

LAA 3064
MOOT/MOCK AND PLACEMENT

LEGAL PROFESSION IN ISLAMIC
PERSPECTIVE AND ITS HISTORICAL
BACKGROUND



CONTENTS

LEGAL PROFESSION IN ISLAMIC
PERSPECTIVE

ISLAMIC HISTORY

MALAYSIAN LEGAL HISTORY

LEGAL PROFESSION IN ISLAMIC PERSPECTIVE

The Holy Quran :

‡ *Surah Al-Anbiya (21) :78-79*

“We also bestowed favors upon Daud and Sulayman when the two were judging a case regarding the field into which the sheep of certain people had strayed by night and were watching them to arrive at the right decision although we had given wisdom and knowledge to both of them” Verse 78.

Cont...

Surah Yusuf (12): 22-29

Case of prophet Yusof and Zulaykha.

“Yusof said: it was she who attempted to seduce me. At this one accusing the other, one member of her own family bore witness saying if his shirt is ripped from the front, then she is speaking the truth and he is lying. But if it is ripped from behind then he is speaking the truth and she is lying. Verses 26-27.

Cont...

Surah An-Nisaa (4): 105

Representation in giving testimony in law of evidence.

“ We have revealed to you book with the truth so that you may judge between people in accordance with the right way which Allah has shown you so be not an advocate for those who betray trust, seek Allah forgiveness, surely Allah is forgiving , Merciful” verses 105-106.

Case of Prophet Harun assisted Prophet Musa.

Hadith

Hadith Ummu Salamah reported that the messenger of Allah declared;

“I’m only a human being and you bring your disputes to me Perhaps some of you indulge in logic to prove your assertions and it may be that I give my decision or the strength of your argumentation. Should I therefore give one that which his brother entitled to he should not take it, for it would be as if I am giving him a coal of fire.”

Hadith: *“If anyone walks with an oppressor to strengthen him, knowing that he is an oppressor he has gone forth from Allah”.*

Practice of The Companions

- # Saidina Ali was known as the best representative amongst the sahabah. For instance in case of *zina* where a pregnant woman who had been married confessed that she has committed *zina* and asked khalifah Umar to stone her to death
 - # In another case where a young lady who fell in deeply love with a young man but unluckily that young man rejected her loves. She planned a device to harm him by accusing him for an offence of rape.
 - # Kaab Bin Sur- a woman complained about her husband.
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Required/Recommended Reading

- Ahmad Ibrahim and Mahmud Saedon, '*Judges and Lawyers under the Shariah*' in Aidit Ghazali (ed), *Islam and Justice*, 1993, IKIM, Kuala Lumpur.
- Baharudeen Abu Bakar, *Amalan Undang-undang Dalam Mahkamah Shariah*' in Abdul Monir Yaacob (ed), *Undang-undang Keterangan dan Prosedur di Mahkamah*, 1995, IKIM, Kuala Lumpur.
- *Minhaj Et Talibin* by Imam Nawawi-Administration of justice-Book 5.
- Sunan Abu Dawud, Kitab Al-Aqdiyyah pp. 1013,1016, 1232.Muwatta Imam Malik, Kitab Al-Aqdiyyah p. 313 and Ibn Qayyim al-Jauziah, Al Turuq al Hukumiyyah pp. 68,70,79,83-84.

ISLAMIC HISTORY

Justice in the Prophet's Period.

- Appointment of Saidina Ali, Muadz Bin Jabal and Unais as qadhis.
 - Prophet himself head of the state and at the same time head of the judiciary
 - Appeals will be referred to prophet himself. There was no specific buildings and mostly conducted trials in mosque. Judges are paid through baitul mal and prophet always gave advise to them. Example Itab Ibn Al Usaid the governor of mecca was paid ten dirhams a day.
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Justice in the Period of Khulafa Ar-Rashidin

Saidina Abu Bakar As-siddiq.

- Head of the state and at the same time head of the judiciary
 - The sources of hukm or decision are Quran and Sunnah, then gathering the companion in order to deduce ruling by way of ijma'. If no rulings be agreed upon unanimously Abu Bakar use his own ijtihad.
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Cont....

Saidina Umar Ibnu Khattab

- The first inventor the system of separation of powers between governor and judges. Governors and judges were different personnel.
 - Umar gave his advise to judges verbally and through letters. Example his famous letter to Abu Musa Al-Ashaari.
 - The court administration was improved.
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Cont...

- # Saidina Uthman Ibnu Affan
 - He is the only judge in the Medina. Ali Talha and Zubair were his advisors .
 - Uthman delegated the power to appoints judges outside Medina to governor. Doctrine of delegation of powers was implemented.
 - Specific Court building was built.
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Cont...

Saidina Ali Ibnu Abi Talib

- He moved the seat of government from Medina to Kufah.
 - Head of the state and judiciary.
 - Introduced a municipal guard called Shurta.
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Justice in the Umayyad Period.

