

THE ISLAMIC LEGAL SYSTEM IN MALAYSIA: CHALLENGES AND STRATEGIES

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ABSTRACT

It is established that Islam has played a crucial role in the development of *Tanah Melayu* as evidenced by its progression from a small village to a bustling trade hub in the Nusantara, and ultimately to a fully-fledged nation. Being an all-encompassing religion, Islam came not only as a belief system; it has as well brought positive changes and order in the political, economic and social aspects of *Tanah Melayu*. In the legal aspect, though Islamic law was used to adjudicate civil and criminal matters at first, the coming of the colonists suppressed its usage and the Common Law was instead, enforced. However, approaching the independence of *Tanah Melayu*, efforts of the Muslim intellectuals and reformists have managed to secure the position of Islam in the Federal Constitution. Today, though Islamic law is ensured with exclusive jurisdiction and recognition, its institutions strive to stay pertinent. Coordinating the law at the federal level remains a challenge especially that involving the inherited power of states over Islam and its law. By using the qualitative method of research methodology, the paper analyses primary and secondary data descriptively by looking into the legal history and development of Islamic law until today. It is found that although Islam and its law are sourced from the supreme law in the country, it has to constantly overcome its challenges to remain relevant and significant. Thus, the paper seeks to look into challenges in administering Islamic law and its institutions. It also suggests some practical strategies toward a standardised and exclusive Islamic legal system in Malaysia.

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SISTEM PERUNDANGAN ISLAM DI MALAYSIA: CABARAN DAN STRATEGI

ABSTRAK

Telah terbukti bahawa Islam telah memainkan peranan penting dalam pembangunan Tanah Melayu seperti yang dibuktikan dengan perkembangannya daripada sebuah kampung kecil kepada hab perdagangan yang sibuk di nusantara, dan akhirnya kepada sebuah negara yang sepenuhnya. Sebagai agama yang merangkumi semua, Islam datang bukan sahaja sebagai sistem kepercayaan; ia juga telah membawa perubahan dan ketenteraman positif dalam aspek politik, ekonomi dan sosial di Tanah Melayu. Dalam aspek undang-undang, walaupun undang-undang Islam digunakan untuk mengadili perkara sivil dan jenayah pada mulanya, kedatangan penjajah menghalang penggunaannya dan Common Law sebaliknya dikuatkuasakan. Namun, menjelang kemerdekaan Tanah Melayu, usaha para cerdik pandai dan reformis Islam telah berjaya memastikan kedudukan Islam dalam Perlembagaan Persekutuan. Hari ini, walaupun undang-undang Islam dipastikan dengan bidang kuasa dan pengiktirafan eksklusif, institusinya berusaha untuk kekal relevan. Menyelaraskan undang-undang di peringkat persekutuan masih menjadi cabaran terutamanya yang melibatkan kuasa sedia ada negeri ke atas Islam dan undang-undang. Dengan menggunakan kaedah kualitatif metodologi kajian, kertas kajian ini merujuk kepada analisis data primer dan sekunder yang dianalisis secara deskriptif dengan melihat sejarah perundangan dan perkembangan undang-undang Islam sehingga kini. Didapati bahawa walaupun Islam dan undang-undang bersumberkan undang-undang tertinggi di negara ini, ia perlu sentiasa mengatasi cabarannya untuk kekal relevan dan signifikan. Oleh itu, kertas kerja ini berusaha untuk melihat cabaran dalam mentadbir undang-undang Islam dan institusinya. Ia juga mencadangkan beberapa strategi praktikal ke arah sistem perundangan Islam yang standard dan eksklusif di Malaysia.

Kata Kunci: Islam, Tanah Melayu, Sistem Perundangan Islam, Perlembagaan Persekutuan, Jabatan Kehakiman Syariah Malaysia.

INTRODUCTION

Almarhum Tan Sri Dato' Harun Mahmud Hashim in the 'Benchmark' in the New Straits Times dated 9th May 2002 interpreted article 3 of the Federal Constitution relating to the position of Islam in Malaysia as follows: that 'Islam is the religion of the state, which makes Malaysia an Islamic state.'¹ Being an Islamic state, the supposed legal system should be the Islamic legal system and Almarhum Tan Sri Harun Hashim thus further suggested that article 4 should be amended to include 'that the sources of the Laws of the Federation are the Qur'an and the Sunnah.'² The statement was made as a result of his visit to the Middle East countries to look into standardisation, codification and administration of Islamic law in Saudi Arabia, Egypt, the United Arab Emirates and Jordan in the end of 2001 led by Almarhum Tan Sri himself.³ Such a strong statement shocked the country's politics at that time. Nevertheless, his constructive opinion has been a strong base until today that supported relevancy of Islamic legal system and the status of Islam within the country's supreme law.

Today, Malaysia is one of the few countries that endorsed the system of legal pluralism. Its legal system which consists of the co-existence of civil and Islamic laws is both legitimate and operates within their stipulated jurisdictions as properly determined by the Federal Constitution. Nevertheless, its Islamic legal system possesses a unique background, as compared to the civil legal system, as it has been in existence for years before the formation of Malaysia itself.

¹ New Straits Times archive at https://news.google.com/newspapers?nid=x8G803Bi31IC&dat=20000415&b_mode=2&hl=en, accessed 12 May 2023. See also R.Sivaperegasam P.Rajanthiran, 'DAP's Opposition as Islamic State,' presented at the Seminar on National Resilience: Political Managements and Policies in Malaysia (13-15 July 2010).

² Ibid.

³ Ibid.

Dated as early as the 13th century, the Islamic legal system is deemed to be well rooted in the country. Moreover, given majority of the population are Muslims, Islam and its elements are automatically embedded and thus, prescribed in formulating the country's policies, including social, political, and economic, as well as legal aspects.⁴

Though today's implementation of the Islamic legal system is limited to only personal matters among Muslims, the system historically was practiced as a whole whereby every aspect of Islam, including laws and regulations, was taken in and made as the constitution of the early Malay Sultanate.⁵ Unfortunately, during colonisation, the Islamic legal system suffered a major setback when the British attempted to supplant their legal system and brought in the Common Law which developed the civil legal system as it is today. The major setback resulted in the Islamic legal system being practiced in a limited jurisdiction.⁶ Even under the limited jurisdiction, Islamic law has been subjected to strict interpretations and critics which have to a certain extent undermine its development.⁷ Nevertheless, over the years, some transformations have taken place in the administration of the Islamic legal system and the transformations contributed to a few significant developments such as the establishment of a coordinating

⁴ Mohamed Azam Mohamed Adil and Nisar Mohammad Ahmad, "Islamic Law and Human Rights in Malaysia," *ICR Journal* 5 (1) (2014): 43-67, at 43-44.

