

CHALLENGES OF SHARIAH COURT IN MALAYSIA: AMEND SUITABLE AND RELEVANT ISLAMIC LAWS BASED ON SHARIAH PERSPECTIVE

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Article history:

Submission date: 1 September 2024
Received in revised form: 5 October 2024
Acceptance date: 1 November 2024
Available online: 31 December 2024

Keywords:

Shariah court, Malaysia, challenges, Islamic criminal law

Funding:

This research did not receive any specific grant from funding agencies in the public, commercial, or non-profit sectors.

Competing interest:

The author(s) have declared that no competing interests exist.

Cite as:

Che Amran, C. N. A., & Mokhtar, A. W. (2024). Challenges of Shariah court in Malaysia: Amend suitable and relevant Islamic laws based on Shariah perspective. *INSLA E-Proceedings*, 7(1), 38-51.



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ABSTRACT

This article highlights the challenges and application of Shariah Court in Malaysia which every year there have an issue regarding to this Islamic Law. As a Muslim applying the Islamic Law is a duty and obligation of every Muslim and cannot be separated at all. Any form of tyranny in any form is opposed and must be eliminated because Islam never tolerates cruelty. It is also aim at fending off some negative notions against the Shariah Court as the second-class court in terms of power and achievements in administering and implementing Islamic law in Malaysia. The study used qualitative approach and refers as well to secondary sources, which includes statutory provisions, articles, website information. It also explains about the existing provisions and suggest improvement of some aspects that are deemed important as the first step to prepare for the implementation of a more systematic alternative sentence in the Shariah Court. The results of the study can make the Shariah court a main guide for Muslims in matters of criminal offences, marriage, property and others. The impact is that the Shariah Court can provide proper justice to Muslims and make the Shariah Court an institution that is held in high esteem by all nations and not arbitrarily disregarded while the sharia law comes from Allah SWT and He is the best creator and knows what the best for man himself.

Introduction

In 2020, 63.5 percent of the Malaysian population professed the Islamic faith (Statista Research Department, 2022). As the majority of Malaysians are Muslim. Therefore, Malaysia has applied Islamic law in Shariah court. Shariah means ‘the correct path’ in Arabic. In Islam, it refers to the divine counsel that Muslims follow to live moral lives and grow closer to God. Shariah is derived from two main sources: the Quran, which is considered the direct word of God, and hadith—thousands of sayings and practices attributed to the Prophet Muhammad PBUH that collectively form the Sunna. As stated in Al-Quran:

Translation: “Then We put you, [O Muhammad], on an ordained way concerning the matter [of religion]; so, follow it and do not follow the inclinations of those who do not know.”

(Al Jathiya 45:18)

M. Kamal (2015) reviewed the works of scholars of the Quran namely al-Tabari’s Tafsir Jami‘al-Bayan; Abd al-Rahman al-Sa‘di’s al-Tafsir al-Karim al-Rahman fi Tafsir Kalam al-Manan; Al-Shawkani’s Fath al-Qadir and Mutawwali al-Sha‘rawi’s Tafsir Khawatir respectively and listed the meanings of the term “Shariah”, namely:

Shariah is the religious obligations (*al-fara'id*), and the divinely prescribed limits “(*al-hudud*), and commandments” (*al-amr*) and prohibitions (*al-nahy*) (which Allah has clearly laid down for human beings to follow). There were those who equated al-Shariah with al-Din (the religion of man’s complete submission to the One True God).

Shariah isn’t the same as Islamic law. Muslims believe shariah refers to the perfect, immutable values understood only by God, while Islamic laws are those based on interpretations of shariah. Interpreting shariah requires deep knowledge of the Quran and Sunna, fluency in Arabic, and expertise in legal theory. However, modern Islamic seminaries have not standardized the level of competency nor the length of study necessary to qualify as a jurist (Khaled Abou El Fadl) a Muslim jurist and law professor at the University of California, Los Angeles.

Malaysia has been declared as an Islamic country as stated in the Federal Constitution. Based on the Federal Constitution (2009), according to Article 3, Islam certified as the Federal religion; however, other religions can practice their religion in peace and harmony without interfering with Islam. Through this information, we can relate that application of Islamic law in Malaysia is influenced by the legal context such as the legal system in Malaysia. Malaysia has a legal system based on Islamic principles that reflect its identity as an Islamic country. For this reason, the understanding of applying the Islamic law based on shariah perspective interpreted by considering the Islamic view prevailing in Malaysia especially for amend Islamic law in the Shariah court in Malaysia.

The Malaysian Constitution has stipulated that the implementation of shariah law is placed under the authority of the State Religious Authority. Each state (14) has its own shariah law (Islamic religious administration, Islamic Family Law, Property Procedure, Criminal Procedure, Criminal Offenses, Shariah Evidence) and each state has 3 hierarchies of shariah courts: Sharia Court of Appeal, Shariah High Court, Lower Shariah Court. Shariah courts can only try Muslims. Shariah courts have been established under the Enactment of the Administration of Islamic Religion in the States, in accordance with item 1, List II, Ninth Schedule of the Federal Constitution. There are several institutions involved in the implementation of Islamic law, namely, the Islamic Religious Council, the Department of Islamic Religion, the Mufti, and the Shariah Court.

