



THE APPLICATION OF ISLAMIC PERSONAL LAW IN
MYANMAR: LEGAL ISSUES AND PROSPECTS

BY

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ABSTRACT

This dissertation generally focuses on identifying, highlighting and examining the application of Islamic personal law in Myanmar together with the legal issues and prospects for its effective administration. This research thus specifically aims to study the existing legal framework; examine the legal issues and problems affecting the effective administration and application of Islamic personal law in Myanmar; compare with selected Muslim minority countries of Southeast Asia, and suggest appropriate legal models for the the effective administration and application of Islamic personal law in the country. The study is by its design a qualitative one. The researcher therefore adopts a socio-legal research approach by using both doctrinal and empirical methods. For the doctrinal, the researcher analyses, relevant laws, judicial decisions and literature while for method the empirical method, the research is based data from face-to-face unstructured interviews. The research sample was determined through purposive convenience sampling method. The researcher also uses comparative legal research method by comparing the administration and application of Islamic personal law in Myanmar with those of other Muslim minority countries principally Thailand, Philippines and Singapore. This comparison was to be useful to provide samples of legal measures for application to solve the problems and legal issues of the application of Islamic personal law in Myanmar. This research reveals that although Myanmar Muslims have been allowed during the British colonial era to practice their religion and to apply Islamic law to their personal affairs, the government has not shown any political will to help Muslims to effectively apply it. The study shows that the government has not put in place a legal framework for the application and administration of Islamic personal law in Myanmar. The study also finds that the government has officially given jurisdiction over Islamic personal law matters to civil courts, which are manned by judges who are neither qualified nor have knowledge of Islamic law. This has led to several problems including occasioning miscarriage of justice, adulterating Islamic law on certain matters, etc. The study also reveals that consequent to the problems identified, Islamic person law in Myanmar is not as developed as in other Muslim minority countries in Southeast Asia. The study thus proposes models for application of Islamic personal law in Myanmar.

ملخص البحث

يركز هذا البحث عموماً على تحديد وإبراز ودراسة تطبيق قانون الأحوال الشخصية الإسلامي في ميانمار جنباً إلى جنب مع المسائل القانونية وآفاق الإدارة الفعالة. ويهدف هذا البحث تحديداً لدراسة الأطر القانونية القائمة من دراسة المشاكل والقضايا القانونية التي تؤثر على الإدارة الفعالة وتطبيق قانون الأحوال الشخصية الإسلامي في ميانمار؛ مقارنة تطبيق قانون الأحوال الشخصية الإسلامي في هذه الدولة مع بعض دول ذات أقلية مسلمة مختارة من جنوب شرق آسيا، واقتراح نماذج قانونية مناسبة لإدارة فعالة وتطبيق قانون الأحوال الشخصية الإسلامي في البلاد. وتعد هذه الدراسة من البحوث النوعية. وبالتالي فإن الباحث يتبنى منهاج البحوث الاجتماعية والقانونية معا باستخدام أساليب المذهبية وغير المذهبية (تجريبية) من البحوث القانونية. وللتعرف على الطريقة المذهبية، قام الباحث بتحليل محتوى القوانين ذات الصلة والقرارات القضائية والأدب، بينما للطريقة غير المذهبية، استخدم الباحث المقابلات وجهها لوجه في لقاءات غير منظمة. وتم تحديد عينة البحث من خلال طريقة أخذ العينات المتاحة، كما استخدم الباحث طريقة البحث القانوني بمقارنة إدارة وتطبيق قانون الأحوال الشخصية الإسلامي في ميانمار مع دول غير إسلامية أخرى فيها أقلية مسلمة مثل تايلند والفلبين وسنغافورة. هذه المقارنة مهمة في تقديم عينة للحصول على اقتراحات مناسبة في حل المشاكل والقضايا القانونية لتطبيق قانون الأحوال الشخصية الإسلامي في ميانمار. وكشفت النتائج في البحث أنه على الرغم من أن مسلمي ميانمار قد سمحوا لهم منذ عهد الاستعمار البريطاني في ممارسة شعائرهم الدينية وتطبيق الشريعة الإسلامية في الأحوال المتعلقة بشؤونهم الشخصية، إلا أن الحكومة لم تظهر أبداً أي إرادة سياسية لمساعدة المسلمين في التطبيق الفعال لقانون الأحوال الشخصية الإسلامي. وتشير الدراسة إلى أن الحكومة لم تضع أي مؤسسة قانونية ولا الإطار القانوني للإدارة وتطبيق قانون الأحوال الشخصية الإسلامي في ميانمار. وتوصلت الدراسة أيضاً إلى أن الحكومة قد أسندت رسمياً الولاية القضائية لمسائل الأحوال الشخصية الإسلامية إلى المحاكم المدنية، والتي يتولاها قضاة ليسوا مؤهلين ولا لديهم معرفة بالشريعة الإسلامية. وقد أدى ذلك إلى العديد من المشاكل التي تمس العدالة، ويناقض الشريعة الإسلامية في بعض المسائل. وكشفت الدراسة أيضاً أنه يترتب على المشاكل التي تم تحديدها، فإن قانون الأحوال الشخصية الإسلامي في ميانمار لم يتم تطبيقه كما في الدول غير الإسلامية أخرى في جنوب شرق آسيا. وبالتالي فإن الدراسة تقترح بعض النماذج لتطبيق قانون الأحوال الشخصية الإسلامي في ميانمار.

