Chapter 9
Transforming and Globalising the Shari’ah Judiciary System of Malaysia

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Introduction

Malaysia has a unique pluralistic legal system that consists of both civil and Shari’ah laws and courts. The origins of this legal system can be traced back to years before Malaysia’s independence when the Malay culture and Islamic law used to be considered the law of the land. English common law was introduced later as a result of the British occupation of Tanah Melayu (Malay Peninsula).

The position of Islamic law in Malaysia is interesting as it is sourced from Islam being the religion of the federation. Article 3 of the Federal Constitution clearly spells that out. Islam is also the religion of the majority in the country. Approximately 61.3% of the population are Muslims (Department of Statistics of Malaysia 2011). However, over the years, Islamic law has been a subject of criticism by many. There were times when this criticism was warranted. But, there were also times when the criticism was fuelled by Islamophobia and prejudice towards anything “Islamic”. As a result, the development and progress of Islamic law became stifled. Instead of concentrating on introducing new laws and developing the existing ones, Islamic law practitioners became preoccupied with explaining to the community, media, and non-governmental organizations that the Muslims in Malaysia have the right to be governed by Islamic law to the extent specified under the Federal Constitution. Labelling Islamic law as unsuitable for the Malaysians would not only offend the Muslims’ feelings, but it would also deprive them of their basic constitutional right.

Be that as it may, the strength manifested by the states led by their Sultans has ensured that Islamic law survives until today. This is also due to the Muslim population in Malaysia, who overwhelmingly supports the application of Islamic law. A worldwide survey conducted by Pew Research Centre showed that 86% of Muslims in Malaysia said that Shari’ah should be the official law, and many supporters of

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Shari’ah had said that it should only apply to their country’s Muslim population (Pew Research Centre 2013).

Keeping Islamic law only alive, however, is not enough in today’s context. Islamic law needs to be transformed to meet challenging ends inside and outside Malaysia. Even though Malaysia has been widely acknowledged as having very progressive and developed legal and judicial practices, including the Islamic law-related ones, there is still room for improvement. Some areas could be explored further, especially those that highlight the concept/philosophy of rahmatan lil alamin (Qur’anic phrase referencing that Prophet Mohammad (peace be upon him) was sent by God as a mercy to all) (Qur’an 21:107).

Islamic Law in the Federal Constitution

The Malaysian Federal Constitution, as drafted by the Reid Commission before the independence, has specified matters that fall under the jurisdiction of the federation and those that are placed under the jurisdiction of the respective states. This was achieved by creating three legislative lists in the Ninth Schedule of the constitution, namely List I – Federal List, List II – State List, and List III – Concurrent List (Lee 2017). Matters under the Federal List fall under the Federal Parliament’s purview, while matters under the State List are under the jurisdiction of the State Legislative Assemblies. The Concurrent List contains matters on which both the Federal Parliament and State Legislative Assemblies may legislate.

Matters relating to the administration of Islam and its laws (hukum syarak) are specifically placed under the jurisdiction of the states, which may enact both substantive and procedural laws on Islamic law matters contained in the State List. This includes the establishment of Shari’ah courts, their procedures, evidence, and appointment of judges. The matters are then legislated into the Administration of Islamic Law Enactments in each state. Nevertheless, as there are 14 states in total, these laws vary in their form and application as each state has its own needs and expectations. The lack of harmonization between Islamic laws and procedures across different states has caused many issues in the cross-state implementation of the Islamic laws to the extent that a court decision in one state would not automatically be enforced in other states without prior registration and endorsement of the same by the latter. Many efforts have been made over the years to solve this problem. The leading force behind these efforts has been the Shari’ah Judiciary Department of Malaysia (Jabatan Kehakiman Shari’ah Malaysia) – (JKSM).