Amendments to Article 121 and Article 5 of the Constitution in 1988 are seen to give new life especially to the jurisdiction of shariah courts. Article 121 clause (1) states that there are two high courts with concurrent and equal jurisdiction. The effect of the amendment was to remove or separate the shariah court from being under the civil court. Whatever is within the jurisdiction of the shariah court, the high (civil) court cannot interfere. The amendment to Article 5 of the Federal Constitution gives higher recognition to shariah courts, when a new proviso has been inserted in clause (4) of Article 5 for sharia courts namely; "And with the further condition that in the case of an arrest for an offense that can be tried by Shariah Court, references in this clause about a Magistrate shall be interpreted as including references about a Shariah Court judge."

What can be concluded is that shariah and Islamic law is important for Muslim as it is a way of life that has been set by Allah SWT. Allah SWT is the creator and he know what is the best for the people. We just have to obey and follow. As mention in Al Quran:

Translation “Whoever obeys Allah and His Messenger will be in the company of those blessed by Allah: the prophets, the people of truth, the martyrs, and the righteous- how excellent these companions are!”

(An-Nisa 4:69)

Problem Statement

Along with the advancement of technology, the world is becoming more advanced causing a few people who appear as if the religion of Islam is ancient, has limitations and is not free to do something especially when something contradicts the religion of Islam. This represent a liberal ideology where individuals are free to do as they please regardless of what is good and bad, halal and haram. Therefore, the widespread liberal perspective in Malaysia poses a significant challenge to the faith of Muslims. As we know, the judiciary in Malaysia is divided into two, namely civil law and Shariah law, and the shariah court is also free from the interference by civil court since the Federal Constitution Amendment in 1988. Similarly, from an administrative perspective, the shariah court has been separated from the Islamic religious department since the beginning the 1990s where Shariah law in Malaysia is designed specifically for Muslims. If this liberal thinking is not curbed it disturbs and threatens Muslims because they will influence and say shariah law does not need to be implemented because they think it is no longer relevant to be practiced nowadays. The effect if not addressed, it will affect the status of Shariah courts and may lead to a negative perception among certain groups. It is even possible that the Islamic community itself will not support the existence of Shariah courts in Malaysia.

Some parties believe that this constitutional amendment does not necessarily dignify Islamic law. Hooker who referred to the decision of the case involving the amendment of the constitution stated that the decision of the case shows that the Constitution and not sharia that interprets the law and the Malaysian Constitution is based on secular concepts, English and Malaysian law and not based on shariah (Hooker, 1993).

In the meantime, the weaknesses found in the sharia court can give a negative image to the Islamic community. For example, Maznah Mohamad in her study of women dealing with sharia courts in Johor Bahru, Pinang Island and the Federal Territory made a statement that there is discrimination in the implementation of Islamic law in Malaysia. Among the evidence to support this statement is that it is very difficult for the poor and women to get a defence in the sharia court because the legal system of the shariah court is difficult to access. He also said that the experience of women in his study said that they were uncomfortable with the atmosphere of religious offices and Shariah courts (Abdul Monir, 1999).

Not only that, on 22 May 2022 there was an issue that challenged shariah law when 21 Shariah Enactments were challenged by two lawyers Nik Elin Zurina Nik Abdul Rashid and her son, Tengku Yasmin Natasha Tengku Abdul Rahman challenged 21 provisions in the Criminal Code Enactment Shariah (I) 2019 Kelantan. It is even more serious when on 30 September 2022, Federal Court Judge, Datuk Vernon Ong Lam Kiat has given permission to challenge approximately 21 provisions in the Kelantan Criminal Code Enactment (I) 2019 to the 2 lawyers. Examples of challenged enactments include section 5 (false allegations), section 11 (destroying a place of worship), section 31 (sexual harassment) and others.

Apart from that, since shariah court have their own system, it is pertinent to note that their own rules and evidence are different from those of the civil court, to some extent. the conflict that occurs when the civil court is interfering with what goes on in the shariah courts. The issue is whether the opinion of a Sharia law expert is binding on the civil court? Zainur Zakaria examines the acceptance of the opinions of shariah experts such as the Mufti in the Evidence Act 1950. He concludes that in matters that touch on shariah law in civil courts, expert opinions on Islamic law should be consulted and used. (Zainur, 1995). There is an assumption that the expansion of the jurisdiction of shariah courts in the criminal framework, certainly, the hudud law, is more religious politics than a serious effort to implement Islamic law. Similarly, the implementation aspect of this law is said to not understand the current reality and the general objective of sharia law. Mahmood Zuhdi stated that the Islamic criminal jurisdiction in Malaysia has not been able to

achieve the objectives of shariah law and considers the shariah court to be nothing more than another secular court (Mahmood Zuhdi, 2001).

In addition, as we know, the Constitution divides the legislative powers between the Federation and the States. This division of powers makes Islam, including Islamic criminal law, a matter for the states, while matters related to the administration of justice in general, including the creation of criminal offenses and their procedures, fall under the federal legislative authority. So far, due to the division of powers, there have been four hudud offenses committed by the State Legislature. The offenses are, adultery, accusing adultery, drinking alcohol and apostasy. These four offenses are considered offenses against Islamic religious orders and only apply to Muslims. The other three hudud offences, namely theft, robbery and fighting the legitimate government, have been mentioned in the Penal Code, which is a law at the Federal level that is adopted on all parties. The same goes for the offense of killing and causing injury. Both of these are found in Federal law. If we can accept those offenses as general offenses for all Malaysians, the changes that need to be made to impose hudud punishment and further make the offenses under this Federal law a general crime.