- # The caliph appointed judges in capital while judges elsewhere by the governors
 - # Jurisdiction of the judges including duty to supervise the execution of the punishment.
 - # Judges started to record their judgment in writing in order to prevent litigating parties from disputing judgment given orally.
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Justice in the Abbasid Period

749 A.C/132 A.H

- # Judges were appointed based on the mazhab of the populates.
 - # Caliphate and judiciary were separated.
 - # Qadhi Qudhat (Chief Justice) was delegated with the power to appoint and dismiss judges, hear appeals and review judge's decision, administer the judicial institutions and give advise to the caliph in judicial and legal matters. First Qadhi Qudhat was Abu Yusof of Hanafi school.
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Turki Uthmnaniyah

- # Islamic empire influenced by western.
 - # Western legal profession started.
 - # Interpreter in court known as “vakil”.
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Required/Recommended Reading

- Dr. Mohamad Muslehuddin, “*Judicial System of Islam Its Origin and Development*”, Islamic Publications Private Ltd, Lahore Pakistan 1991.
 - Farid Sufian Shuaib, Tajul Aris Ahmad Bustami & Mohd Hisham Mohd Kamal, *Administration of Islamic Law in Malaysia Text and Materials*, 2001, MLJ.
 - Dr. Ahmad Abdul Muniem Al-Bahai, *Tarikh Al Qada fil Islam*.
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MALAYSIAN LEGAL HISTORY

■ The position of Islamic Law Prior to The Reception of English Law.

(1) Malacca Sultanate

- Sultan appointed qadis as their advisers in religious matters.
 - Islam was the state religion of Malacca. Laws of Malacca and Maritime Laws of Malacca.
 - Malacca Laws consists of islamic family law, criminal law, sale and evidence and etc.
 - Penalties according to hukum Allah and Hukum Adat (patriarchal and matriarchal).
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Cont...

Portuguese

- Governor had supreme command over all inhabitants
 - Assisted by Ovidor (CJ), viador (mayor), the Bishop.
 - Malays came under the jurisdiction of the Bendahara, Malays in Naning and Linggi were controlled by a Temenggong.
-

Cont...

Dutch

- Governor had supreme authority over all inhabitants
 - Assisted by Council consisting of the Collector, Mayor. Another council is Council of Justice.
 - Laws regulations were issued by the central government in Holland.
 - Leave the Malays to practice their own customs and law.
-

The position of Islamic Law during British Period

- # British influence most of the legal system in Malaysia. 1807- First Charter of Justice 1826- Second Charter of Justice The effect is Islamic law had lost its significant and was only applied in the area of Islamic family law.
 - # In 1937 Civil law enactment was enacted and introduced to FMS and extended to SS. All civil cases were subjected to the English law.
 - # Mohammedan Marriage Ordinance 1880 was promulgated in which it regulated the muslim marriage and divorce for straits settlements until the Administration of Muslim Law Enactments were introduced to cover all Malaya. The ordinance provides inter alia Governor appointed the Qadhi. Appeals heard by the Governor. The governor will appoint mufti to assist registrar in Islamic law matters.
-

Hierarchy of Courts

Supreme Court (Formerly known as Courts of Judicial Commissioner);

Court of Magistrates of the First Class

Court of Magistrates of the Second Class

Court of Khathi and Assistant Kadhi

Court of Penghulu

The position of Islamic Law after Independence Until Today

- Article 4 (1)-Constitution is the supreme law and Article 3 (1)- Islam is the religion of the federation.
- Ruler is the Islamic head of the state
- Amendment to the Article 121 (1A) of the Federal Constitutions.
- Formerly the administration of Islamic law concentrated on Majlis Agama Islam.
- There are three authorities handling the Islamic law matters in the states;
 1. Majlis Agama Islam
 2. Mufti
 3. Shariah Courts

The Establishment of the Syariah Court

Shariah Appeal Court- Chief shariah judge and 2 others

Shariah High Court- kadhi besar

Shariah Subordinate Court-kadhi

Jurisdiction of the Shariah Court

- # Muslim Courts Criminal Jurisdiction Act 1965- any offence punishable with imprisonment for a term exceeding 6 months or any fine exceeding RM1000.00 or with both.
 - # The act was amended in 1984 and the jurisdiction has been extended to punishable with imprisonment up to 3 years or fine up to RM5000.00 or whipping up to 6 strokes or the combination of all these.
 - # Only covers Muslim and within state boundaries.
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Cont....

✚ Judges of the Syariah Court

- The ruler appointed the judge known as qadhi or qadhi besar. Known as qadhi.

✚ Syariah Prosecutor

- The ruler or YDPA with advise of Majlis has the right to appoint Chief Shariah Prosecutor. At his sole discretion, he has the right to start proceeding for any offence committed at the shariah courts.