Shari’ah Judiciary Department of Malaysia (JKSM)

JKSM was established on 1st March 1998 as a federal government agency responsible for coordinating the implementation of the Islamic law throughout the country and management of appeal cases in the Shari’ah Appeal Courts of the respective
states and federal territories (*Latar Belakang JKSM*). JKSM has also been tasked with other functions, such as the conduct of research relating to Islamic law and Shari’ah judiciary, particularly on matters that reflect on current developments in the country. The conducted research would normally lead to the formulation of guidelines/practice directions and other rules and regulations relevant to the Shari’ah officers and institutions in the states and other related agencies.

JKSM also employs and trains Shari’ah officers, and these officers are deployed to Shari’ah institutions in the federal territories and the states that accepted *Gunasama* Service Scheme (JKSM Profile). The service scheme was introduced due to JKSM’s effort to push coordination in the administration of Islamic laws between the states, despite the possible issues that may arise due to the territorial jurisdiction of the law. Through the scheme, JKSM can also provide human resources to the states that consist of officers and staff who are picked based on their specific qualifications and training. Until today, seven states have accepted the service scheme, and JKSM strives to convince the remaining states to do the same.

Strong partnerships with other federal government agencies like the Department of Islamic Development of Malaysia (JAKIM) and states’ religious agencies have enabled JKSM to continue strengthening and improving the administration of Islamic laws throughout the country. JKSM recognizes that the improvement is only possible through constant reflection on the Islamic laws and policies, and their implementation. The laws that do not work need to be changed and adapted to the needs of the Muslim community to whom these laws apply. But it is not only the laws that may need to be changed. The attitudes of those entrusted with the administration of Islamic law would also need to be in tune with the necessary changes. If that is not done, then there is a possibility of having good laws badly implemented. This is why JKSM has taken upon itself the duty to reflect on the work it does and lead the necessary transformation of the Shari’ah judiciary system to make it more agile and responsive to current needs and challenges.

### Transforming the Shari’ah Judicial System

Significant efforts to transform the Shari’ah judicial system have been made. The transformation can be observed in the following fields:

#### Coordination of Appellate Process in the Shari’ah Courts

The efforts to strengthen the appellate review process in the Shari’ah institutions have been carried out since the 1980s until today. The efforts began with the replacement of *Mahkamah Qadhi* (Qadhi Court) with *Mahkamah Shari’ah* (Shari’ah Court). Besides that, the Qadhi Court, which consisted of only two tiers (Qadhi Court and Main Qadhi Court) and a *Jawatankuasa Ulangbicara* (Retrial Committee)
that heard appeal cases, was then upgraded to three tiers consisting of Shari’ah Subordinate Court, Shari’ah High Court, and Shari’ah Appeal Court (Sejarah Penubuhan 2017). The three-tier arrangement remains until today.

To coordinate the appeal cases throughout the country, seven Appeal Shari’ah Court judges are appointed at the federal level and placed at JKSM. They are led by the Shari’ah Chief Justice of JKSM. These judges are appointed by the Yang di-Pertuan Agong after consultation with the Shari’ah Chief Justice based on long experience sitting as Shari’ah court judges or as practicing legal and judicial experts (Administration of Islamic Law (Federal Territories) Act 1993, s. 42). These judges function as circuit judges where they will travel to each state and hear appeal cases. Nevertheless, as Shari’ah jurisdiction belongs to each state, the judges only sit in the states that accept their appointment through the gunasama scheme. The states that accepted the scheme basically agreed to coordinate their Shari’ah courts’ administration and operation with JKSM, which operates at the federal level. Having the appeal cases heard by this panel of judges enables uniformity in respect of the application of laws and reporting of cases. (Program Kehakiman, 2018).

**Protection of Women and Children**

Women and children are considered as the most affected parties in family disputes cases. This is because the men (fathers/husbands), who have been designated in Islamic law as the main bread-winners in their families, evaded their obligations in many cases. Hence, the dissolution of marriage also means the dissolution of the family support structure.