If hudud is classified as a general crime and removes hudud from legal restrictions associated with Islamic religious principle, then hudud can be enacted by Parliament. From a constitutional perspective, there are no legal barriers for Parliament to enact hudud laws. Provided that it is related to any matter mentioned in the Federal List. This point is quite clear as mentioned in Item 4(h) of the Federal List, in the Ninth Schedule. No restrictions are placed on the Powers of Parliament for the purpose of "Creation of offenses in respect of any matter included in the Federal List or referred to by federal law".

Due to the issue discussed above, therefore this topic has been decided to do research regarding this topic. The purpose of this research is to ensure the Shariah law are suitable and relevant towards people based on issue nowadays. Also, to understand how Shariah court in Malaysia gives a solution regarding the challenges towards the Shariah law and study how Shariah court can give the right towards people.

Research Questions

- 1) What is the concept of Islamic criminal law according to Shariah perspective?
- 2) What are the jurisdiction and position of Shariah court in Malaysia?
- 3) What are the challenges and achievement of Shariah court in Malaysia nowadays on amend suitable and relevant Islamic criminal law?
- 4) Is Islamic law in the Shariah Court effective and does it need for improvement of the States Shariah legal provision.

Research Objectives

- 1) To identify the concept of Islamic criminal law according to Shariah perspective.
- 2) To analyse the jurisdiction and position of Shariah court in Malaysia.
- 3) To examine the challenges and achievement of Shariah court in Malaysia nowadays on amend suitable and relevant Islamic criminal law.
- 4) To propose whether Islamic law in the Shariah Court effective and does it need for improvement of the States Shariah legal provision.

Literature Review

According to Raihanah Abdullah (2009) stated the weakness of Shariah court in Malaysia have made the negative perception towards its especially for women. Also, the statement of the media gives an impact towards the Shariah court. It is because women are the majority attend to the court to fight for their right and have the protection by the law. This writing also shows the adjournment of a case in the Shariah Court. Other than that, writer also gives solutions to the challenges that happened therefore the issue has been settled.

Some researchers believe that this text does not sufficiently address the debates about the challenges of Shariah courts or the relevant facts and laws.

The document discusses the jurisdiction and position of Shariah Courts in Malaysia, with a focus on recent cases involving interference from Civil Courts. It highlights the historical background of Islamic law in Malaysia and the structure of the Shariah Courts. It also examines the jurisdiction of the Shariah Courts, and the amendment made to Article 121 of the Federal Constitution. The document concludes that there is still a lack of clarity on the jurisdiction of Shariah Courts and the need for further clarification. Researchers opined that this writing does not focusing on the amendment whether the Islamic law nowadays are suitable or need to improvise.

The document discusses the implementation of alternative sentences in Shariah courts as a means to rehabilitate offenders. It highlights the need for improvement in the legal provisions of Shariah law in the states to avoid legal problems. The document also explains the different forms of alternative sentences, such as good behaviour bonds and rehabilitation centres, and suggests improvements to the existing laws.

Regarding the text above, researchers observed that the author prioritizes alternative sentencing; however, for such alternatives to be viable, existing legislation must be reformed to guarantee legal rights for the intended beneficiaries.

Results and Discussion

The Concept of Islamic Criminal Law according to Shariah Perspective.

Islamic law or known as Shariah Law is based on revelation from Allah SWT which cover all aspect of human life, “*ibadah*”, “*muamalat*”. “*jinayat*”, “*faraid*”. It appears to emphasize the importance of individualized sentencing, equal application of the law, consistency with the legal framework, and protection of offenders' rights even during punishment (Al-Alfi, 1982). The root word of *jarimah* literally means "to cut off" (Anwarullah). This word also means a sin, a crime, a fault, an offence or an act of disobedience, a transgression whether done intentionally or committed through inadvertence (Lane Edward). In the religious context, the word *jarimah* means an act of committing what has been prohibited by the Syariah or not doing what has been ordered by the Syariah, of which, consequently the punishment of *Hudud* or *Ta'zir* has been prescribed (Abu Zahrah). In other words, *jarimah* means the commission of a prohibited act or omission of an obligatory act for which punishment is prescribed. The commission and omission are violations of the legal order and prohibitions imposed by law. An example of the commission of a prohibited act is adultery (*al-zina*) for which the punishment as prescribed in the primary sources of Islamic law punishment is one hundred lashes whipping for unmarried persons and stoning to death for married persons.

However, word *al-Jinayah* defined as all forms of prohibited and destructive actions, whether the Action is on the body, property or so on. Crime is any form of offense according to Shariah that can be punished based on God's law whether it is *qisas*, *hudud* or *takzir* (Hassan al- Mawardi, 1966). This definition tries to distinguish between crimes that can be punished and crimes that cannot be punished by the government. This makes the scope of crime large because all offenses that can be punished by the government according to Sharia are considered crimes (Fathi Yusof, 2014). In the classical textbooks of fiqh, criminal law is not regarded as a single, unified branch of the law. Provisions regarding offences mentioned in the Quran and Hadith constitute violations of the claims of God (the right of Allah) with mandatory fixed punishments; these offences are apostasy (*riddah*), robbery (*hirabah*), unlawful sexual intercourse (*zina*), theft (*sariqah*), the unfounded accusation of unlawful sexual intercourse (*qazaf*) and drinking alcohol (*syurb khamr*). Provisions for offences against another person, i.e., homicide and wounding, are subdivided into:

- (i) those regarding retaliation (*qisas*) and,
- (ii) those regarding financial compensation (*diyat*)

And they are provisions concerning discretionary punishment of sinful or forbidden behaviour or of acts endangering public order or state security (*ta'zir*).

