Malaysia. As such the history of legislation of enactment in Kelantan (the Unfederated Malay State) had been introduced late compared to the Strait Settlements and the Federated Malay States²⁵.

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The early stage of the Kelantan Enactment which was approved by this state, focused towards legislation in marriage and divorce only²⁶. After that, the other things followed but it was without Civil and Criminal law. These two were still under the British law system²⁷.

Generally, this enactment was introduced in Kelantan before 1909 due to the British being indirectly involved in the Kelantan Administration as Siamese Advisors in Kelantan.

In 1909, the Siamese and British signed an agreement known as the Anglo-Siamese Treaty 1902. This agreement gave power to Siamese to elect W.A Graham as an advisor for *Raja* Kelantan. Therefore, British involvement had begun informally in Kelantan.

W.A Graham had put forward a great effort to ensure success in the Islamic Administration of Kelantan. Here, he had lessened the power of *imam*. His action actually involved the Islamic affairs though he knew that he could not get involved. During his days as an advisor, he implemented certain laws and also his jurisdiction in Syariah Court. Beside that, he also implemented the law and *Zakat* System, Friday Prayer and Divorce Regulation. However, the law implemented actually followed the British laws System²⁸.

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²⁵ Abdullah Alwi Haji Hassan, 1996, "*The Administration of Islamic Law in Kelantan*", Kuala Lumpur, Dewan Bahasa dan Pustaka, p: vi

²⁶ *ibid*

²⁷ Abdul Kadir bin Haji Muhammad, 1996, "*Sejarah Penulisan Hukum Islam di Malaysia*", Kuala Lumpur, Dewan Bahasa dan Pustaka, p: 134.

²⁸ Abdullah Alwi Haji Hassan, 1996, "*The Administration of Islamic Law in Kelantan*", Kuala Lumpur, Dewan Bahasa dan Pustaka. p: 34-35

Since, W.A Graham, who was the exponent, introduced the British came to Kelantan as an advisor, a series of law in Islam. In 1907, a few laws were introduced. The laws namely The Notice of Syariah Court on 15 April 1907, Notice No. 1 of 1907, Notice of *Zakat* on 9 September 1907, The Divorce Regulation of 1325 (1907) on 2 Rabi al-Awwal 1325H.

The law has approved in 1908 is The Regulation empowered imams to bring individuals who ignored the payment of *Zakat* on 3rd March 1908, The *Surau* Regulation of 1326, No.2 of 1908 on 4 August 1908²⁹.

In 1909 there was also the Divorce Regulation (Undang-Undang Orang Hendak Bercerai Suami Isteri dan Lain-Lain) 1327H No. 6 of 1327. Other than that, in 1911, the registration of Marriage and Divorce was approved known as An Enactment to Provide for The Registration of Marriage and Divorce of Muhammadans, No.1 of 1911.

A few laws were approved in 1914 namely The Notice of Release The Enforcement of Obligatory Attendance at The *Surau Kecil* and Giving Exemptions for Non-Attendance at The *Surau Besar* during Difficult Times No. 9 of 1914, the Notice of Muslim who wanted to marry more than one, Notice No. 15 of 1914. It was allocated to everyone except for the kinsfolk of Raja, who wanted to marry more than one. Firstly, he must have a written declaration in front of the Syariah Court that he must be unbiased to his wives and be responsible to provide their allowance of money. Whoever failed would be fined RM100 or to imprisonment for a term of two months. Besides that, every person and *Imam* involved in this case is liable to a fine not exceeding RM200 or to imprisonment for a term of three months. This notice however was not enforced.

In 1915, the Kelantan state approved The Notice of Muhammadans: Prohibition of Intoxicating Liquor and Rulers of Fasting, No.12 of 1915 (16 June 1915). This notice, allocated a fine to be imposed to any Muslim who consumed

²⁹ Abdullah Alwi Haji Hassan, 1996, "*The Administration of Islamic Law in Kelantan*", Kuala Lumpur, Dewan Bahasa dan Pustaka. p: 34-35

liquor, and adults and sane Muslims who break the fast during the month of *Ramaddan*³⁰.

In 1916, a few rules were approved. The rules namely The Notice on Matters Relating to Marriage, Divorce, Reconciliation and *Ta'lik*, Notice No. 18 of 1916 and to determine the Notice of Regulation of Matters to be Heard in the Syariah Court, Notice No.19 of 1916. Besides that, in the same year the rule for the members of the Council of Islamic Religion and Malay Custom, Kelantan was approved. These rules were created as a few the provisions about the items of council, jurisdictions and their responsibilities. Section 24 had given the power to council to manage about mosques and *suraus* in Kelantan and their officers. Section 25 gave power to councils to send out *fatwa-fatwa* and section 26 also allocated that the council must have their own estimated budget. Based on the laws, the council legislated notice No.3 of 1916. With this notice the council had the right to acquire some form of payment from *Zakat* collected in Kelantan. Then, the Notice No.10 1916 was published. This council was given the authority to take over the *Mufti*. The Notice also annulled the *sarau* law 1908. Besides it gave the authority to the Council of Religion as *Nazir* for all *suraus* and mosques, also in power to appoint or dismiss any *sarau* and mosque officers or any related matters³¹.