⁵ Hanifah Haydar Ali Tajuddin, Nasimah Hussin and Majdah Zawawi, "Restorative Justice in Islamic Law: Application in Malaysian Legal History and the Criminal Justice System," in *Research Handbook on Islamic Law and Society*, ed. Nadirsyah Hosen (United Kingdom: Edward Elgar Publishing Limited, 2018), 260.

⁶ Ashgar Ali Ali Mohamed and Muhamad Hassan Ahmad, "British Administration of Malay Peninsula and Its Impact on the Status of Islamic Law," in *Islamic Law in Malaysia: The Challenges of Implementation*, Eds. Adnan Trakic and Hanifah Haydar Ali Tajuddin (Springer Nature Singapore, 2021), 12-13.

⁷ Ashgar Ali Ali Mohamed and Muhamad Hassan Ahmad, "British Administration of Malay Peninsula and Its Impact on the Status of Islamic Law," in *Islamic Law in Malaysia: The Challenges of Implementation*, Eds. Adnan Trakic and Hanifah Haydar Ali Tajuddin (Springer Nature Singapore, 2021), 12-13.

body at the federal level.⁸ Thus, in order to discover the Islamic legal system, it is important to analyse how it was implemented by the early Malay Sultanate and its journey to become the system as practiced today.

In analysing the position of Islam as a legal system, then and now, the qualitative method using primary and secondary data is essential. These data are obtained through a comparative analysis of the Malaysian legal history and today's development of Islamic law, and its institution. The research finds that the journey from securing Islam's position in the country in ensuring the use of its law, and in recognising it as an institution is everything but easy. As Islamic law is a state matter, the challenge to standardise the 'fourteen sets' of Islamic law is difficult. Even with the establishment of a dedicated department at the federal level since 1998, the journey towards standardising and coordinating continues with obstacles and hurdles. One of the obstacles is the states' interpretation of coordinating the law would require them to let go of their inherent power over Islam. Thus, it is observed that the states' readiness and cooperation are pertinent as it is deemed to be key in ensuring the possibility of enhancing the Islamic legal system in the country.

ISLAMIC LEGAL SYSTEM IN THE MALAYSIAN LEGAL HISTORY

Tanah Melayu was recorded to have accepted Islam as early as the twelfth century. The first physical evidence of the influence of Islam was found in the state of Terengganu, where a set of writing in Arabic

⁸ Hanifah Haydar Ali Tajuddin, "Transforming and Globalising the Shari'ah Judiciary System in Malaysia," in *Islamic Law in Malaysia: The Challenges of Implementation*, Eds. Adnan Trakic and Hanifah Haydar Ali Tajuddin (Springer Nature Singapore, 2021), 112-113.

letters was found engraved on a rock called *Batu Bersurat*.⁹ The rock was dated 22 February 1303 AD.¹⁰ Another physical evidence is a mark on the tomb of one Syekh Abdul Kadir Ibn Husayn Shah Alirah found in Tanjong Ingeris, Kedah dated 902 AD, which suggests that Islam might have reached the *Tanah Melayu* as early as the 10th century.¹¹ Nevertheless, before the 15th century, Islam was only practiced as a personal religion. Islam only became widely practiced as a religion and also as a system after the first Sultan of Malacca who converted to Islam, adopted Islam as the state's religion and as its formal political and legal system. Its *Undang-Undang Melaka*, for example, influenced the laws in other states, including Pahang, Johor and Kedah.¹² The widespread and influence of Islam were possible given the role of Malacca as one of the important trade centres at that time.

Other than being an important trade centre, Malacca was also the centre of Islam in the eastern sphere. It became a place where the *imams* and *ustazs* gathered to discuss religion and philosophy.¹³ The administration of Malacca played a big role in sending Muslim missionaries to spread Islam to the nearby provinces including Java, Borneo and the Philippines.¹⁴ The practice of Islam as a religion and as a formal system of Malacca was also possible as it was blended with the custom of the local communities. Islam made its way into the custom or *adat* of the locals which before that was strongly influenced by Hinduism.¹⁵ Little by little, the common practices of the locals were supplanted by practices that were in line with Islamic teachings.

⁹ Arba'iyah Mohd Noor, "Perkembangan Pensejarahan Islam di Alam Melayu," *Jurnal al-Tamadun* 6 (2011): 37.

¹⁰ Ibid.

¹¹ Ibid.

¹² Liaw Fock Fang, "Undang-Undang Melaka. The Laws," (PhDthesis, The Royal Netherlands Institute of Southeast Asian and Caribbean Studies, 1976), 33.

¹³ Arba'iyah Mohd Noor, "Perkembangan Pensejarahan Islam di Alam Melayu," *Jurnal al-Tamadun* 6 (2011): 30-31.

¹⁴ 'Malacca Sultanate,' New World Encyclopaedia, accessed October 1, 2020, https://www.newworldencyclopedia.org/entry/Malacca_Sultanate

¹⁵ Liaw Yock Fang (ed.), "Undang-Undang Melaka. The Laws of Malacca," (PhDthesis, Koninklijk Instituut Voor-Taal-Land-En Volkenkunde, 1976), 33.

Being a state that accepted Islam as its official religion, many Islamic principles were applicable in the administration of Malacca. For a start, the term ‘Sultan’ replaced the term ‘Maharajah’ which was used before that due to the Hindu influence in the region.¹⁶ The alphabet in the Malay language was the *Jawi* alphabet which resembles the alphabet of the Arabic language; the same alphabet used in the Quran, the primary source of Islam.¹⁷ The Malay language with the *Jawi* alphabet became the *lingua franca*, an important language spoken in the state.¹⁸

Islam as a legal system played a crucial role in regulating the Malaccan pluralistic society. It was documented that at its peak, there were about eighty languages spoken in Malacca suggesting the complexity and the varieties of races that existed at that time.¹⁹ Nevertheless, historical evidence that suggests the triumph of the Sultanate to administer the state by sourcing their legal system to that of Islam, proved that Islam is indeed a viable legal system to cater to the complexity and varieties of inhabitants in Malacca.

The set of law that regulated Malacca was called the *Undang-undang Melaka* or *Kanun Melaka* was one of the early legal manuscripts in the *Nusantara*. The *Kanun* contained laws regulating personal matters of the Muslims such as marriage, divorce and inheritance. It also contained laws regulating public and transactional

¹⁶ Hanifah Haydar Ali Tajuddin, Nasimah Hussin and Majdah Zawawi, “Restorative Justice in Islamic Law: Application in Malaysian Legal History and the Criminal Justice System,” in *Research Handbook on Islamic Law and Society*, ed. Nadirsyah Hosen (United Kingdom: Edward Elgar Publishing Limited, 2018), 261.