Some scholars said that it encompasses all kinds of prohibited acts that relate to injury whether in relation to the human body or property or other violations (Al-Zailaie). According to other scholars, the word refers to or means offences liable to punishment under *Hudud* or *Oisas* (Ibn Al-Farhun). Generally, jurists do not differentiate between *jarimah* and *jinayah*, as both words have the same meaning or are synonymous to each other (*Audah*). Among other words that also associated with crime are disobedience (*ma siyyah*) and sin (*ithm*). Actually, the word disobedience (*ma siyyah*) is a general term, encompassing both punishable and non-punishable offences.

Islam has, in fact, adopted two courses for the preservation of the five indispensables in human life: religion (Islam), life, intellect, offspring and property. The first is through cultivating religious consciousness (*al wazi' al dini*) in the human soul and the awakening of human awareness through moral education. The second is by inflicting deterrent punishment (*al qanun*), which is the basis of the Islamic criminal system. The Islamic Criminal Law, which is part of the Shariah Law, provides a worldly punishment in addition to that in the hereafter (Zulkifli Muda, 2010). Indeed, the original source of Islamic Law is Allah. Syariah is the main part of the religion of Islam that is introduced and revealed by Allah, who is actually the Lawgiver. Although there are differences on standards of punishments, such as offences liable to punishment under *Hudud*, offences liable to punishment under *Qisas*, and other offences liable to *Ta'zir*, all of them are subjected to the main source, that is punishment under Allah (by virtue of al-Quran).

Translation: And so, judge (you O Muhammad) among them but what had been revealed and follow not their vain desires, but beware of them lest they turn you (O Muhammad) far away from some of that which Allah had sent down to you,

(Al-Maidah 5:49)

Last but not least, the principles of Islamic criminal law in regard to accusations. It is an important principle that a person is not allowed to make an accusation without producing proof or evidence. Without sufficient evidence, such accusations do not hold any legal standing. In fact, the accuser may be regarded as sinful and, in some cases, may even face punishment themselves. Furthermore, it is emphasized that the accused person is presumed innocent in the eyes of the law and the public until there is substantial evidence to prove otherwise. It is worth mentioning that these principles are also adopted in Malaysian law.

The Jurisdiction and Position of Shariah Court in Malaysia.

Muslim judge (*Qadi*) appointed by “*Raja*” and “*Sultan*” of their respective states except in the Federal Territories, Penang, Malacca, Sabah and Sarawak where the appointment is made by the Yang di-Pertuan Agong. The Prosecutor and the Islamic Affairs Officer are among the Court's staff. The role of the Islamic Affairs Officer is to receive complaints, investigate and assist the *Qadi*. Prosecution is usually made by the Religious Prosecutor. The Islamic Law of Evidence is applied in the Shariah Court where in the Law on the Administration of Islamic Law through the Enactment provides that the Shariah Court must follow the law of evidence as found in Islam such as in the aspects of the number, status and quality of witnesses or evidence need proof.

In the early 90s the structure of the Shariah Court was updated. Steps have been taken by the Islamic Religious Affairs Department to reorganize the structure of the Shariah Court into a three-tier hierarchy. Through the Islamic Law Administration Act (Federal Territory) 1993 and the Islamic Law Administration Act (Selangor) 1989, a new structure with the concept of a three-tier hierarchy was created:

- (i) Shariah Subordinate Court;
- (ii) Shariah High Court;
- (iii) Shariah Court of Appeal.

Looking at the problems of non-uniformity in the decisions of the Shariah Court because there are differences in the Islamic Religious Administration Enactment and the procedures for appointing judges of the Shariah Subordinate Court, Shariah High Court and the Shariah Court of Appeal which are different

and the lack of Shariah Court judges throughout the country resulting in many Mal cases and Shariah crimes were delayed, so the government agreed to establish a new department known as the “Jabatan Kehakiman Shariah Malaysia” (JKSM) which began operating on 1 December 1998 (Dato’ Ghazali, 1999). Except for Shariah Courts in the Federal Territory of Kuala Lumpur and Labuan, the existence of Shariah Courts is under the jurisdiction of the states. The Ninth Schedule (List II - State List) of the Federal Constitution provides:

"Hukum Syarak dan undang-undang diri dan keluarga bagi orang-orang yang menganut agama Islam, termasuk Hukum Syarak berhubung dengan mewarisi harta berwasiat dan tak berwasiat, pertunangan, perkahwinan, perceraian, maskahwin, nafkah, pengambilan anak angkat, taraf anak, penjagaan anak, pemberian, pembahagian harta dan amanah bukan khairat, wakaf dan ta'rif serta mengenai amanah dan khairat agama, perlantikan pemegang-pemegang amanah..."

Therefore, the power of the State Legislature is to enact matters regarding Islamic law as provided in the Ninth Schedule, List II - State List. This includes the power to establish courts that have jurisdiction over Muslims only. Although this provision clearly deals with state jurisdiction, there are many other Federal laws that limit state jurisdiction.

