An Introduction of Colonial Framework from Watanic Jurisprudence Analysis: A Case Study on The Malay States

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Abstract
Colonisation and decolonisation are popular research subjects, but they lack legal definitions. Colonisation brings the subject of colonialism that invites broader aspects of research. Most of the discussions about the impact of colonialism upon nation-states do not distinguish between sovereign and colonised states. This attitude is contagious from the habit of stereotyping that everything that came under British influence was colonised and under colonial rule. This is a qualitative study of legal history employing watanic jurisprudence analysis. The Malay states become a case study because the legal historical texts prove otherwise than what the public perceives. Hence, this article aims to construct the colonial framework from the perspective of international law. This study is essential because many writings employ the words 'colony', 'colonisation', 'under colonial rule', and 'colonised states' arbitrarily without first examining the legal position of any state, including the Malay states that were once under the influence of the British. The above attitude renders the study of many aspects of 'the so-called colonised Malay states' biased and constructed from the wrong foundation. In conclusion, there must be evidence of the transfer of internal sovereignty to a foreign authority to constitute a colonisation. From this premise, the Malay states were not colonised, and the sovereignty of the Malay rulers continues to this day as enshrined in Article 181(1) of the Federal Constitution.

Keywords: Colonial framework, colonisation, colonialism, watanic jurisprudence, the Malay states.

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Introduction

Colonisation and decolonisation are popular research subjects, but they lack legal definitions. Colonisation brings the subject of colonialism that invites broader aspects of research. Most of the discussions about the impact of colonialism upon nation-states do not distinguish between sovereign and colonised states. This attitude is contagious from the habit of stereotyping that everything that came under British influence was colonised and under colonial rule.

Colony is defined by L.B.Curzon (2007) as "any part of Her Majesty's dominance outside the British Island: except (a) countries having fully responsible status within Commonwealth; (b) territories for whose external relations a country other than the UK is

responsible; (c) associated states'. Colonisation comes from the root word colony, indicating a state of defeat, loss of supreme position, complete elimination of control and the existence of foreign authority that replaced local governments within their territories.

According to the Oxford Dictionary (2024), colonisation is "the act or process of sending people to live in and govern another country;" on the other hand, decolonisation means "the process in which a country that was previously a colony (controlled by another country) becomes politically independent: the process of getting rid of colonies:". The Cambridge Dictionary (2024) defines a colony as a country or area politically controlled by a more powerful government that is usually far away, such as Australia and New Zealand, former British colonies. Those definitions raise many questions underpinning the concept of a colony and colonisation, hence requiring further scrutiny.

A colonial power always ascribed to itself as the sovereign state. As such, colonisation is a term that is the opposite of sovereignty. According to legal jurists like Bodin and Thomas Hobbes, sovereignty is the supreme authority with ultimate power in the political and legal cosmos. Generally, it connotes the supreme authority within a territory. Since colonisation involves more than one country and the internal affairs of other countries or territories, it must conform to the framework of international law in interpreting its concepts and principles.

Hence, this article aims to construct the colonial framework from the perspective of international law. This study is essential because many writings employ the words 'colony', 'colonisation', 'under colonial rule', and 'colonised states' arbitrarily without first examining the legal position of any state, including the Malay states that were once under the influence of the British. The above attitude renders the study of many aspects of the so-called colonised Malay states biased and constructed from the wrong foundation.

Methodology

This article uses the research design of legal history that employs a watanic jurisprudence analysis. The watanic jurisprudence analyses legal documents and sources of sovereignty based upon two philosophical worldviews: the continuum and dichotomous frameworks relying upon local legal historical context as well as the present legal provisions to determine a legitimate constitutional system of a country and valid legal interpretation that uphold the rule of law.

This method could also be employed to perform legal analysis on any legal issues that require jurisprudential perspectives. Local laws and customs are analysed broadly and purposively in the correct linguistic, philosophical, and local historical context. The relevant philosophical framework will be used as the governing principle to interpret constitutional provisions, legal documents, and other legal issues. In this case, the words colony and colonisation are viewed from the perspective of international law. The circumstance in the Malay states is a case study because the legal historical texts prove otherwise than what the public perceives. Observation is made on various legal reports, treaties and international law cases.