APPROVAL PAGE

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DECLARATION

I hereby declare that this dissertation is the result of my own investigation, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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To

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6. Thein Thein Htwe, Dr., (LL.B), (LL.M, LL.D, Japan), Staff Officer, Research Department, Office of the Supreme Court of the Union, Nay Pyi Daw, Myanmar. Interviewed by researcher, Yangon, 2013
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LIST OF ABBREVIATIONS

A.D	Anno domini (In the Year of our Lord)
A.I.R	All India Report
All	Allahabad Series
Art	Article
B.C	before Christ
B.E	Buddhist calendar (Thailand)
B.L.R	Burma Law Reports
B.L.T	Burma Law Times
C.C	Chief Court
Cal	Calcutta Series
Ed	Edition
Etc.	et cetra (and so forth)
F.B	Full Bench
H.C	High Court
I.A	Invertors Article
I.C	Investors Chronicle
i.e.	id est (That is)
I.L.R	India Law Reports
L.B.R	Lower Burma Law Reports
M.E	Myanmar Era
M.I.A	Moore's Indian Appeal cases
No.	Number
P.C	Privy Council
R.L.R	Rangoon Law Reports
Ran	Rangoon Series
S	Section
S.C	Supreme Court
S.L.R	Singapore Law Reports
Sec	Section
U.B.R	Upper Burma Law Reports
Vol.	Volume
WWII	2 nd World War

TABLE OF TRANSLITERATION

Table of the system of transliteration of Arabic words and names
used by the International Islamic University Malaysia.

b = ب	z = ز	f = ف
t = ت	s = س	q = ق
th = ث	sh = ش	k = ك
j = ج	ṣ = ص	l = ل
ḥ = ح	ḍ = ض	m = م
kh = خ	ṭ = ط	n = ن
d = د	ẓ = ظ	h = ه
dh = ذ	‘ = ع	w = و
r = ر	gh = غ	y = ي

SHORT: a = اَ ; i = اِ ; u = اُ

LONG: ā = آ ; ī = إ ; ū = و

Diphthong: ay = آي ; aw = آو

CHAPTER ONE

GENERAL INTRODUCTION

1.0 INTRODUCTION

Myanmar is the pluralist country; there are many ethnic groups belonging to different religions: Muslims, Hindus and Christians, living together and its majority race is Myanmar (formerly known as Burmese) who are majorly Buddhists. According to the Myanmar official statistics, the main religions of the country are Buddhist 89.2%; Christianity 5%, Islam 3.8%; Hinduism 0.5%; Spiritualism 1.2% and others 0.2%¹. However the World Factbook of CIA shows Buddhist 89%, Christian 4%, Muslim 4%, animist 1% and other 2% of the population.²

The above statistics show that while the Buddhists are the majority in Myanmar, Muslims are a minority race. Historically, Buddhism was introduced into Myanmar through the influence of Indians and Chinese at different periods of its history.³ Thus, the laws in the pre-colonial of Myanmar were influenced and dictated by Buddhist laws.⁴

Although there is no definite documentary records explaining when Muslims first arrived in Myanmar, there are indications that this happened between the 7th and 9th century.⁵ Some other historical indications, however, suggest that some Muslims

¹ Ministry of Foreign Affairs, "Religion", About Myanmar (Retrieved on 20.12.2011) www.mofa.gov.mm/aboutmyanmar/religion.html

² Central Intelligence Agency, Burma (20.12.2011)