- ✚ Peguan Syarie- The Majlis may on the payment of prescribed fee admit persons having sufficient knowledge of Islamic law to be peguan syarie to represent any parties before any shariah court.
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Lawyers in the Malaysian History

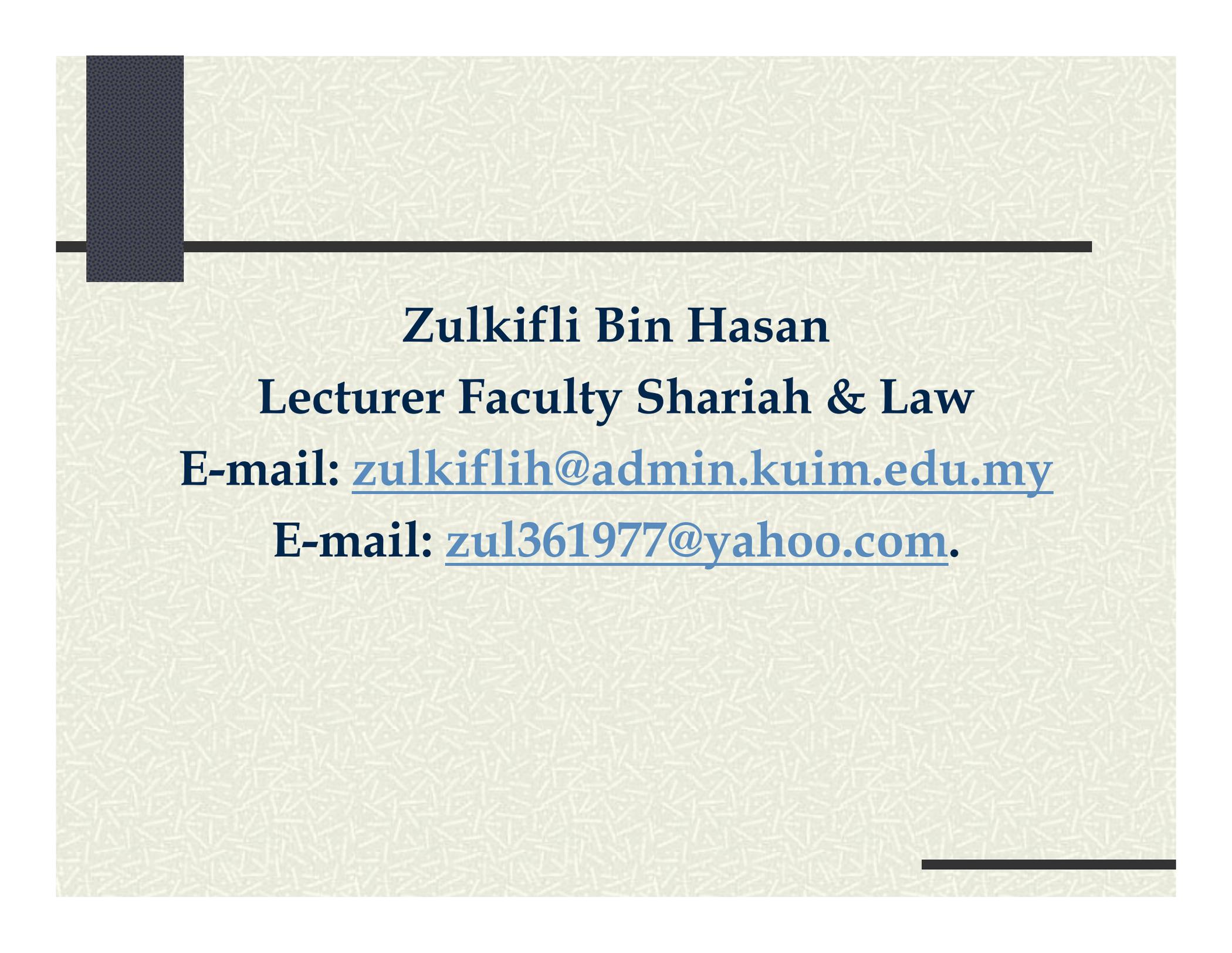
- # Legal system came into existence after COJ. Fused Legal profession. There was no Bar to set up and licensing control of lawyers.
 - # 1914 Legal profession Enactment- Established a Bar Committee.
 - # 1947- Bar Council was established.
 - # 1976- LPA was passed- Establishment of Malaysian Bar, Qualifying Board.
 - # An advocate and solicitor can be Peguam syarie if he fulfilled the requirements of Peguam syarie .
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Issues

- # Lack of independence- peguam syarie, judges, political interference.
 - # No professional body as Bar Council
 - # Lack of proper training
 - # Civil court often interfere with the jurisdiction of the shariah court.
 - # Standardization of the Islamic law and centralisation of the shariah court.
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Required/Recommended Reading

- Ahmad Ibrahim, Ahilemah Joned, *Malaysian Legal System*, Dewan Bahasa dan Pustaka, 1995, Kuala Lumpur.
 - Farid Sufian Shuaib, Tajul Aris Ahmad Bustami & Mohd Hisham Mohd Kamal, *Administration of Islamic Law in Malaysia Text and Materials*, 2001, MLJ
 - Ahmad Ibrahim, *Pentadbiran Undang-undang Islam di Malaysia*, IKIM, 1997, Kuala Lumpur.
 - Hamid Jusoh, *The Position of Islamic Law In the Malaysian Constitution With Special Reference To The Conversion Case In Family Law*, Dewan Bahasa dan Pustaka, 1991, Kuala Lumpur.
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