This method conforms with the rules of constitutional interpretation outlined in the Federal Court's case of Indira Gandhi A/P Mutho v. Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018].

Malay States

The Malay states comprised the Federated Malay States and Unfederated States before the formation of the Federation of Malaya by way of the Federation of Malaya Agreement dated 21 January 1948. Subsequently, the constitutional development process was pursued, and a fresh Federation of Malaya Agreement was signed on 5 August 1957. 31 August 1957 signified the proclamation of the independence of Malaya.

To legally introduce the objective of the Federation of Malaya and the relationship between the British Government and the Malay states, the speech of the State Secretary for the Colonies when presenting the *Bill of the Federation of Malaya Independence* on 12 July 1957 carried great credibility when he states:

> This Bill seeks to enable provision to be made for the establishment of the Federation of Malaya as an independent sovereign country within the Commonwealth. We have had a long and honourable association together, and this association will continue in the future, though in a new form.
>
> Our relations with Malaya have throughout been based on agreements and treaties. Our power and jurisdiction were acquired by treaty and must be ended by treaty. Our earliest Settlements in Malaya, except for Malacca, were established by consent of the rulers concerned, and the spread of British protection throughout the Peninsula towards the end of the nineteenth century was affected by treaty and not by conquest.

He further explained the source of authority that established the Federation of Malaya in 1948:

> The Bill that I am presenting today does not itself, grant self-government to Malaya, but it enables Her Majesty to enter into an agreement to establish an independent Federation of Malaya and to provide an order-in-council for the implementation of that agreement. The grant of independence to the Federation presents special constitutional problems and requirements. The present authority of Her Majesty's Government in the United Kingdom in Malaya derives from three sources. It derives, first, from the agreements between Her Majesty the Queen and the rulers of each of the nine Malay States, by virtue of which these States are under Her Majesty's protection. Secondly, it derives from the sovereignty of Her Majesty over the Settlements of Penang and Malacca and, thirdly, from the Constitution of the present Federation contained in the agreement made in 1948 between His late Majesty and all the rulers jointly.
>
> The grant of independence requires that a new agreement should be made between Her Majesty and the Malayan rulers, withdrawing Her Majesty's protection and jurisdiction and agreeing to establish an independent Federation. The future Constitution of the Federation will be scheduled to the new agreement. So, the Bill enables Her Majesty to enter into an appropriate new

> agreement to this end but provides that the agreement should not be brought into force until the new Federal Constitution has been approved by the Federal Legislature and by the States.
>
> I said that the authority of the United Kingdom Government derived, secondly, from Her Majesty's Sovereignty over the Settlements. This Bill provides for the relinquishment of Her Majesty's sovereignty over Penang and Malacca, and the Federal Constitution provides for their incorporation with the new Federation as two new States.
>
> Penang and Malacca will enter the Federation as equal partners with the other States.
>
> In the view of the Reid Commission, which went into this with very great care, and in the view of Her Majesty's Government, who also have studied it with very great care, this is by far the wisest course in the interests of the people of the Settlements, with whom we have had an especially close and lengthy association. They will be equivalent in status with the other States, and their governors will take their place with the rulers of the Malay States. Needless to say, in an independent Malaya, they will be, as the rest of Malaya will be, within the Commonwealth.

The statement made by the State Secretary for the Colonies about the independent status of the Malay states was in line with the observations made by the Reid Commission (1957) when it was stated in paragraph 191 of their report, "We do not think that the Settlements can remain part of Her Majesty's dominions. The rest of the Federation never has been and will not now become part of Her Majesty's dominions."

Colonisation and Sovereignty: An Overview

Strang (1996:25) discusses the effects of *colonial imperialism* as a form of colonialism. According to him, colonial imperialism involves conflicts over who owns or controls what. The usual explanations of these very real conflicts usually point to a variety of realistic principles: simple differences in power, economic or political drivers in imperialist powers, patterns of cooperation between Westerners and non-Westerners, and competition between powers in anarchic state systems. He added that non-Western sovereignty is actively decriminalised in national communities and Western societies; this abolition of non-Western politics is essential in structuring the conventional path towards colonial domination and a model of resistance or adaptation that sometimes leads to recognising non-Western politicians as sovereign states.