³ Phayre, P. Arthur, *History of Burma: From the Earliest Time to the End of the First War with British India*. (London: Routledge, 2000) at 2, 8, 16-22,

⁴ The Supreme Court of the Union, *The Republic of the Union of Myanmar, Origin, Legal System* <http://www.unionsupremecourt.gov.mm/?g=content/origin>, (viewed on 20.4.15)

⁵ Ezati, Abu al- Fazl, *The Spread of Islam, the contributing factors*. 4th rev. Ed. (London: Islamic College for Advanced Studies Press, 2002) at 301-303; Yegar, Moshe, *the Muslim of Burma: A Study of a Minority Group*, (Otto Harrassowitz, Wiesbaden, 1972) at 2.

settled in several places in Myanmar since the first Myanmar Empire and then the population gradually increased.⁶ However, it is unanimously agreed by historians that Muslims had apparently reached and settled in Myanmar before the intrusion of the British.⁷ Notwithstanding the long presence of the Muslims in Myanmar, there is no evidence of the application of Islamic personal law until the third Myanmar Empire when it was briefly considered and applied.⁸ After this period, the application of Islamic personal law was abolished again in Myanmar, and the the present form of implementation of Islamic personal law was developed during the British colonial era.⁹

The British officially annexed and colonised Myanmar (formerly Burma) as part of British India after the Anglo-Burmese war of 1885. Consequently, the British enacted several statutes including the personal law matters. Some of these laws are the *Kazis Act*¹⁰ which was passed in 1880 but extended to the whole of Myanmar after total annexation, the *Mussalman Wakf (Validating) Act*¹¹ and the *Mussalman Wakf Act*¹². When Myanmar became an independent country, the government also enacted the Dissolution of Muslim Marriage Act¹³ in 1953 and it came into force in 1954. However, the most important law on the application of Islamic personal law is the Burma Laws Act passed by the British Government in 1898¹⁴, which provides, among other things,

⁶ Yegar, Moshe, *The Muslim of Burma: A Study of a Minority Group*. (Otto Harrassowitz, Wiesbaden, 1972). at 3-10

⁷ *Ibid.*, at 29-31

⁸ Tin, U, *Myanmar Min Oak Choke Pon Sar Tan [The Royal Administration of Burma]*, Part 4, (Yangon Ancient Literature and Culture Section, Ministry of Culture, Myanmar, 1962-73) at 176 see also Yegar Moshae at 10

⁹ Yegar, Moshae at 29-39

¹⁰ The Kazi Act (India Act, XII, 1880), *the Burma Code*, Vol. XI. (Government of the Union of Burma, 1958) at 22-24

¹¹ The Mussalman Wakf Validating Act, (India Act, VI, 1913), *the Burma Code*, Vol. XI, (Government of the Union of Burma, 1958), at 24

¹² The Mussalman Wakf Act, (India Act, XLII, 1923), *The Burma Code*, Vol. IX, (Government of the Union of Burma, 1957), at 164-168

¹³ The Dissolution of Muslim Marriage Act, (1953), *The Burma Code*, Vol XI, (Government of the Union of Burma, 1958) at 25

¹⁴ The Burma Laws Act (India Act, XIII, 1898), *the Burma Code*, Vol. I, (Government of the Union of Burma, 1955)

that in the event of a dispute involving a personal law matter, the courts of the Union of Myanmar should apply laws of Myanmar, including Islamic personal law where the parties are Muslims, Hindu law for the Hindus and Buddhist law for the Buddhists.¹⁵ This law legitimises the application of Islamic personal law in Myanmar.

However, despite the recognition of Islamic personal law in Myanmar, there are no *Shari'ah* courts to administer the law like other countries. Islamic personal law matters in Myanmar are therefore decided by the civil courts which are mostly manned by non-Muslim judges. Moreover the majority of lawyers in Myanmar are non-Muslim, although there are some Muslims in litigation practice. Muslims of Myanmar are apparently weak in religious education and Arabic language. Furthermore, statutes on Muslim personal law matters are inadequate and incomplete. For instance, there is still need to make laws regarding divorce in Myanmar. Consequently, decisions on Muslim personal law matters are arrived at based on expert opinion and precedent. Due to the inadequacy of the statutes on Islamic personal law matters, Myanmar courts mostly rely on cases decided by Indian courts even though in many cases, they are not apposite.