In 1917, a few laws were approved on which authority was given to teach *tasawuf*. It was contained in The Notice of Requiring to Obtain Authority for Teaching Islamic Mysticism, No.18 of 1917; The Marriage and Divorce Muslims 1917 (Amendment), No.21 of 1917. Other than that, there was a notice to prohibit from the misuse of the *Al-Quran* verses at any stage of performance. Under notice 32 of 1917, the prohibition to teach about religion without approval through a notice namely The Notice of The Prohibition of Teaching of Muhammadan Religion or Delivering *Fatwa* by Unauthorized person and Required to Ask the Council Approval of 1917, notice No. 45 of 1917.

³⁰ Ahmad Ibrahim, 1977, "*Perundangan Islam di Kelantan*", dalam Seminar pentadbiran Undang-undang Keluarga Islam Kelantan, 20-21 Julai, Kota Bharu. p: 1

³¹ Ibid

In 1919, laws were also introduced on the law of marriage between Kelantanese and Indians. These laws were known as The Regulation of Marriage between Kelantanese and Indians of 1919; the division of property between husband and wife was introduced in Muhammadan Division of Property Between Husband and wife of 1919, Notification No. 33 of 1919.

The administration of Islamic law enactment was amended from time to time until 1938, after that the amendment of other enactments were complete and perfect compared to the earlier enactments. It was The Muhammadan (offences) enactment 1938³², Enactment No. 21 of 1938 on 16 August 1938 and get authentication by A.C Baker as the British advisor in Kelantan and also divided it to two stages which contained 27 sections describing some offences, fines and prosecutions according to Islamic law. The First stage of the enactment was defined by a few words which had relations with the laws, of which it means “*anak muda*” “*bujang*” “*kadi*” “*Majlis Agama*” and so on. Besides, this enactment clearly expressed that this can be enforced towards Muslims only. Non-Muslims were not bound under these enactments³³.

The second part, allocated that who ever does not carry out or perform their obligations would be found guilty and can be sentenced with fines and imprisonment³⁴.

Among the things that could be found guilty under this enactment was those not attending Friday prayers for males who were already 15 years old and above. He could be excused if he was sick, if Friday falls on the Sultan birthday and so on. If a person was accused of the committing of any offences according to this enactment would be liable to a fine of RM0.50 for the first penalty and RM1 for consequent penalties. Whereas, if a person was accused of the commission because buying, selling and drinking liquor he would be liable to fine not exceeding RM25 or to imprisonment for a term not exceeding the first offence and to other penalties, he

³² n.a, The Muhammadan Offences Enactment of Kelantan, 1938,

³³ Abdullah Alwi Haji Hassan, 1996, “*The Administration of Islamic Law in Kelantan*”, Kuala Lumpur, Dewan Bahasa dan Pustaka, p: 35

³⁴ Abdul Kadir bin Haji Muhammad, 1996, “*Sejarah Penulisan Hukum Islam di Malaysia*”, Kuala Lumpur, Dewan Bahasa dan Pustaka, p: 139.

would fined not exceeding RM50 or to imprisonment for a term not exceeding two months. But, they cannot be punished if it was buying and selling liquor to non-Muslims³⁵.

If someone was caught selling or buying food that can be eaten at daytime in the month of *Ramaddan* it is an offence. So this offence can be fined not exceeding RM25 or to imprisonment for a term not exceeding two months for another penalties. The offences of *Khalwat* are liable to a fine not exceeding RM50 or to imprisonment for a term not exceeding one month. After that, to imprisonment for a term not exceeding two months for other penalties³⁶.

Another offence was sexual intercourse, but the enactments had no allocation of punishment for those who did this offence. Other offences were teaching without any classes; propagating faithless distortion; importing, publishing and printing religious books without permission of the Council of Islamic Religious, offences of humiliating Islamic teachings whether by writing or speaking; offences of misusing the verses in the *al-Quran* on the stage³⁷.

In these laws, there were also provisions for the wife where she has a right to claim maintenance from her husband; the children have a right to claim maintenance from their father as written in this provision and also a husband is responsibility to give maintenance for his wife who was divorced and still in *iddah*. The law also, legislated for the *imam*, who was found guilty for not giving money to the officer and the other officers mosque, guilty of a husband who left his wife and guilty of a wife when she did not obey her husband. Furthermore, this enactment legislates the authority of Sultan to do any laws, which is related with this enactment³⁸.

With the enforcement of this enactment, part of this notice was terminated. The notices namely Notice No.12 of 1915, The Notice of Muhammadans Prohibition of Intoxicating Liquor and Rules of Fasting; Notice No.8 of 1917 The Notice of

³⁵ Abdul Kadir bin Haji Muhammad, 1996, "*Sejarah Penulisan Hukum Islam di Malaysia*", Kuala Lumpur, Dewan Bahasa dan Pustaka, p: 139.

³⁶ Ibid, p: 140.

³⁷ n.a, The Muhammadan Offences Enactment Kelantan 1938, sec. 10-14

³⁸ Ibid, sec. 26