For example, in the field of succession, testate and intestate, account has to be taken of the Probate and Administration Act and the Small Estates (Distribution) Act with the result that the *Qadi* are in effect only given the function of certifying the shares to be allotted to the beneficiaries under Islamic law. In the field of criminal law in particular, the jurisdiction of the Shariah Courts is very limited. It has jurisdiction only over persons professing the religion of Islam and it has only such jurisdiction in respect of offences as is conferred by Federal law. Until 1984, the Muslim Courts (Criminal Jurisdiction) Act, 1965 had provided that such jurisdiction should not be exercised in respect of any offence punishable with imprisonment for a term not exceeding six months or any fine exceeding \$1,000.00 or with both. The Act was amended in 1984 and the jurisdiction of the Syariah Court has been extended by giving them jurisdiction to deal with cases punishable with imprisonment up to three years, or fine up to \$5,000.00 or whipping up to six strokes or the combination of all these. The Criminal jurisdiction of the Shariah Courts is therefore less than that of the First-Class Magistrate which can generally try offences for which the maximum term of imprisonment does not exceed ten years imprisonment.

The Selangor Syariah Criminal Offences Enactment has established several specific categories of crimes, namely:

- 1) Faith-related offenses such as spreading false doctrines and *takfir*.
- 2) In relation to the sanctity of Islam and its institutions such as insulting matters related to religion, religious authorities, fatwas, disobeying court orders, gambling, drinking alcohol and intoxicating beverages, disrespecting the month of Ramadan, not performing Friday prayers and not paying Zakat or fitrah.
- 3) In relation to immorality such as incest, prostitution, sexual relations, celibacy, men acting like “pondans” and indecent behavior in public.
- 4) Misdemeanours such as running away married women, preventing married couples from living as husband and wife, inciting husband and wife to divorce or leave their obligations, selling or giving children to non-Muslims, *qazaf* (accusing adultery), collecting zakat without truth and misusing the halal mark.

Jurisdiction Mal

Terms ‘*mal*’ actually refers to property but in a legal context, it refers to non-criminal cases. The *mal* jurisdiction of the Shariah Court applies to all Muslims who are residents of the states and in fact, the Shariah Court has almost comprehensive jurisdiction and includes many aspects of the Islamic family:

- 1) Related to issues before marriage.

Such as breaking up an engagement, applying for permission to marry and applying for polygamy.

2) Related to questions during marriage.

Such as an application to confirm a marriage, an application to annul an invalid marriage, an application for self-support, child support, convicting a wife of *nusyuz*, a wife's application for her husband to live together again and others.

3) Related to the question of dissolution of marriage.

Application for divorce by *khuluk*, *lian*, *fasakh*, *talaq*, *ta'liq*, divorce by order, due to apostasy and also on the presumption of death.

4) Any application in an ongoing case (interlocutory order)

For example, a temporary application for alimony for both self and child, gift, restraining order against property and harassment.

For example, it is very appropriate for a woman to apply for a ban (injunction) against her ex-husband not to disturb him. As well as applying for a restraining order so that jointly owned property is not allowed to be involved in any business.

5) Issues arising after divorce.

For example, consolation (*mutaah*) after divorce, matrimonial property, iddah maintenance, child maintenance, arrears of maintenance and also the issue of *hadanah* (childcare).

6) Applications regarding wills, waqf and inheritance.

7) Application for enforcement of court order.

In 1988 an amendment was made in Parliament to Article 121 by adding clause (1A). Article 121 (1) "Then there shall be two High Courts which have the same jurisdiction and level, that is:

(a) one in the States of Malaya which is named the High Court in Malaya and which has its registered office in Kuala Lumpur; and one in the States of Sabah and Sarawak which is named the High Court in Borneo and which has its registered office at any place in the States of Sabah and Sarawak as determined by the Yang di-Pertuan Agong; and any subordinate court as provided by Federal Law; and the High Courts and subordinate courts shall have such jurisdiction and powers as may be conferred by or under Federal law. (1A) The courts mentioned in Clause (1) shall not have jurisdiction in respect of any matter within the jurisdiction of the Syariah Court.

According to Professor Ahmad Ibrahim, a major effect of this amendment is to reduce the discrepancy between the decisions of the Syariah Court and the High Court. Among them in the case of ***Myriam v. Mohamed Ariff* [1971]** where the divorce was made before the Qadi and it was agreed by both parties that the custody of the two children, an 8-year-old daughter and a 3-year-old boy, was handed over to their father. Then the plaintiff made an application in the High Court requesting that he be entitled to custody of the child even though he was married to another man who was not the mother of the children.

With reference to section 45(6) of the Selangor Islamic Law Administration Enactment 1952, the Civil High Court held that when there is a conflict of decision between the Syariah Court and the Civil Court, the decision of the Civil Court prevails. Furthermore, with the Guardianship of Infants Act 1961, the Civil Court held that this act does not conflict with the jurisdiction of the Civil Court in this case. In the end, Hakim Abdul Hamid decided that the son was handed over to his mother and the girl to her father.