¹⁷ Arba’iyah Mohd Noor, “Perkembangan Pensejarahan Islam di Alam Melayu,” *Jurnal al-Tamadun* 6 (2011): 36- 37.

¹⁸ Arba’iyah Mohd Noor, “Perkembangan Pensejarahan Islam di Alam Melayu,” *Jurnal al-Tamadun* 6 (2011): 36- 37.

¹⁹ “Malacca Sultanate,” *New World Encyclopaedia*, accessed October 1, 2020, https://www.newworldencyclopedia.org/entry/Malacca_Sultanate

matters such as criminal, commercial and maritime laws.²⁰ The maritime law was detailed in another set of laws enforced, i.e. *Undang-undang Laut Melaka* (the Maritime Laws of Malacca).²¹

There is a few research on *Kanun Melaka* that proved that some of its provisions contained Islamic law principles.²² Generally, the *Kanun* used similar terms as contained in Islamic law. This to a certain extent, contributed to the enrichment of the Malay language. Examples of the terms are *nikah* (marriage), *talaq* (divorce), *mudda'I* (plaintiff), *mudda'aalaih* (defendant or the accused), *bai'* (sale), *shahadah* (witnessing) and *ikrar* (confession).²³ Furthermore, at every beginning and ending of *fasal* (section), the phrases '*bismillahirrahmannirrahim*' (In the Name of the God the Most Gracious, the Most Merciful) and *wallahu 'alambissawab* (God Knoweth Best what is True) were used.²⁴

Shaping the Islamic Legal System – Towards Independence

Islam has indeed come a long way in the history of Malaysia. Even with the colonisation by the foreign powers, especially the British, it failed to detach Islam from the majority inhabitants of the region, i.e., the Malays. The fight through the Malayan Union in preserving the power of the Sultans who were regarded as the protectors of Islam in the federation has demonstrated the extent the Malays could go in protecting the sacredness of the religion.²⁵

The fight to ensure the special position of Islam in the soon-to-be independent federation continued until the day of independence. The British again tried to 'liberalise' the federation by drafting the

²⁰ Mohd Roslan Mohd Nor, Ahmad Termizi Abdullah and Abdul Karim Ali, "*From Undang-undang Melaka to Federal Constitution: the Dynamics of Multicultural Malaysia*," SpringerPlus 5(1683) (2016): 1-8, at 1-2.

²¹ Ibid.

²² Liaw Yock Fang (ed.), "*Undang-Undang Melaka. The Laws of Malacca*," (PhDthesis, Koninklijk Instituut Voor-Taal-Land-En Volkenkunde, 1976), 33.

²³ Ibid.

²⁴ Ibid, 34.

²⁵ Muhammad Haniff Hassan, "Explaining Islam's Special Position and the Politic of Islam in Malaysia," *The Muslim World* 97 (2007): 292.

constitution based on the Indian Federal Constitution. Anticipating what could happen, many learned Malays fought to make sure the position of Islam and the rights of the Malays as the majority in the country were guaranteed in the Malaysian Federal Constitution. Thus, article 3(1) was inserted into the Federal Constitution. It states:

“Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.”

Nevertheless, the condition for Malaysia to be an independent federation was that it could not be a religious state. The insertion of Islam as the religion of the federation was carefully laid out as the drafting commission reported, ‘The observance of this principle shall not impose any disability on non-Muslim nationals professing and practising their own religions and shall not imply that the State is not a secular state’.²⁶ Muhammad Haniff observed that even though the Malay elites regarded the article as a mere symbolic which limit Islam to ceremonial purposes only, the context of the article remains ambiguous and thus, it is open to various interpretations.²⁷ The reason for this is that Islam is not only a set of beliefs and practices, it also encompasses guidelines on societal, governmental, financial, and legal structures.²⁸

With regards to its law, the provision that guarantees the application of Islam as a legal system in Malaysia is Article 74 read together with the State List of the Federal Constitution.²⁹ The provision

²⁶ *Report of the Federation of Malaya Constitutional Commission 1957*, (London: Colonial Office London, 1957); cited by Hassan, “Explaining Islam’s Special Position,” 292.

²⁷ Hassan, “Explaining Islam’s Special Position,” 292- 293.

²⁸ Azzah Nasiha, Jani Ayub Khan and Syaripah Ruzaini Syed Aris, “Acceptance of Multicultural Society on the Hudud Bill Implementation in Malaysia,” *Journal of Media and Information Warfare* 9 (2017): 64.

²⁹ Hamid Jusoh, “Perkembangan Undang-undang Jenayah Islam di Malaysia (Development of Syariah Criminal Law in Malaysia),” in

awarded limited jurisdiction in dealing with personal matters and crimes that are against the precepts of Islam committed by the Muslims, and also the general administration of Islam in the country.³⁰ The jurisdiction of Islamic law as mentioned in the State List includes:³¹

“Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious endowments, institutions, trusts, charities, and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue, mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of Syariah Courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom.”

Even with the existence of the two provisions of Islam and Islamic law in the Federal Constitution, some still question the validity of the Islamic legal system in the country.³² Though it is established that

Undang-undang Islam: Jenayah, Keterangan dan Prosedur (Islamic Laws: Criminal, Evidence and Procedure, ed. Nasimah Hussin et al. (Kuala Lumpur: Dewan Bahasa dan Pustaka, 2007), 39.

³⁰ Ninth Schedule, List II (State List) of the Federal Constitution.

³¹ Ibid.

³² Muhammad Haniff Hassan, “Explaining Islam’s Special Position and the Politic of Islam in Malaysia,” *The Muslim World* 97 (2007): 292. See also Rosli Dahlan and Fawza Sabila Faudzi, “The Syariah Court: Its Position Under The Malaysian Legal System,” (9 March 2016) viewed at

Malaysia practices plural legal systems, which consist of civil and Islamic, there are criticisms that belittle the latter and its institutions as to be examined further.³³

Developing Islamic Legal System– Post Independence

What came after the independence was the efforts to develop Islamic law and its institution in Malaysia. This was necessary as by then, Islamic law was given an official recognition in the Federal Constitution. In discussing the legal system, one needs to understand what constitutes a legal system. A legal system consists of rules, procedures, and institutions by which public initiatives and private endeavours can be carried out using legitimate means.³⁴ From this definition, it can be understood that the main components of a legal system include having substantive and procedural laws that play the role of setting the law and a legitimate body to interpret and enforce the law.³⁵ Thus, the efforts carried out to develop the Islamic legal system in the country include upgrading its jurisdiction, standardising the legislation, and improving the Islamic institutions in the country. These are not easy tasks.