Furthermore, according to Strang (1996), colonial imperialism is the expansion of the official empire of foreign domination. The most stinging example involves the annexation of non-Western countries as the possession of Western colonisers. Total control also arises through the protectorate relationship, in which a non-Western ruler retains internal power but leaves command over foreign affairs and the entire international personality to the protecting power.

Another vital statement of Strang (1996) is that positivist analysis added to the notion of natural law in the early nineteenth century. Here, the rights and duties of international law are seen not as existing in the human condition but as a product of concrete history. This shift in reasoning, part of a much more extensive reshaping of Western thought, significantly reduced concerns about non-European sovereignty. From the 1830s to the 1920s, international lawyers spoke of a "family of nations" in which a non-Western country may, for some reason, accept its sovereignty. Non-Westerners are seen as failing to understand the requirements of Western international law and constitutionally failing to appeal according to its methods. For example, the conversion (*annexation*) of Asian or African countries can be legitimately disputed by rival European powers but not by the colonised country itself.

Hinsley (1986), a leading political science expert, defined sovereignty as the theory or assumption of political power and aims to build that power that may be lost or taken, eroded or increased; sovereignty, to him, is not a fact. It is a concept that has been applied by people who, under certain circumstances—qualities they have contributed or claims they have returned—to the political power they or others exercise.

Hinsley's definition shows that sovereignty is a philosophy of law that is not limited to exercising political power. Wolff (1990) in Philpott (2023) defines it as the right to govern and, reciprocally, to obey. According to Philpott (2023), what is most important here is the term "right", which signifies legitimacy. Sovereign authorities derive power from several sources of legitimacy that are recognised together: Natural law, divine mandate, hereditary law, constitution, and even international law. In the contemporary era, several legal bodies are the source of sovereignty, such as the monarchy, constitution and parliament.

A detailed debate on sovereignty can be found *in Kedaulatan Malaysia: Governan Utama Negara* (Wan Ahmad Fauzi, 2022). Sovereign authority is where the legitimate source of legislative, executive, and judicial powers resides. The sovereign authority can delegate to other parties to perform one or all three functions of such powers. If there is no deprivation of the sovereign power from a local government, such a state is not considered colonised.
According to Dixon (2013), there are eight conditions in which sovereign power is acquired, namely:

1. Effective control implementation- occupation and prescription
2. Discovery.
3. Cession and treaty.
4. Use *of force – conquest.*
5. Territory increases
6. Judicial decision
7. *Uti possidetis* and other principles related to territorial acquisition.
8. Self-determination.

This article will construct the colonial framework from the above legal perspective.

Colonial Framework

The Colonial Framework in the context of this study was specifically developed to test the position of a sovereign state under international law that falls under some influence of external authority vis-à-vis external power. The position of the Malay states becomes a comparative study because the public popularly perceives the celebration of Independence Day on 31 August 1957 as the British colonised them.

The issue often debated by many scholars, politicians, and the public is the impact of British influence through the advisory system in the Malay states, which gave rise to the claim that the Malay states were colonised.

Based on the position of the Malay States from the perspective of the eight conditions, only two conditions, namely *cession* and *under conquest*, are the most legitimate yardsticks in assessing the challenges of its sovereignty sustainability. *Cession,* according to *Oxford Public International Law* (2024), is:

> An understanding under international law by which territory is transferred from one State to another with the consent of both States. It is one of the modes by which states can lawfully acquire territory (Territory, acquisition), and since it is based on mutual consent, it is presumably the mode that has the greatest practical relevance today. As it necessarily entails a change of territory, cession entails a case of State succession, i.e., the replacement of one State by another in the responsibility for the international relations of the territory...

The interpretation of *cession* in Malaya should refer to local practices that even the British self-recognise. The doctrine of local circumstances dictated the application of English law even in the colony of Penang. In the case of Straits Settlements *Yeap Cheah Neo v Ong Cheng Neo* [1875], Sir Montague Smith, on behalf of the Judicial Committee of the Privy Council, stated that statutes relating to matters and exigencies peculiar to the local conditions of England and which are not adapted to the circumstances of the colony, do not become a part of its law, although the general law of England may be introduced into it.