However, after the 1988 amendment there were some High Court Judges who still ignored the amendment of Article 121 (1A) 1988. This can be seen in the case of ***Ng Wan Chan v. Majlis Ugama Islam Wilayah Persekutuan & Anor* [1991]** and another where a dispute has arisen as to whether the deceased Lee Siew Buddhist or Muslim. The deceased's widow claimed that her husband was a Buddhist while the Islamic Religious Council held that he was a Muslim, declaring that the deceased was a Buddhist during his lifetime and until his death. He requested that the High Court issue an interlocutory injunction so that his body would not be handed over to the Islamic Religious Council. Next, the Islamic Religious Council

disputes the jurisdiction of the High Court hearing this case because they think it falls under the jurisdiction of the Kuala Lumpur Syariah Court. The High Court held that section 45(2) and (3) of the Selangor State Shariah Law Administration Enactment 1952 gives jurisdiction to the Syariah Court in the matters listed there in and the list does not include jurisdiction to determine whether a person adheres to or practices Islam. Since there is no provision that gives this jurisdiction to the Syariah Court in deciding whether a person is a Muslim or not at the time of his death, this does not prevent the Civil Court from making a decision. Therefore, the High Court ruled that the evidence in the case was not enough to prove that the deceased was a Muslim at the time of his death. There is no evidence to show that the deceased's conversion to Islam was made in accordance with the Selangor State Islamic Law Administration Enactment 1952 and the rules made under it. The Honourable Hakim opined that the deeds done by the deceased during his lifetime clearly show that he did not follow the teachings of Islam. With that, the Court ruled that the deceased was not a Muslim at the time of his death.

However, there are also Judges who tend to make decisions in favour of the Syariah Court. In one case *Md. Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan Kuala Lumpur* [1998], 33 plaintiff (original name Lee Leong Kim) a Buddhist embraced Islam on March 30, 1978 and adopted the name Md. Judge Lee bin Abdullah. On 10 October 1995 through deed poll and legal declaration, the plaintiff has declared that he has left Islam and has shown his intention to use the name Lee Leong Kim. Lee claimed that his act of leaving Islam was guaranteed under article 11 of the Federal Constitution and that no one had the power to restrict his freedom from doing so. The defendant did not file any affidavit in opposition to the plaintiff's application but the defendant filed a suit in chambers for the plaintiff's application to be rejected under Order 18 Rule 19 of the High Court Rules 1980 on the grounds that the High Court did not have jurisdiction to hear the plaintiff's application as contained in article 121(1A) of the Federal Constitution. With reference to paragraph 1 of list II of the Ninth Schedule of the Federal Constitution, the Honourable Judge Dato' Abdul Kadir Sulaiman ruled that the court that has jurisdiction in relation to the matters raised is the Syariah Court. therefore, the plaintiff's application is rejected with costs because the Civil Court does not have jurisdiction to hear the matter requested in this application based on article 121(1A) of the Federal Constitution.

The Challenges and Achievement of Shariah Court in Malaysia Nowadays on Amend Suitable and Relevant Islamic Criminal Law?

Challenges of Shariah court

Islamic criminal law is a law that is suitable for all societies in all ages. It is also a law that is in accordance with the nature of human events. What is more important is that Islamic criminal law must be practiced by those who believe. Among the proofs that show the obligation are the following verses of the Qur'an:

Indeed, We have revealed to you, [O Muhammad], the Book in truth so you may judge between the people by that which Allah has shown you. And do not be for the deceitful an advocate.

(An Nisa 4:105)

In the current and present context, the suspension of a law falls within the jurisdiction of a legislative body such as a state legislative assembly or parliament. Although the judge has the right not to impose a sentence. A judge must acquit the accused if the available evidence does not meet a specified standard of proof, including, for example, someone stealing during the dry season because of hunger. Some say that the implementation of the Islamic Penal Code should be delayed to avoid financial pressure due to the lack of foreign investors. The validity of this argument is questionable as Islamic law is enforced with fairness in accordance with Allah SWT will. As a result of the implementation of Islamic laws, there is peace and tranquillity in the country and crime can be reduced to a very minimal level. This development will certainly increase the attractiveness of investors to invest in this country that practices Islamic criminal law. In addition, future investors should not be afraid, because they do not come to commit crimes, but to invest capital. There are also those who wish to avoid the enforcement of Islamic criminal law on the grounds that the Islamic state and many people who have not accepted evil make Islam enforceable. Implementation of Islamic law does not compel all citizens to first embrace Islam. The purpose of implementing Islamic criminal law is to eliminate or reduce crime. It must be fulfilled anyway. The current criminal law has proven to be a failure in eradicating crime. For example, in 2021, crime case

were 52974 cases (Ahmad Ismadi, 2023). The facts show that the average crime rate in Malaysia is always increasing at a higher rate than the population growth rate. People feel insecure. If this development is allowed to continue, the safety of the people and the peace of the country will be more and more threatened. In order to overcome this problem, Islamic criminal law needs to be re-enforced. It should be the situation of the people who do not fully appreciate Islam and the number of evildoers should be a driving factor to enforce the Islamic criminal law, instead of a factor not to implement it as claimed by some parties. If we want to wait for the whole society to be 'good' without the implementation of Islamic criminal law, we will not succeed even until the end. This is because Islamic criminal law is complementary to the process of *islah* or *tajdid*, which is the process of changing society for the better. Educational efforts, the development of family institutions, social development and da'wah will not be fully successful without the enforcement of Islamic criminal laws as required by Allah SWT.

In addition, there are also voices that say that Islamic criminal law cannot be enforced because the people are still ignorant of the law. Islam actually does not require all citizens to understand a law before its implementation. Even in any legal system in the world there is no Parliament or Legislature that requires the understanding of the people before a law is passed. In Malaysia alone there are over 760 acts and thousands of laws and regulations. Not many people understand all the laws. Parliament still approves all laws even if they are not fully understood by the people. Islamic criminal laws such as "*hudud*", "*qisas*" and "*takzir*" are actually laws that are readily known by the people, especially Muslims because they are found in the Al-Quran and Hadith which are the daily reading of Muslims. It is also taught in mosques and mosques. There are many books in various languages that describe this Islamic criminal law. If anyone has not understood it even once it can be known and understood easily. Therefore, there is no reason for Muslims to reject the implementation of Islamic criminal law due to the ignorance of the community.