As for Shari’ah courts, the constant critique of being ‘unfriendly’ courts for women and children has motivated the Shari’ah officials to double the efforts in serving women and children best. In devising such efforts, the new approach would have to depart from litigating such cases, as courts are basically functus officio after cases are decided and are not responsible for enforcing its orders/judgments unless an application to enforce such orders is submitted to the courts. Therefore, in 2008, JKSM established the Family Support Division (FSD), a body that enforces and executes maintenance orders and accelerates and guarantees the portion entitled by the women and children (Bahagian Sokongan Keluarga, 2018). The division aims to achieve multiple objectives, including providing legal advice to the parties involved in the claim of maintenance, enforcement procedures, and execution of judgment or order of the Shari’ah court. Furthermore, it provides temporary financial assistance in the form of advance payment of maintenance to the women and children to support their living expenses immediately after the divorce. The advance payment will be obtained from the defaulted ex-husbands/fathers who are now judgment debtors, and effective measures are used to make sure that they continue to carry out their responsibilities (Bahagian Sokongan Keluarga, 2018).

The work that the FSD does could undoubtedly be improved with the help of the states’ Shari’ah courts. Thus, FSD and JKSM are persistent in having continuous
engagement and discussion with the Shari’ah courts to develop better strategies to effectively enforce court orders and reduce procedural burden (Bahagian Sokongan Keluarga, 2018). FSD offices are currently placed in every Shari’ah court in the states and parties who have just obtained their orders/judgments will immediately be referred to the offices. As FSD operates outside the litigation restriction, enforcement of the orders/judgments is monitored through the E-Nafkah system that triggers hints for monitoring execution monthly (Family Support Division Help Services). This way, parties do not have to come to the courts to apply for their orders/judgments to be enforced after finding out the other party has evaded the payments. Besides that, as the officers are government officers, parties are not required to pay for the service. (Kajian ke Atas Keberkesan Perlaksanaan Perintah oleh Bahagian Sokongan Keluarga, JKSM 2012).

As will be detailed in the discussion below, there are other efforts undertaken by the JKSM to serve better the vulnerable members of the community, including women and children.

**Improvement of Physical Infrastructures**

JKSM is making continuous efforts to ensure that the infrastructures and facilities available at the Shari’ah institutions, especially the Shari’ah courts are well-suited and functional. This includes well-equipped courtrooms, mediation (sulh) rooms, and counters. The Federal Government has allocated substantial funds channeled to the states that accepted the gunasama service scheme. Most of the states have used the allocated funds and built new Shari’ah court complexes. These new Shari’ah courts complexes come with equipped trial rooms, waiting rooms, and special exits for witnesses, electronic facilities that can support videoconferencing and recording of trials, and range of disabled-friendly facilities (Kompleks Mahkamah Shari’ah Sabah siap Mei 2020, 2020). Having new court complexes means that Shari’ah courts no longer need to operate under the extension of states or religious departments’ offices. This also resolves issues relating to old facilities of courtrooms.

**Innovations and Improvements of Electronic Infrastructures**

In keeping pace with the IT development and transformation, JKSM realises that it needs to invest more in its electronic infrastructures. This ‘investment’ is important in ensuring faster delivery of service and a more accurate public presentation of its service. For this purpose, an ICT division is established at JKSM and all Shari’ah courts to accommodate such efforts.

The first of such efforts began with developing the E-Syariah System that established E-Syariah Portal back in 2003 (Sejarah Penubuhan E-Syariah 2008). The portal digitalises court processes and is accessible by all court clients, including
lawyers and disputants. One of the essential improvements that the system aims for is developing a central electronic communication channel between the JKSM and Shari’ah courts in the states (*Pengenalan E-Syariah*). The portal, among others, enables checking of the status of cases, download of e-forms, publication of information, registration of Shari’ah counsels, searching for information of Shari’ah counsel, and online calculator for a portion of the inheritance (*Brochure of Portal E-Syariah*). The challenges of operating an online system are, nevertheless, inevitable. Thus, from time to time, the ICT division is reviewing the system to upgrade its server and deliver more online services to the public. Currently, E-Syariah 2.0 is in operation with certain update features that expedite online registration of cases, summonses, orders, etc.

Over the years, the states’ Shari’ah courts have introduced electronic innovations that aim to have a well-equipped system to store and analyse data so that a service, which is faster, more accurate, and of better quality, can be delivered to the court clients. Some of the innovations are detailed below.