In addition, the limitations of the principles of English law in another settlement that was Malacca, were also explained by Judge Maxwell in the case of *Chulas v Kolsom binti Seydo Malim* [1867] when his lordship emphasised that it has been decided many times as a legal doctrine that the English rule does not apply to the nation when the application of the rule will bring tyranny and oppression.

The above *obiter dictum* evidence that the application of the principle of English law was not absolute, and the British executive actions in Malaya were also subject to the principle of the rule of law.

This article presents three forms in local legal documents of how a cession took place, there were:

1. The Perak Treaty dated 18 October 1826 between Paduka Sri Sultan Abdullah Ma-alum Shah and Captain James Low stipulates, “The Sultan, who governs the whole of the

Perak Country and its dependencies, has this day, in the month and year herein specified, given over and ceded to the Honourable the East India Company of England, to be under its government henceforward and forever, the Pulo Dinding and the Islands of Pangkor……, to be kept and governed by them, and to be placed under any one of their governments as they may think fit."

2. The treaty between Sultan Ali and Temenggong Daing Ibrahim, dated 10 Mac, 1855, stipulates, "1st. His Highness Ally Iskandar Shah bin Sultan Hussain Mohomed Shah, for himself and successors, does hereby cede in full sovereignty and absolute property to His Highness Datu Tumungong Daing Ibrahim Sri Maharajah bin Tumungong Abdul Rahman Sri Maharajah, his heirs and successors forever, the whole of the territory of Johore within the Malayan Peninsula and its dependencies, with the exception of the Kassang territory hereinafter mentioned."
3. Warkah Dato' Klana Petra Syed Abdul Rahman al-Kadri, the ruling chief of Luak Sungai Ujong, about the surrender of a piece of land measuring 94 acres in Simpang dated 31 May 1877, stipulates, "This piece of land I, of my own free will, cede to the Queen's Government, Her Heirs and successors forever to be under the jurisdiction of the Queen's Government, Her Heirs and successors."

Based on the above legal documents, a cession must be expressly stipulated, or the transfer of sovereign power over a particular territory or part of it occurs. On the other hand, a local sovereign power can also be seized through conquest.

The same practice applied in India that involved the British or East-India Company as follows:

1. Treaty dated 19 August 1904;

I, Sawai Madho Singh, Maharaja of Jaipur, hereby cede to the British Government full and exclusive power and jurisdiction of every kind over the lands in the said State which are, or may hereafter be occupied …..

2. Treaty of Maharaja Soorut Sing Bahadoor dated 9 March 1818;

.... or, in the event of his not finding the means to pay those expenses, he will, in lieu, cede parts of his territory to the British Government, which, after the payment of those expenses, shall be restored.

3. Treaty of Rajah Sikkimputtee dated 10 February 1817;

ARTICLE I
The Honourable East India Company cedes, transfers and makes over in full sovereignty to the Sikkimputtee Rajah, his heirs or successors, all the hilly or mountainous country situated to the eastward of the Mechi River and to the westward of the Teesta River, formerly possessed and occupied by the Rajah of

Nepaul, but ceded to the Honorable East India Company by the Treaty of Peace signed at Segoulee.

In *the Island of Palmas Case (Netherlands, USA), The Hague, April 4, 1928, Volume II pp. 829-871,* the *Permanent Court of Arbitration* dealt with the issue of a dispute over sovereignty over the Island of Palmas between the United States and the Netherlands. The case arose from the United States' claim that its sovereignty over the island of Palmas was acquired from Spain through the cession of sovereignty under the Paris Treaty of 1898.

The United States' claim failed because the Arbitrator ruled, "no presumption in favour of Spanish sovereignty can be based in international law on the titles invoked by the United States as successors of Spain." The legal principle of the decision is that a party that does not have sovereignty over a territory cannot cede the right to another party.