<https://www.mondaq.com/trials-appeals-compensation/472794/the-syariah-court-its-position-under-the-malaysian-legal-system> (accessed 1st May 2023)

³³ Ibid.

³⁴ “What is Legal System?,” Alvendia, Kelly & Demarest Law Firm, accessed October 10, 2020, <https://www.akdlawyers.com/what-is-the-legal-system/#:~:text=The%20legal%20system%20includes%20rules,interpreting%20and%20enforcing%20the%20laws.&text=Three%20major%20legal%20systems%20of,common%20law%20and%20religious%20law.>

³⁵ Ibid.

i) *Enacting Exclusive Shariah Legislation*

Before independence, the provisions of Islamic Law were few and those were compiled in an all-encompassing ‘omnibus’ administration of Islamic law or Muslim law legislations of each state.³⁶ The Islamic laws were administered differently between federated and unfederated Malay states. The laws were scattered in different forms consisting of enactments and regulations. For example, the legislation for Islamic criminal law for Selangor, Pahang and Negeri Sembilan was called Muhammedan (Offences) Law, while in Terengganu the law was enforced in separate regulations.³⁷ Furthermore, each state did not have a codified legislation. In Perak, for example, the law that criminalised Muslims for not performing Friday prayers and the offence for adultery were passed in different enactment. The first offence was passed in the Muhammadan to Pray in Mosque 1885, while the later was passed in the Adultery by Muhammadan 1894. The issues relating to omnibus legislations and differences in administering Islamic law in different states that were carried since the days of colonisation until the independence posed a big challenge for the Islamic institutions to encounter and resolve as the jurisdiction of Islamic matters continued to be placed under the states, even after the independence.³⁸

Nevertheless, as discussed above, while the provisions on Islam as the religion of the Federation and the application of Islamic law in Malaysia are limited, the status of Islam and Islamic law continue to be preserved by the Federal Constitution. Based on the preservation of Islam and its law in the Federal Constitution, active efforts have being carried out to revise, standardise, and upgrade the Islamic law. In revising, standardising and upgrading the law, amendments to the Islamic law legislation need to be made and the

³⁶ Siti Zubaidah Ismail, “At the Foot of the Sultan: The Dynamic Application of Shariah Law in Malaysia,” *Electronic Journal of Islamic and Middle Eastern Law* 3 (2015): 75.

³⁷ Hanifah Haydar Ali Tajuddin and Nasimah Hussin, “Islamic Criminal Law,” in *Islamic Law in Malaysia: The Challenges of Implementation*, Eds. Adnan Trakic and Hanifah Haydar Ali Tajuddin (Springer Nature Singapore, 2021), 31.

³⁸ Hanifah Haydar Ali Tajuddin, “Transforming and Globalising the Shari’ah Judiciary System in Malaysias,” in *Islamic Law in Malaysia: The Challenges of Implementation*, Eds. Adnan Trakic and Hanifah Haydar Ali Tajuddin (Springer Nature Singapore, 2021), 112-113.

provisions need to be detailed and specified in specific and exclusive legislation.. A few states initiated the efforts followed by others. By the early 1990s, specific and exclusive legislations of Islamic law were passed. These include the Islamic Family Law, Syariah Court Civil Procedure, Syariah Court Evidence, Syariah Criminal Offences, Syariah Criminal Procedure, Administration of Islamic Law and Syariah Court (Criminal Jurisdiction).

In order for legal systems, including the Islamic legal system, to stay relevant, their laws have to be constantly revised and upgraded by minding the current affairs of the community. The above Islamic legislations, unfortunately, seemed to be rather slow in development. As for the Federal Territory, the law-making process is even longer because any amendments have to be tabled in Parliament. Often, amending Islamic law is made controversial and this significantly slows down the effort.

As of now, amending the laws is seen important more than ever. This is mainly to serve the court clients, i.e., the Muslims in the country.

An example of amended legislation is the the Syariah Court (Criminal Jurisdiction) Act (Act 355). The purpose of the amendment is to enhance the jurisdiction of the Shariah court in awarding punishment to the Shariah offenders. It is basically setting the ceiling of the maximum amount of punishment whether in the form of fine, imprisonment and whipping.³⁹

Exclusive Jurisdiction of the Shariah Courts

The 1807 Charter of Justice which introduced English law into Penang stated that such law would only be applicable when it suited the

³⁹ Data sourced from Policy and Research Division, Syariah Judiciary Department Malaysia (JKSM).

circumstances of the local community. If carefully translated, should the situation not suit the community, the law of the land should be applicable, i.e., Islamic law and the Malay customs.⁴⁰ However, English judges seemed to disregard the position of the Charter relating to Islamic law and applied the common law regardless of whether it suited the community. In *Re Goods of Abdullah* for example, Benjamin Malkin R held that the transfer of property wholly by a Muslim deceased by way of a will was valid according to English law, though it clearly went against the rule of *Faraid*.⁴¹

Before the independence, many decisions of the Shariah courts (known as *qadhi* courts) were overturned by the civil courts. These situations happened due to the practice during the British colonisation which made their common law as the general law of the land.⁴² Cases that were decided according to the Shariah principles were reversed and decided according to the common law principles instead.⁴³ For example, in the case of *Ainan bin Mahamud v Syed Abu Bakar*,⁴⁴ the issue relates to the status of a child born four months after the mother's marriage. The civil court decided that the child was legitimate despite the stipulation in the *Hukum Syarak* that a child must be born at least six months after the marriage in order to assume the legitimacy status. Another example is in the case of *In Re Maria Hertogh* where the decision by the Shariah court which held that the marriage of a Dutch lady to a Malay man was valid was overturned by the civil court based

⁴⁰ Ashgar Ali Ali Mohamed and Muhamad Hassan Ahmad, "British Administration of Malay Peninsula and Its Impact on the Status of Islamic Law," in *Islamic Law in Malaysia: The Challenges of Implementation*, Eds. Adnan Trakic and Hanifah Haydar Ali Tajuddin (Springer Nature Singapore, 2021), 13.

⁴¹ (1835) 2 Ky Ec 8.

⁴² Ashgar Ali Ali Mohamed and Muhamad Hassan Ahmad, "The Status of Islam and Islamic Law in the Malaysian Federal Constitution," in *Islamic Law in Malaysia: The Challenges of Implementation*, Eds. Adnan Trakic and Hanifah Haydar Ali Tajuddin (Springer Nature Singapore, 2021), 24.