This Islamic criminal law is suitable for all communities. However, there are those who say that this law is not suitable to be carried out in a country that has a multi-racial society. Actually, this is not a strong reason because the Islamic government led by the Messenger of Allah SWT in Medina was also a multi-racial and religious society that was also inhabited by Jews alongside Muslims. Al-Qurtubi explained that there is a difference of opinion among scholars regarding the position of the implementation of Sharia criminal law on non-Muslims. Some scholars such as Imam Malik and al-Syafie think that they are given a choice whether to be punished by Sharia criminal law or not. If this view is taken, there is no question of multiracial and religious communities as an obstacle to the implementation of Shariah criminal law. If they do not want to choose Shariah criminal law they can be judged and punished according to existing laws such as the Penal Code. Strictly speaking, Islamic criminal law is a law bestowed on humans as a blessing from God. This law is in accordance with human instincts which are so complex and difficult to predict. The implementation of Islamic law will bring success not only in this world but also success in the hereafter.

Innovation and achievement of Shariah Court

Several innovations in the form of online service improvement to meet the current needs of problems related to the resolution of cases in the Shariah Court. Among the innovations that also contribute to the resolution of Shariah cases is the practice of *ṣulh* which was first introduced in 2002 through the formation of *Majlis Ṣulh* (Tuan Mohammad Shakir, 2016).

The practice of *ṣulh* in the Shariah Court in Malaysia is inspired from the approach of case resolution in court practice in Singapore and the approach is modified to be realized in the context of the practice of the Shariah Court in Malaysia. What is interesting, the concept of resolving cases through *ṣulh* in the Shariah Court in Malaysia is also applied by the *Biro Bantuan Guaman* (BBG) under name mediation.

Along with the advancement of communication in today's global world, *Jabatan Kehakiman Syariah Malaysia (JKSM)* developed several systems to improve administrative efficiency and human capital professionalism in the Shariah Court in Malaysia. One of them is the development of the E-Faraid system, which is considered essential in the management and resolution of faraid cases in the Syariah Court, from the registration of cases to the issuance of a faraid order. This system helps to speed up the registration process of the case because all the information related to the claim such as the personal identification number of the deceased, date of death, death certificate number, address of the next of kin and other are linked and verified directly with the National Registration department (JPN). Since this system is capable

of generating the count and distribution of faraid property to the rightful heirs up to a hundred layers of heirs, this system allows judges to decide faraid cases quickly and efficiently.

In addition, JKSM has created a K-Faraid portal that contains complete Faraid knowledge with the opinions of jurists regarding the *imu*. The portal can not only be accessed by JKSM staff but can also be accessed by Shariah Courts across the country and the general public. In accordance with the function of the Shariah Court which adjudicates cases based on Sharia law, JKSM has created a Nas Portal that contains the text of the Quran, Hadith and the opinions of jurists based on the Sharia law and criminal case code used in all Shariah Courts in Malaysia. The existence of this portal can be considered as an information gateway or database that facilitates the reference of Shariah legal practitioners, academics, researchers, Shariah law students and the public society. (Tuan Mohamad Shakir, 2016). While at the state level, some of the innovations made were also recognized, including the Gold Award and the best Young ICC at the Central Region Team Excellence Mini Convention organized by the Malaysian Productivity Corporation (MPC) on 26 April 2016 which was received by the Federal Territories Shariah Court through the E-Fos Project (E-Fast.Order.*Sulh*). This project is implemented to improve the *sulh* work process where the *sulh* order can be issued within an hour after endorsement. This is to ensure that cases can be resolved quickly, dispose of outstanding cases and reduce case delays.

Meanwhile, the Terengganu Shariah Court implemented the EZNafkah innovation project, which aims to speed up the process of applying for child support assistance to those entitled in the enforcement proceedings of the child support order in the Terengganu Family Support Section. This innovation successfully won an award at the international level when it won the Gold Award in the International Conference on Quality 2014 which was held in Shinjuku, Tokyo, Japan.

Is Islamic law in the Shariah Court effective and does it need for improvement of the States Shariah legal provision

The importance of proposing a new form of punishment as an alternative to the existing form of punishment imposed on Sharia offenders in Malaysia today is a necessity to transform and further empower the National Islamic Judicial Institution (Institut Kehakiman Islam Negara) in an effort to make it always relevant to the current situation (Hasnizam & Jasri, 2014). Alternative punishment refers to an alternative punishment instead of the original punishment. The original punishment is the punishment provided in Act 355. For example, the alternative or alternative to imprisonment is a fine while failure to pay the imposed fine, the alternative will be imprisonment (Siti Zubaidah, 2011). Alternative punishment contains elements of rehabilitation such as counselling, community service work, *fardu ain* classes, faith strengthening classes and programs at mosques (Noor Huda. 2013). However, the imposition of alternative punishments cannot be implemented arbitrarily. Among the factors that are taken into account in the imposition of alternative punishments on sharia offenders are the seriousness of the offense committed, age, character, level of mental health and others (Dato' Yusof, 2014). This alternative punishment can only be imposed on the offender when the Court deems it appropriate that it can be beneficial for the offender (Siti Zubaidah, 2015). Among these forms of alternative punishment are:

Command to Be Good (Bon Berkelakuan Baik)

The method of offender rehabilitation through alternative punishment in the Shariah Court can be seen from the point of view of issuing good behavior bonds and maintaining peace. Bond is the temporary release of the accused person by submitting sufficient surety and undertaking of the Surety to ensure the presence of the accused person on each day of the trial. An undertaking signed by the Guarantor is called a surety bond. Conditions imposed on accused persons and bail conditions are at the discretion and jurisdiction of the court. In the Good Behavior Bond order, the offender can be ordered to attend counseling sessions, programs at the mosque, do community service work and so on.