**E-Tray and I-Post**

The Shari’ah Judiciary Department of Terengganu has introduced ‘e-Tray’ and ‘i-Post’. E-Tray is an innovation designed to hasten the delivery of summons, notices, and affidavits online from district to district through an in-house system. On the other hand, I-Post is an online smart order submission, a channel used by the Shari’ah court of Terengganu and the Islamic Religious Office (JAIT). It is a jointly developed system between JAIT and Shari’ah Judiciary Department of Terengganu (JKSTR) that expedites the submission of an order of dissolution of a marriage between the two agencies which manage and record matters relating to the status of marriages of the Muslims. (*Saingan Akhir Anugerah Inovasi Islam 2016*).

**E-Siap**

Penang Shari’ah Judiciary Department (JKSNPP) has also made some improvements in its digitalisation. For example, it introduced e-Syariah Instant Access Procedure (*e-Siap*) which has been built and integrated within the main E-Syariah system. It is designed to expedite the process of getting a court order within one day for cases where the dissolution is mutually agreed upon by parties. The system is accessible by the public at the counter of every Shari’ah court in the districts of Penang. Computers are prepared for the clients to draft their statements of claim and upload them to the system. The main aim of E-Siap is reflected through its motto ‘*Hari Ini Setuju Hari Ini Siap*’ (Agreed Today Resolved Today). As of now, there are 12 categories of cases where E-Siap can be used, and the cases include divorce, claim of the jointly acquired property, claim of the monetary gift (*mutaah*), and maintenance of waiting period (*nafqah iddah*). (*Projek E-Siap Raih Anugerah Emas di Mini Konvensyen Team Excellence Wilayah Utara 2015*).
MySolve System

The MySolve System is introduced by the Shari’ah Judiciary Department of Perak. It enables the registration of cases of mutual divorce for parties without having to attend the court (for registering their cases). After registration is completed online, a mention date will be set, and parties only have to attend the court on the designated date for resolution of their marriage. (System MySolve)

Two-Easy

The Shari’ah Court of Melaka introduced ‘Two Easy’ where summons are immediately served after the process of sulh if the parties fail to dissolve their disputes amicably. This certainly saves the court’s time from being postponed for delivery of summons. Moreover, mention of the case can immediately be done on the same day before a Deputy Registrar. Another innovation introduced by the Shari’ah Court of Melaka is E-Perintah. It enables disputants to check the status of completion of the court orders and when they are ready to be collected. The disputants only attend the court for collection when their order is ready (E-Perintah).

E-Fos

The Shari’ah Court of Federal Territories has introduced the ‘Electronic-Fast Order Sulh’ (e-Fos) system to improve the issuance of the order of sulh. The system prepares templates for 19 categories of cases to assist and accelerate the preparation of Final Order after the endorsement of agreement of dissolution of disputes before a Shari’ah judge. The innovation, which started as a Key Focus Activity, later became a project for Innovation and Creativity Circle (ICC) under the Prime Minister Office. E-Fos aims to reduce the period of issuance of the order of sulh to one hour after endorsement, compared to 14 days before that. The project is perceived as one of the efforts to revive the handling of Majlis Sulh, which has before that been the innovative icon of the Shari’ah court. Besides, e-Fos has also provided better service for the Shari’ah courts’ clients (Sulh Unit, JKSM).

The above innovations have received gold medal and acknowledgments both at national and international levels during the Majlis Persada Inovasi Kebangsaan INTAN, the Annual Productivity & Innovation Conference and Exposition (APIC) organized by the Malaysian Productivity Corporation (MPC), and the International Convention on Quality Control Circles (ICQCC) in 2014–2019 respectively. All the recognitions are evidence that states’ Shari’ah judiciary departments and states’ Shari’ah courts are making substantial and constant efforts to deliver better, faster, and accurate services. These have made the Shari’ah institutions as Rahmah institutions and ummah-friendly.