⁴³ Hussin Che Pa, Nasrul Hisyam Nor Muhammad and Suhaimi Musatr, "Bidang Kuasa Eksklusif Mahkamah Syariah Selepas Pindaan Perkara 121 (1A) Perlembagaan Persekutuan: Satu Penilaian (Exclusive Jurisdiction of the Syariah Court after the Amendment of Article 121(1A) of the Federal Constitution: An Evaluation)," *Malaysian Journal of Syariah and Law USIM* 4 (2016): 3-4.

⁴⁴ [1939] MLJ 209.

on the English law principle of domicile and eventually held the marriage as invalid.⁴⁵ The interference of common law on Shariah remained until after the independence. In *Martin v Umi Kalsom*,⁴⁶ a marriage that was decided to be invalid according to the *Hukum Syarak* was held to be valid by the civil court based on the English domicile principles.⁴⁷ From the discussion so far, interference of common law happened on cases that involved issues relating to personal matters of the Muslims which should have been decided according to the Islamic principles considering the religion of the parties.

Following the events, it was clear that there should be a provision in the Federal Constitution that safeguards the exclusivity of the Shariah court and its jurisdiction. The effort to insert such provision into the Federal Constitution was championed by a prominent legal personage, the late Prof. Ahmad Ibrahim.⁴⁸ With his diligence efforts with other Muslim legal reformists at that time, a provision was inserted into the Federal Constitution that safeguards the exclusivity of the jurisdiction of the Shariah court.⁴⁹ The amendment in 1988 to Article 121 of the Federal Constitution inserted a new clause, clause (1A). The amendment to a certain extent gives recognition to the long-standing Islamic legal system that has been in existence in the country. Article 121 of the Federal Constitution states:

(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely—

(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its

⁴⁵ [1951] MLJ 64.

⁴⁶ [1963] MLJ 1.

⁴⁷ Che Pa, Nor Muhammad and Mustar, “Bidang Kuasa Eksklusif Mahkamah Syariah,” 4.

⁴⁸ Ahmad Nabil Amir, “Ahmad Ibrahim and the Islamization of Law in Malaysia,” *Nurani: Jurnal Kajian Syari’ah dan Masyarakat* 22(1) (2022): 170.

⁴⁹ Ibid.

principal registry at such place in the States of Malaya as the Yang di-PertuanAgong may determine; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-PertuanAgong may determine;

(c) (Repealed),

and such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

The insertion of clause (1A) grants the exclusivity to the Shariah Court in terms of its jurisdiction, position and independence by affirming that the civil court as mentioned in clause (1) shall have no jurisdiction over matters that are within the Shariah jurisdiction. Nevertheless, the amendment did not safeguard the jurisdiction of the Shariah court from the civil court in total as the latter still possesses revisionary power to review and reverse the decision made by the Shariah court.⁵⁰ The cases that were reviewed mostly involved issues on conflict of jurisdiction between parties of different religions. For example, in the case of *Teoh Eng Huat v Qadhi of Pasir Mas & Anor*,⁵¹ the Federal Court reversed the decision of the Shariah court regarding the religious status of a child under 18 years of age and held that it was invalid as the religious status of a minor is determined by his parents or guardian.⁵² Today, however, another type of cases that are being reviewed involved issues of human right of Muslim's accused parties committing Shariah offences. In these cases, it is contended that Shariah offenses violate individuals' rights to act upon their desires and

⁵⁰ Siti Zubaidah Ismail, "At the Foot of the Sultan: The Dynamic Application of Shariah Law in Malaysia," *Electronic Journal of Islamic and Middle Eastern Law* 3 (2015): 79.

⁵¹ [1990] 2 MLJ 300.

⁵² Che Pa, Nor Muhammad and Mustar, "Bidang Kuasa Eksklusif Mahkamah Syariah," 6.

do as they please with themselves. For example, in the case of *Mohd Juzaili Mohd Khamis & Ors v State of Negeri Sembilan & Others* where the Muslim accused parties questioned the constitutionality of section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992 relating to the offence of male person posing as a woman.⁵³

The jurisdiction that limits the Shariah courts in imposing its punishment has been increased in 1984 with the amendment made to the Syariah Court (Criminal Jurisdiction) Act. The previous limits were set at RM 1000 as the amount of fine and six months of imprisonment or both. The increased jurisdiction was then set at RM5000 of fine, three years of imprisonment and a new mode of punishment was added, which is caning of not more than six times or with any combination of the punishments.⁵⁴ Nevertheless, the punishment limits that were set in 1984 are still applicable today, and these limits are comparatively low as compared to the lowest court under the civil jurisdiction, namely the First Class Magistrate Court, which has the jurisdiction to impose imprisonment for a term of not less than ten years. Thus, it is opined that the Act should be amended and the efforts did start years ago, but sadly it is yet to be realised.

ii) Upgrading the Shariah Courts

During the colonisation and before independence, the Shariah court had always been subordinate to other courts and placed at the bottom of the court structure.⁵⁵ Their jurisdiction was restricted and, in many cases, not recognised, which led to many of its decision being overturned by the civil courts, as explained above. Although in a few

⁵³ [2105] 3 MLJ 513

⁵⁴ Section 2 of the Syariah Court (Criminal Jurisdiction) Act 1965.

⁵⁵ "Recent Development of Shariah Law in Malaysia," Jabatan Kehakiman Syariah Negeri Pulau Pinang (JKSNPP), last modified December 17, 2022, <http://jksnpp.penang.gov.my/index.php/18-penerbitan-mahkamah/91-recent-developments-in-shariah-law-in-malaysia>.

cases where Islamic law was recognised as the law of the land, it remained as an observation by the court.⁵⁶ The Shariah courts at that time also operated without proper building, let alone facilities and their staff were ignored of their employment rights.⁵⁷ Though some of the judges (*qadhis*) were university graduates, they were not regarded as professionals.⁵⁸

After independence, as explained above, the Islamic law and Shariah court have received recognition in the Federal Constitution. Thus, with the recognition obtained, efforts were carried out to develop the courts. In the first phase, the development was mostly concerning the setting of its power and jurisdiction as there were issues of overlapping of matters with the states' religious offices and the Muftis' offices.⁵⁹ In the 1990s, a three-tier Shariah court was established comprising of Shariah Subordinate Court, Shariah High Court and Shariah Appeal Court. This three-tier Shariah court operates under the states' power applying substantive and procedural legislation enacted by each State Assembly. Thus, unlike the civil court, which has a single chief justice for the entire country, each state's Shariah court is led by fourteen chief Shariah judges.