In other instances, disputes arise over territorial claims belonging to other sovereign governments, triable in the *Permanent Court of International Justice*. In the case *of Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5),* the Permanent Court of International Justice tried the disputed legal status of East Greenland when the Royal Government of Denmark sued the Royal Government of Norway. This is because, on July 10, 1931, the Royal Norwegian Government issued a declaration to continue occupying certain territories in Eastern Greenland, which, at the claim of the Danish Government, were subject to the sovereignty of the Danish Crown.

The above application was for the Court's judgment that "the aforementioned declaration of occupation and any steps taken in this regard by the Government of Norway constituted a violation of the existing legal situation and was accordingly unlawful and invalid".

Article 52 of *the Vienna Convention on the law of treaty 1969* provides, "treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of International law embodied in the Charter of the United Nations". The two cases involving the law between the two sovereign states and the Vienna Convention were cited to show that a foreign state's actions in another state's local affairs can be challenged in international court forums.

Conquest, on the other hand**,** from the point of view of international law, according to Britannica (2024), is: The acquisition of territory through force, especially by a victorious state in a war at the expense of a defeated state. An effective conquest takes place when physical appropriation of territory (annexation) is followed by “subjugation” (i.e., the legal process of transferring title). Influence is another popular term when debating the relationship between foreign powers and other states. There are two categories of influence, namely:

1. the act of interference.
2. the act of intervention.

Interference and intervention indicate the degree of foreign powers' influence on local governments' internal affairs. Influence with the act of interference is considered unlawful. In this context, direct and indirect interference occurs outside the local government's consensual limits.

On the other hand, there is lawful and unlawful intervention. Intervention can arise from a legal relationship, either diplomatic or contractual. Intervention due to an obligation as stipulated in an agreement is lawful. The form and effect of lawful intervention differ from interference and unlawful intervention. A more accurate term for intervention due to an obligation under a valid agreement is "contractual relationship". This is because the contractual relationship is a matter between the two consensual parties.

Intervention is said to exist under the *protectorate* and *protected state*. *Oxford Public International Law* (2024) defines the terms 'protectorate' and 'protected State' as follows:

> a relatively powerful State's promise to protect a weaker State from external aggression or internal disturbance, in return for which the protected entity yields certain powers to the protector. Typically, the legal basis for a regime of protection is a treaty by which the protecting State acquires full control over the external affairs of another State or territory. At the same time, the latter continues to have command over its internal affairs. The dependant entity is not annexed (Annexation) or...

In the relationship between a foreign power and its protectorate, the consent of the local government is obtained through an agreement that defines the obligations of both parties. This relationship often occurs due to the needs of each party. In this situation, the essence of the contract and its implementation need to be analysed to check whether what is happening is valid. The implementation and enforcement arising from the agreement according to its terms is the act of compliance between the contracting party. Breach or omission by any contracting party is the act of non-compliance that may result in the other party seeking legal remedy. The relationship between the two parties should be based on the terms and conditions agreed upon as they translate to each other's intentions.

Independence and freedom are two words close to the issue of colonisation. The term independence itself can denote two conditions, namely:

1. The existing conditions for an independent country.
2. The changes that occur in the country resulting from certain events.

Since there can be various consequences of the intervention, such as the following:

1. A situation that leads to the transfer of internal sovereignty to a foreign power.
2. A condition that places a state under protection.
3. Circumstances that give rise to a causal action against a party who violates the terms and conditions of the agreement.

Therefore, the relationship between the two parties needs to be examined case-by-case, without simplistic generalisation. In any case, the term independence or its celebration should be interpreted after reviewing the relevant facts before its declaration.

In summary, the extent of such intervention must be examined to determine whether it may invoke legal remedy against the defaulting party instead of depriving the internal sovereignty.

Another pertinent issue in articulating the aspect of sovereignty is the term freedom. Freedom is not a strict requirement for a sovereign government. Taking an example of human life since the time of the Prophet Adam (a.s), no human being lives in absolute freedom; indeed, there are limitations and obstacles. Committing to a lawful contract itself restricts one's freedom. However, such restriction does not amount to colonisation. It is a reality in community affairs and larger groups in the government or state. The essence of freedom ultimately comes back to the options available in dealing with any issues, including crisis management.