JKSM, together with the states’ Shari’ah courts are also not far behind from exploring quality systems that aim at better management and conducive
surrounding in offices through MS ISO 9000, Public Sector Conducive Ecosystem (EKSA), and System Star Rating (SSR).

The Islamic Law and Jurisdiction

The development of Islamic laws and the judiciary has been happening since before independence until today. It started with single legislation on the administration of Islamic law, which congregated other laws on procedural, evidence, and substantive laws on family matters and crimes. Later, in the 90s, the laws were separated into different legislations. Until now, the legislations applicable in the Shari’ah court are comprised of Administration of Islamic Law, Islamic Family Law, Shari’ah Civil (Mal) Procedure, Shari’ah Criminal Offences, Shari’ah Criminal Procedure, and Shari’ah Court Evidence.

Expanding of Jurisdiction of the Shari’ah Court

The operation of the Shari’ah courts has not always been smooth. Many issues arose, and many have also been resolved. Particularly, issues relating to the courts’ jurisdiction have been continuous, and JKSM has been involved in resolving such issues.

The continuous effort to review and improve the laws has not only aimed to update the existing laws, but the effort has also clarified other related areas of Islamic laws, such as laws on inheritance (faraidh) and endowment (waqf). A lot of work is currently being done to compile and enforce the laws on gift inter vivos (hibah) and inheritance (faraidh). Apart from the laws, there are also various guidelines and practice directions introduced by the JKSM for more standardised court flows and procedures in handling cases, and these are referred to by the states’ Shari’ah courts.

In transforming and diversifying the jurisdiction of the Shari’ah court, the effort to expand the jurisdiction should be ongoing. Through such effort, new ideas and perspectives can be considered in coming out with a more relevant approach, whether in finding better ways to resolve family disputes or in punishing offenders. For example, in imposing a punishment on an offender, the Shari’ah courts are now considering alternatives to the ‘usual’ punishments, such as fine, imprisonment and whipping, and replacing them with the ones that are rehabilitative and reformative. This is because the main goal of punishment in Islam is to induce regret and repentance from within the offenders. Alternative punishments such as attending congregational prayers, daily sermons, cleaning mosques, and public places are found to be able to achieve the desired goals better than the usual punishments. Thus, JKSM is currently conducting research on how to execute alternative punishments more effectively through collaboration with other agencies, such as the religious offices, Islamic religious councils, the Prison Department of Malaysia, the Social Welfare
Department, and mosque committees in localities (Policy and Research Division JKSM). This can be done through amendment to the existing laws, issuance of practice directions, standard operating procedures, and guidelines to standardise the execution.

JKSM and the Shari’ah courts are committed to finding effective ways to make sure that courts are open and operational. The ongoing pandemic and restriction of the movement have compelled the government agencies that mainly serve the public to remain not only functional but also safe for the public and the staff. The Shari’ah courts experience the same challenge. Disputants and lawyers continuously demand their cases to be heard as many of these cases involve the rights and liabilities of individuals and dependants. As a result, JKSM began having electronic or online court sessions. In trying to find the best method for conducting such court sessions, JKSM leaves the options open by learning from their counterpart, the civil courts, and also from other countries. Webinars are conducted in order to learn from the best practice. One of the successful ones includes a webinar with the judges of the Family Court of Australia on ‘Keeping Courts Open and Operational During COVID-19’. Other webinars conducted were with the Shari’ah Court of Singapore, Indonesia, and Brunei. As a result of these online discussions and proactive engagement by the Director General of JKSM, efforts are currently concentrated on amending the laws to include electronic or online court sessions and devising court rules and regulations pertaining to that matter. (Policy and Research Division, 2020). This is not to say that there are no successful electronic or online sessions conducted by the Shari’ah courts in the states. The States of Selangor and Negeri Sembilan, for example, are among the first Shari’ah courts that conducted such court sessions where disputants were in other countries (JAKESS 2020). The aim is certainly to make electronic or online court sessions the new norm of conducting case mentions and trials.