It is observed that even after the insertion of clause 121 (1A) of the Federal Constitution, the civil courts still interfered with the jurisdiction of the Shariah courts. In the case of *Shahamin Faizal Kung bin Abdullah v Asma Bte Haji Yunus*, the issue regarding the custody of a child of a Muslim spouse was decided by the civil court.⁶⁰ The judge in that case, Edgar Joseph Jr observed that clause (1A) did not in any way override the jurisdiction of the civil court as provided in the Court of Judicature Act 1964. Sections 23 and 24 of the Court of Judicature Act 1964 basically stipulated the general and specific civil jurisdiction of the high court and literally, it could mean that it should

⁵⁶ For example, in the case of *Ramah v Laton* [1926] 6 FMSLR 128 where the court observed that Islamic law is not a foreign law and it is the law of the land.

⁵⁷ JKSNPP, "Recent Development Shariah Law in Malaysia."

⁵⁸ Ramizah Wan Muhammad, "The Administration of Syariah Courts in Malaysia, 1957- 2009," *Journal of Islamic Law and Culture* 13(2) (2011): 246.

⁵⁹ *Ibid.*

⁶⁰ [1992] 2 CLJ 327. Discussed by Wan Muhammad, "Administration of Syariah Courts in Malaysia 1957- 2009," 248.

include every civil matter of every citizen regardless of whether they are Muslim parties. Fortunately, starting from the late 1990s onwards, the trend started to change. This was illustrated in a few cases where the Muslim parties first referred their cases to the civil court and the cases were later transferred to the Shariah court as it was decided that the matters fell under the latter's jurisdiction. In *Kamariah bte Ali dan lain-lain v Kerajaan Negeri Kelantan dan Satu Lagi*, and *Lina Joy v Majlis Agama Islam Wilayah Persekutuan dan Lain-lain*,⁶¹ it was decided that in cases involving the declaration of the religious status of a Muslim, the matter should fall under the realm of the Shariah court.⁶²

TOWARDS COORDINATING THE ISLAMIC LEGAL SYSTEM

The second phase is coordinating the legal system. This is done by harmonising the law and the practice of the Shariah courts in the fourteen states. In 1996, the government realised the need to standardise the administration of Shariah courts in the country. The concern was that as the courts operate under different states' administrations, it was difficult to coordinate their operation. Another issue was in terms of the application of the laws where one issue could be subjected to different interpretations due to the absence of standardisation. Thus, on 3rd July 1996, a cabinet meeting agreed to restructure the Shariah courts all over the country. It was agreeable that it should be done by establishing a federal body under the Prime Minister's Office that coordinates the operation and administration of the courts. The body which was later known as the Jabatan Kehakiman Syariah Malaysia (Shariah Judiciary Department of Malaysia) was then officiated on 15th December 1998 by the late Yang Berhormat Dato'

⁶¹ [2005] 1 MLJ 197 and [2007] 4 MLJ 585.

⁶² Farid Sufian. Shuaib, "The Islamic Legal System in Malaysia," *Washington International Law Journal* 21(1) (2012): 99-100.

Paduka Dr Abdul Hamid bin Othman, the then Minister of the Prime Minister Office.

Shariah Judiciary Department of Malaysia (JKSM)

Bearing the mission to improve efficiency and uniformity in the Shariah judicial administration system throughout Malaysia, the Shariah Judiciary Department of Malaysia ('JKSM') sets off to work its way, but accomplishing it is no easy task. In the beginning, JKSM embarked its mission with the backing from the federal government that provided financial assistance and fifteen workforces consisting of a Director General or Chief Syarie Judge, a registrar, administrative officers and a few staff, JKSM was committed to achieve what it is established for.

Today, JKSM continues to grow and its mission is now constructively carried out by divisions consisting of the Family Support Division, Training Division, Information and Communication Technology Division, Information Resource Centre and Publication Division, Policy and Research Division, Registration, Secretariat and Records Division, Management Service and Human Resource Division, Integrity Unit and Corporate Communication Unit.⁶³

In a larger perspective, the task entrusted upon JKSM is relating to the establishment of the Islamic legal system in the country. As a greater challenge is posed on the Shariah officers and Shariah institutions, it is essential that JKSM develops specific strategies in developing and upgrading Islamic Law and Shariah institutions in the country. These strategies would cater to the development of skilled human resources, electronic facilities and physical infrastructures.

⁶³ "Fungsi Bahagian- Bahagian dalam Jabatan Kehakiman Syariah (JKSM)," Laman Rasmi JKSM, accessed October 1, 2020, <http://www.jksm.gov.my/fungsi-bahagian/bahagian>

Strategies for Upgrading Islamic Law and Shariah Institutions

i. Skilled Human Resource⁶⁴

When JKSM was established, the Shariah courts were in the phase of building its reputation in the society. The reason is that its reputation was subjected to critics which caused negative inferences by the Muslim community. The critics were mostly related to the low quality of the court decisions by the Syarie judges.⁶⁵ Previously, the Syarie judges were appointed from among graduates from the Middle East universities who did not have a legal background.⁶⁶ Thus, they did not have sufficient skills in reading and interpreting laws which led to injustice to the disputant parties.⁶⁷ In the early phase, the critics were to a certain extent correct. JKSM realised that it has to take the critics seriously so that measures can be taken to improve its quality

One of the important aspects that need to be improved is to upgrade its human resources, specifically regarding the competency of the Shariah officers soon-to-be Syarie judges, Shariah prosecutors, and counsels at the Legal Aid Departments.⁶⁸ In ensuring competency, JKSM has to recruit Shariah officers who possess the legal background, not only in Shariah, but also civil. Thus, qualified candidates are those who hold either a double degree of both, civil and Shariah laws or who have completed a Diploma in Administration Islamic Judiciary (DAIJ) or such other equivalent diplomas offered by public universities. One of the earlier public universities which offer such a programme is the International Islamic University Malaysia. The qualifications are very

⁶⁴ Dato' Dr Hj. Mohd Na'im bin Haji Mokhtar, "Melestarikan Mahkamah Syariah," (speech, Law Faculty of UiTM Shah Alam, October 28, 2020).

⁶⁵ Ramizah Wan Muhammad, "The Administration of Islamic Justice: Position and Jurisdiction of Syariah Court in Malaysia," 8(4) International Journal of Liberal Arts and Social Science (April, 2020): 43- 64, at 59.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Data from Policy and Research Division, JKSM.

important as like the civil court, the Shariah court also involves applying and interpreting substantive and procedural laws as well. Thus, as a start, the candidates for Shariah officers' service must be equipped with a legal background.