According to Rousseau, who supports the social contract theory (Philpott, 2023), a country can be legal only if the general will of its experts guides it. When citizens obey a law, they have freedom because it is enacted of their own will through their elected representatives. Although the law must be obeyed voluntarily or not, liberty still exists because they choose their candidates, who are determined by majority votes.

Although the parliament is considered sovereign in England, it does not have absolute freedom because it is bound by the *Bill of Rights 1689*. The British government no longer had complete independence when it joined the European Union in 1973, but Britain is still considered a sovereign country.

In short, from the aspect of sovereignty, a decision made by a local government because of any pressure does not necessarily deprive it of its position as long as the validity of an action resides in the internal authority. The wisdom to manage and respond to critical situations is an act of choice. The sovereignty of the local government is only stripped if such a position is transferred to a foreign power due to *cession* and conquest, as debated under international law. On the other hand, local governments can challenge the actions of foreign parties who interfere in their internal affairs or unilateral acts of the parties who violate the agreement's terms.

Therefore, the celebration of Independence Day needs to be examined from four angles, namely:

1. Free from colonisation.
2. Free from interference.
3. Free from intervention, or
4. Free from agreements.

Free represents a state of independence but not in a strict sense, as argued. Freedom from colonisation occurs when a foreign power returns its sovereignty over a colony to the local authority. Freedom from interference occurs upon the end of a foreign power's interference in the internal affairs of a sovereign state. Freedom from the intervention and agreement is when the terms and conditions of the signed agreement no longer bind both parties.

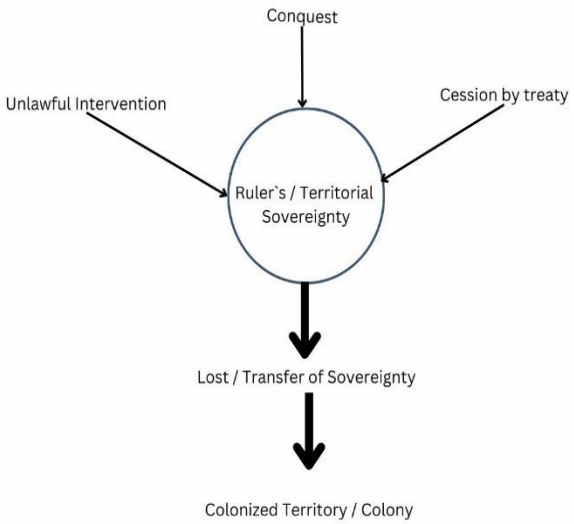
The above circumstances must be distinguished when analysing the position of the Malay states and any other cases. Upon examining all treaties in the Malay states, it was found that the Malay rulers entered no treaty to cede or transfer their sovereignty to the Dutch, British or Japanese. Only the city of Malacca fell by conquest to the Portuguese and later the Dutch

with the assistance of the Johor-Riau Sultanate; subsequently, the British took over the port city of Malacca from the Dutch in 1824. The Japanese occupied Malaya from December 1941 until September 1945, but they did not deprive the sovereignty of the Malay rulers.

The British intervention in the internal affairs of the Malay states through various treaties that introduced an advisory system. However, the British did not preside over the state council of the Malay states that remained under the rule of the Malay rulers. When the Malayan Union was revoked, the Federation of Malaya was formed by the joint delegation of powers between the British Crown and the Malay rulers. The Federation of Malaya Agreement dated 21 January 1948 entrusted the High Commissioner to preside over the federal administration. The term High Commissioner connotes a position lower than governor; where the term commissioner was commonly used in the Malay states, such as commissioner of land and commissioner of Muslim Religion. The term denied the Federation of Malaya, under colonial rule, from 1948 until 1957.

Conclusion

All relevant legal documents must be analysed based on legal history and available legal documents underpinning the subject under study. The British did not colonise the Malay states, owing to the legal historical evidence and circumstances viewed from the perspective of international law. There must be evidence of the transfer of internal sovereignty to a foreign authority to constitute a colonisation. From this premise, the Malay states were not colonised, and the sovereignty of the Malay rulers continues to this day as enshrined in Article 181(1) of the Federal Constitution.



Rajah 1 : Bentuk Campur Tangan (Interference)
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