**Globalising the Shari’ah Judiciary System**

The world now witnesses many changes as globalisation takes over. Globalisation does not only affect corporations and businesses but also private and familial relations. When these relationships go to trial, the Shari’ah judiciary must be prepared to face possible cross-border challenges.

**Enforcement of Shari’ah Court Order Across Borders**

Enforcement of court orders beyond borders seems to be an issue that may give rise to multiple other issues involving enforcement of orders relating to maintenance, custody, property claim, marriage registration, divorce, and verification. Due to the inability of Shari’ah courts to enforce orders beyond the borders of Malaysia, this
leads to cases such as parental abduction and non-performing of stipulated obligations by non-Malaysian or non-resident parties.

In view of this, Malaysia is currently in the process of ratifying a few related international conventions like the Hague Conventions on Private International Law that relate to family law and child protection matters (Hague Conference on International Private Law [HCCL] 2020). These conventions are deemed to be a suitable tool to resolve the issues. Thus, issues that arise from the conflict in a marriage of dual citizens governed by two or more laws could be resolved. However, it is observed that the main impediment in conforming to the conventions is the fact that the Shari’ah court is territorial in nature, and the application of Islamic laws differs from one state to another. Nevertheless, JKSM, as a federal body that coordinates the Islamic laws and their application in the states, might play its role in making adjustments to comply with the conventions.

One specific convention that Malaysia is considering and perhaps ratifying is the Hague Convention on the Civil Aspects of International Child Abduction. The convention aims to protect the welfare and safety of children, as well as the right of the parent with custody. This convention can ensure the enforcement of Shari’ah court orders concerning child custody and other rights beyond Malaysia. Upon ratifying the convention, amendments to the existing laws, such as establishing the central authority and competent authorities in the states, temporary residence, and support system for the children, are required. These amendments would be for the betterment of children and their custodians and, hence, should be made.

**International Training of Shari’ah Judges and Officers**

Over the years, JKSM, through its collaboration with institutes and agencies from other countries, has managed to provide training for the Shari’ah judges and officers in the United Kingdom, Saudi Arabia, Egypt, Indonesia, and Singapore. In 2019, 33 Shari’ah judges and officers completed their training at the Imam Muhammad Ibn Saud Islamic University of Riyadh, Saudi Arabia. During the 30-days training, the participants completed five modules on the Shari’ah judiciary in three weeks and, the last week, the participants were brought to visit Madinah and Makkah (Training Division JKSM, 2019). JKSM is hopeful that such training will continue to be offered in the coming years.

A few Shari’ah judges and officers have also participated in training at the Muslim College London and Clifford University of Clifford. The present Director General of JKSM, Dato’ Setia Dr. Hj Mohd Na’im was appointed as a visiting fellow by both the Oxford Centre for Islamic Studies of the University of Oxford and Harvard Law School of Harvard University. Such exposure and training are hoped to bring in diversification, especially in the administration of the Shari’ah judiciary.

Besides attending training outside Malaysia, internationally renowned experts are also invited to train Shari’ah judges and officers in Malaysia. Current online webinars where legal and judicial experts are invited as guest speakers are
considered as exposure and informal training of the Shari’ah judges and officers. Besides that, international consultant such as the Accord Group based in Australia has been invited from time-to-time to train and expose sulh officers on mediation and alternative dispute resolution (ADR) methods. The training helps the sulh officers to communicate and handle sulh sessions effectively (Sulh Unit JKSM). Apart from learning from others, JKSM has received visits from practitioners and students from other countries who wish to learn from JKSM.

The Way Forward

The transformation and globalisation of the Shari’ah judiciary and laws in Malaysia is an ongoing process to which JKSM and the Shari’ah courts are very committed. The transformation includes the upskilling of the personnel that drives the services and refurbishment and digitisation of the facilities. Though the process is continuous and not easy, it takes perseverance and insistence in realising the dreams. To achieve the intended goals, JKSM will need support and cooperation from the states and their Shari’ah institutions. What is clear is that the transformation discussed above shows that JKSM is capable of being an independent Shari’ah judicial agency in the future.

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