JKSM also realised that in order to ensure a good performance of the Shariah officers, they have to undergo training in relevant fields. Skilled and experienced members of the judiciary and from the Attorney General Chambers, experienced Syariah judges and academicians have been constantly invited to give talks and lectures to the JKSM officers.⁶⁹ Periodic courses are being provided with the aims to improve judicial and legal skills for judges, prosecution officers, legal aid lawyers, sulh and Family Support Division officers.⁷⁰ Non-periodic courses and programmes are also provided to enable officers to get industrial trainings in other countries such as Saudi Arabia, Egypt and the United Kingdom and from other government agencies with parallel functions.⁷¹

The current JKSM administration recognises the importance of qualifications and emphasises that the Shariah officers should constantly improve themselves by acquiring knowledge and upholding integrity to demonstrate their exceptional abilities in fulfilling their responsibilities.⁷² This is done by establishing a strategic partnership with academic institutions as a way to encourage officers to further their studies or to conduct joint research with academics.⁷³ In terms of practicing integrity, JKSM is also enthusiastic about instilling an integrity culture among the officers. Integrity courses and programmes are being held in order to spread awareness. The integrity Unit is also established in JKSM which is responsible to deliver such functions.⁷⁴

In enhancing human resource, JKSM has received a budget of RM 180,000 in 2019 and with the current planning of development in

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Data from Training Division, JKSM.

⁷³ Ibid.

⁷⁴ Data from Integrity Unit, JKSM.

such area, it is hopeful that more can be allocated in order to make sure the realisation of the plans.⁷⁵

ii. Upgrading Electronic Facilities

In making sure the effectiveness in delivering its services, JKSM sees that the Shariah institutions have to streamline themselves with the use of information technology and communication. The Shariah courts have been actively developing electronic innovations to provide ease and swiftness in delivering services to their clients.⁷⁶ The E-Syariah system is one of the early initiatives that was built, not only to facilitate the services, but it has as well helped in effectively coordinating the workflow of the courts across the country.⁷⁷ Electronic means that target hastening the delivery of summons, court orders, and related court documentation are Fast Track,⁷⁸ e-Syariah Instant Access

⁷⁵ Data from Policy and Research Division, JKSM.

⁷⁶ Data from IT Division, JKSM.

⁷⁷ Ibid.

⁷⁸ Fast Track is an innovation by the Syariah Judiciary Department of Selangor (JAKESS) in providing quicker resolution of divorce proceedings where parties have mutually agreed. The system was introduced in 2015 and it has shortened the resolution of such cases from 90 days to 6 hours. Referred to Jabatan Kehakiman Syariah Selangor, *Bulletin Jabatan Kehakiman Selangor: 2015 Tahun Gemilang JAKES- Fast Track*, by Herlina Ainizawati Zakaria et al. Buletin Keluaran 25 Bil 2/2015, Selangor: JAKES, 2015, accessed October 1, 2020, https://www.jakess.gov.my/pdf/buletin/Buletin%20JAKESS%20B25%202_2016_D3%20FULL.pdf.

Procedure (e-siap),⁷⁹ and MySolve.⁸⁰ Furthermore, *e-nafkah* operated by the Family Support Division has made the monitoring of the enforcement of maintenance orders at every Shariah court in Malaysia more efficient.⁸¹

In facing the challenge of building the reputation of the Shariah institutions, today's administration of JKSM has adopted responsive and diplomatic approaches in correcting and responding to the critics out there. Engagements with the members of society and NGOs are held in order to provide the correct information and answer any misinformation about the operation and administration of Shariah institutions.⁸² Other than the physical mediums used to reach the public, JKSM has as well opted to maximise the use of its social media and its website.⁸³

iii. Upgrading Physical Infrastructure

At this stage, JKSM bridges the states' Shariah courts with the federal government and assists in the forms of monetary and human resources. Over the years, one of the main problems faced by the Shariah courts

⁷⁹ e-Syariah Instant Access Procedure (e-siap) is an innovation by the Syariah Judiciary Department of Penang (JKSNPP) enables disputants in mutually agreed cases to get the judgment within one day. It combines existing systems such as E-Syariah, E-Sulh, E-Bicara and E-Pliding and judgments are generated from E-Judgment. Referred to Mohd Rifaudin Hj. Abd Wahab, E- Syariah Instant Access Procedure (E- Siap), (Pulau Pinang: Syariah Judiciary Department of Pulau Pinang, 2016), accessed on October 1, 2021, <http://habinovasi.mampu.gov.my/view/index.php?inovasiPDF=2022-e-siap-e-syariah-instant-access-procedure.pdf#.X6RJc2gzY2w>

⁸⁰ MySolve is an innovation by Syariah Judiciary Department of Perak (JKSPk) that handles registration of mutually agreed divorce and confirmation of divorce pronouncement cases without having to attend the court. Referred to "Sistem MySolve," Jabatan Kehakiman Syariah Perak, accessed October 1, 2021, <http://syariah.perak.gov.my/index.php/sistem-mysolve>.

⁸¹ "Family Support Division, JKSM," Official Website Jabatan Kehakiman Syariah Malaysia, accessed October 1, 2021, <http://www.jksm.gov.my/en/fungsi-bahagian/bahagian-sokongan-keluarga/>.

⁸² Data from Policy and Research Division, JKSM.

⁸³ Ibid.

before was the absence of a proper physical court building and infrastructure.⁸⁴ Previously, courts were situated in buildings belonging to other agencies, which resulted in inadequate infrastructure for clients of the court. With finance from the federal government, JKSM channeled monetary assistance to help the states to build their proper Shariah. Some of the completed facilities include the Shariah courts in the Federal Territories, Penang, Kelantan, Sabah and Pahang.⁸⁵

The new facilities enable proper infrastructures to be built such as bigger court halls and offices equipped with electronic facilities to support recording of the trials, witness rooms and exits, other than the general facilities. Besides, infrastructure that assists clients with disabilities is also built. This enables access to the physical buildings for all.

Towards Achieving Strategic Coordination in the Application of Islamic Law

In making sure the coordination in the operation of the Shariah courts and application of Islamic Law in the states, JKSM has been persistent in devising ways to achieve it. It is a difficult task of coordinating the application of Islamic law in fourteen different states. Though unlike in the past, communication amongst the Shariah courts are better today and thus concerns of one court can be heard and discussed on proper platforms with the others.⁸⁶

The application of Islamic Law according to the legislation might differ from one court to another as the development phase of the legislation is different. Some states still apply legislation that was amended back in the 1990s. The provisions of this rather old legislation would not cater to the needs of today's society as some might be outdated or simply do not cover the present situations.⁸⁷ Bearing the

⁸⁴ Ibid.