Based on the above issues, this research unavoidably evaluates the development of Islamic personal law in Myanmar, presenting it together with challenges and comparisons with other Southeast Asian Muslim minority countries. This study makes the suggestions which are possible to solve the problems. Therefore, this topic is chosen on the basis of its importance and in the context that Myanmar is a part of Asia and Islamic personal law is practised in the whole country even though the law has not been guided well in its development due to many factors.

¹⁵ Ibid., Sec- 13(1)

1.1 SIGNIFICANCE OF THE STUDY

Myanmar is the Southeast Asia country which recognized the application of Islamic personal law as an important part of the country's legal system. Though Muslims in Myanmar are a minority, they have been dwelling there and Islamic personal law has been applied for decades. Since then, Islamic personal law has survived, though there are not enough statutes applicable to all matters of Islamic personal law and no specific Muslim institution which can take responsibility. Therefore, whenever disputes are brought to the civil courts, legal issues and challenges have arisen in matters of practical application. Therefore, this research is an attempt to examine the legal issues in several aspects, and comparing them with their application to on Islamic personal law of other Muslim minority countries of Southeast Asia. Besides, information on Myanmar is very limited and is not easy to get externally. Although this piece of work is not based on total information but to the extent available on the problem, the application of Islamic personal law in Myanmar, it can help partly to those who are interested in Islamic personal law of Myanmar and the practical application of Islamic personal law in Myanmar.

1.2 STATEMENT OF PROBLEM

Although the Myanmar law applies to of Islamic personal law in the country, it does not provide for the education of its lawyers and judges to handle Islamic personal law matters neither has it established any judicial position to adjudicate such matters. Thus, while the available law schools in Myanmar train lawyers and judges in handling civil law cases.

Due to the different historical paths by which Islam was introduced in Myanmar, the operation and the rulings on application of Islamic principles are determined by the

leaders of the many Muslim groups in Myanmar.¹⁶ Each of these groups produces its own muftis who issue *fatwās* on application of Islamic personal law matters as they concern their group members. These muftis obtained their religious education from different countries and different schools with different religious thoughts, methodologies and perspectives. They did not only learn the religious education but also the culture of the places where their schools were situated. Thus, the differences in their *alma mater* and the various customs influence their *fatwās*. For this reason, problems and challenges have arisen in the application of Islamic personal law in Myanmar. The inconsistency in the *fatwā* delivered by the *Muftis* of the different Muslim groups has affected the quality of judgments delivered by the civil courts in respect of Islamic personal law matters.¹⁷

The purpose of this research is to analyse the problems relating to the application of Islamic personal law in Myanmar taking into account the inadequacy of the statutes governing Muslim-related disputes and the Myanmar legal system which has caused inconsistency and diversity in legal decision making procedure. The fact of relevant court structure as well as statutes have forced the authority to rely largely on translated Islamic personal law books and ‘expert opinion’ who may not be necessarily an expert in the subject matter of disputes. Experts’ opinions are also not uniform due to the diversity of Islamic religious organizations and muftis in consequence of the customs and different religious schools at which they learned. It leads to problems in dealing with family legal disputes for Muslims of Myanmar.

¹⁶ Yegar, Moshe at 40-57

¹⁷ Than Tin, U, B.A, B.L, Advocate (801), interviewed by researcher, (Yangon, 2012)

1.3 OBJECTIVES OF THE STUDY

The main objective of this study is to examine the possibility of the comprehensive implementation of Islamic personal law in Myanmar. Based on this limited objective, this study aims to:

1. Analyse the existing statutes relating to Islamic personal law in Myanmar.
2. Examine the problems and challenges of Islamic personal law in Myanmar.
3. Compare the application of Islamic personal law in Myanmar with other Muslim minority countries.
4. Suggest the appropriate model for proper implementation of Islamic personal law in Myanmar.

1.4 HYPOTHESIS

This research is based on the hypotheses that:

1. The rights of Myanmar Muslims to be governed by *Shari'ah* as their personal law is not adequately recognised.
2. The inadequate implementation of the rights of Myanmar Muslims to *Shari'ah* as their personal law is caused by the law.
3. Myanmar's legal structures and statutes need to be reformed and updated to give Muslim minorities the right to be governed by *Shari'ah* as their personal law.

1.5 LITERATURE REVIEW

The literary sources of information of this study are mostly translated Islamic personal law textbooks which are relevant to Islamic personal law in Myanmar, and which are most accessible to the researcher. Due to the minority status of Muslims in Myanmar