⁸⁵ Data from Policy and Research Division, JKSM.

⁸⁶ Ibid.

⁸⁷ Ibid.

inherent issues, JKSM has actively conducted research in developing and circulating practice directions and guidelines to the Shariah courts. As the practice directions and guidelines covered and elaborated the procedures and interpretations of the provisions, the application of some of the provisions in the states' Shariah courts are to a certain extent able to be coordinated and standardised. Through the means, new concerns and procedural ambiguities are explained which enables more effective applications of the laws. Prior to the application of any practice directions in the states, consultation with the Shariah courts of the respective states is mandatory. The administrative approval of the chief Syarie judge of a Shariah court is required for the reference of a practice direction. The issue, among others is discussed through platforms like Meetings of Chief Syarie Judges, Discourse of Director General of JKSM, and Conference of Shariah Officers.

Another effort done is the establishment of a panel of appeal Syarie court judges at JKSM. The panel consists of seven judges headed by the Chief Syarie Judge of JKSM. This panel travels in rotation across Malaysia and sits at the states' Shariah appeal courts to decide appeal cases. This practice is adopted in ensuring that the interpretation and application of the laws are standardised in each state.⁸⁸

⁸⁸ Data from Policy and Research Division, JKSM.

WAY FORWARD

In developing the Islamic legal system, changes in the Shariah institutions are a must. Nevertheless, changes in an institution can only be realised through a dedicated human power skilled not only with carrying out their responsibilities, but such responsibilities are to be carried out with integrity and honesty. The need for integrity and honest in human resource was stressed upon right from the time of our second prime minister, Tunku Abdul Rahman Putra Al-Haj and the person that he saw with such values was Almarhum Tan Sri Harun Hashim.⁸⁹

Due to his values, Tan Sri Harun Hashim was appointed as the first Director of National Investigation Bureau (BSN) in 1967, today's Malaysian Anti-Corruption Commission. At the time of acting as the director of BSN, Tan Sri was also a deputy public prosecutor. His appointment was solely for the purpose of fighting corruption so to encourage integrity in the public service and more importantly, among the executives. Tan Sri's legacy of instilling integrity and honesty in the public service especially should be constantly reminded and regarded as an important ingredient in developing Islamic legal system where the human power possesses such qualities. JKSM foresees the importance of instilling integrity and honesty among the Shariah officers. The Training Division and Integrity Unit of JKSM are accorded with divising trainings that instill awareness of responsibility of carrying out their duties with the qualities. Besides that, JKSM has as well initiated its journey to come out with Organisational Anti-Corruption Plan (OACP) by establishing a dedicated committee to develop OACP.⁹⁰

⁸⁹ Legasi Harun Hashim Perangi Rasuah (7 March 2020) by Wilayahku, viewed at <https://www.wilayahku.com.my/legasi-harun-hashim-perangi-rasuah/#.ZFsrjXZBy5c>, accessed 1st May 2023.

⁹⁰ Mesyuarat Pembentangan Dokumen OACP (30 May 2022) Jabatan Kehakiman Syariah Malaysia Facebook, viewed at <https://www.facebook.com/myJKSM/posts/152732953936025/?paipv=0>

The Shariah courts have for so long operated on a three-tier hierarchy consisting of a subordinate court, high court and appeal court. Concerns have been voiced for so long about the lack of appeal stages, especially for cases initiated in the Shariah high court where parties only have a one-time chance to appeal against the decision. While the plan to increase the hierarchy of the Shariah court has been a talk for over a decade, it seems yet to be realised. Currently, JKSM is dedicated to realising the plan, and is actively pursuing efforts to expand the hierarchy from three tiers to four tiers. The plan is even more relevant when the Shariah Judiciary Department of Perak has increased its hierarchy with the establishment of *Mahkamah Utama Syariah Negeri Perak*.⁹¹ Discussions and strategies have been devised and it is now one of the utmost importance projects by JKSM together with other states' Shyariah courts. The model created by JKSM will undergo a pilot-test in the Shariah Court of the Federal Territories, after which other *gunasama* states⁹² will implement it.⁹³

<http://www.jpa.gov.my/index.php/kehakiman/mahkamah-utama>, accessed 1st May 2023.

⁹¹ Mahkamah Utama Syariah, viewed at <http://syariah.perak.gov.my/index.php/kehakiman/mahkamah-utama>, accessed 1st May 2023.

⁹² Referring to states that accept placement of officers of federal appointment. See www.jpa.gov.my.

⁹³ Data from Policy and Research Division, JKSM.

Another crucial development in developing the Islamic legal system is the need to review and amend the current legislation of Islamic Law. As explained above, some of the legislations are last amended in the 1990s and thus, new concerns are not addressed properly. The efforts of reviewing the existing provisions in the legislation are a necessity in order to keep up with the changes in the current society. For example, the COVID-19 pandemic has necessitated a shift towards conducting hearings and trials online. Thus, JKSM is currently amending section 119 of the Syariah Court Civil Procedure (Federal Territories) 1998 to allow court mentions and trials to be conducted using remote communication technology.⁹⁴ With the ongoing effort to amend the Islamic law legislation, loopholes in the law can be identified. For example, provisions on *hibah* and *wakaf* are not covered or are only briefly mentioned in the existing laws. Thus, this calls for the amendment of specific legislation detailing the two matters.

For future development, JKSM sees that the Shariah courts have to be separated from the executive in order to dispose of its functions as an independent judiciary body more effectively. This will cater to issues relating to preparing proper facilities for the judges in terms of providing more specific trainings and payment of emolument. Many can be learned from the civil court which has operated independently for many years.

⁹⁴ Data sourced from Policy and Research Division, JKSM.

CONCLUSION

With all the proactive efforts in developing the Islamic legal system in Malaysia, the challenge to standardise the operation of Shariah courts and application of the Islamic laws remain the main challenge. It is a big task for JKSM being the coordinating body. From the discussion here, it is clear that standardisation is necessary because if there is no proper coordination, the implementation of Islamic Law could appear to have 14 distinct approaches, which is a consequence of it being governed by 14 states. The efforts continue and JKSM itself has been tirelessly calling all states to give their full support in achieving the aim of standardisation and unification. It is hopeful that with all the strategies in place, the Shariah court would be a better institution than what it was before in administering justice. Based on the spirit of *'ta'awun* (cooperation in righteousness and piety)⁹⁵ and unity in *wihdatulfikr* and *'amal* (unity in discoursing and finding solutions for issues and problems), the works continue. It is said, 'united we stand' and that is the way forward and the only way in strengthening the Islamic legal system in Malaysia.

⁹⁵ Quran, 5:2.