Rehabilitation at an approved Rehabilitation Center/ approved home

In addition to bonds, an alternative method of execution in the Shariah Court can also be made by ordering that the offender be sent to a rehabilitation home. The power to establish this rehabilitation home is under the Islamic Religious Council of the States. Based on the Islamic Religious Administration Enactment (Selangor State) 2003, Riqab Registration, Rehabilitation and Control Regulations (Selangor State) 2013 which came into effect on 1 August 2013, 'House of Rehabilitation' means any House of Rehabilitation

established under any written law that provides rehabilitation, treatment and protection for *Riqab*. The term 'Rehabilitation' refers to the rehabilitation process through specific training and activities based on modules, counseling and regular advisory services to change negative behavior and develop personal in among *Riqab*. The rehabilitation provided includes a clinical and spiritual healing process through an agency that has jurisdiction over *Riqab* to cure the 'disease' faced.

Therefore, the purpose of enactment of Islamic criminal law is to create a sense of fear, fear of committing a crime because Allah SWT is our creator, Allah SWT who has all the attributes of perfection certainly makes the best and most suitable law for humans. Allah SWT knows best what criminal laws are in accordance with human nature. Man-made laws are vulnerable because human knowledge and abilities are limited. In addition, people are always influenced by the environment, family background, education, lust and incitement of the devil (Abdul Ghani, 1997). That is why human laws are constantly changing, for example homosexuality used to be considered a crime, but today it is no longer considered a crime, it is even raised as a legal practice through marriage as practiced in certain countries. It is clear that human laws have their own interests compared to Islamic laws which are fair and impartial and do not favor anyone.

Islamic criminal law is very careful when it comes to convicting someone with a criminal sentence. For example in the case of *hudud*, the conviction is very severe. For example, in the case of theft, the stolen property must be kept in a suitable place, and there should be no urgent problems such as war, famine and calamity. Likewise in the case of adultery that was convicted with the confession of testimony by four men who saw the incident clearly like seeing a bucket go into a well. If you fail to bring four witnesses, the person who made the accusation will be charged with *qazaf*. The conditions of witnesses in Islamic law are very strict. A witness must be fair i.e. not wicked. There is a witness screening process called '*tazkiyah al-syuhud*'. If it is found that the witness has committed a major sin, always commits crimes and has abominable morals, then his testimony can be disputed (Mahmod, 1998). In civil criminal law, the moral and character of witnesses are not taken into account in determining the validity of their testimony.

As the Shariah Courts are State courts and have jurisdiction only within the respective States, it is necessary to have provision for the service and enforcement of summonses, warrants and judgments of the Shariah Court issued in a State in other States. This can be done through reciprocal arrangements between the States but it is suggested that there should be a federal law to provide for the service and enforcement of summonses, warrants and judgments of the State Shariah Courts throughout Malaysia and, if possible, even outside Malaysia, in Singapore, Indonesia and Brunei. In order to have an efficient administration of the Islamic Law, it is not only necessary to have competent judges, judicial and legal officers but also to have lawyers or syarie lawyers to assist the parties to the litigation and the courts. Provision has therefore been recommended for the admission and control of syarie lawyers. It is also necessary to provide for the education and training of the persons who will be the judicial and legal officers and the syarie lawyers in the Shariah Courts. In this respect the International Islamic University plays a significant part. In order to improve the professional qualifications of the existing judicial and legal officers a one-year in-service diploma course has been offered by the University to upgrade the knowledge in matters of the legal system, the Constitution, the laws of evidence and procedure and the professional skills in the administration of the law. The LL.B. programme at the International Islamic University combines the study both of the Shariah and the civil law, which are taught in Arabic and English respectively; and particularly for those who would like to join the Shariah judicial and legal service a fifth year LL.B. Shariah course is offered where Shariah subjects are studied in depth using Arabic as the medium of instruction. Thus, it is hoped that the future judicial and legal officers and syarie lawyers in the Shariah Courts will have a better qualification and status, in that they will be qualified persons under the Legal Profession Act and also competent in the Shariah. A diploma course is also offered for lawyers trained in the civil law, who would like to study the Shariah to enable them to be accepted as peguam syarie.

Proposal have also been made for the increase in jurisdiction of the Shariah Courts especially in regard to probate and the administration of the Muslim estates. These will need the amendment of the Federal Constitution but laws have already drafted on wills and administration an estate of Muslims. In addition, there need to be laws dealing with zakat and fitrah, the Baitulmal and Wakafs. In regard to criminal offences, the jurisdiction of the Shariah Court needs increased. Power of arrest and criminal investigation

need to be provided for and in time the jurisdiction of the shariah should be extend so that it can deal not only with minor “*taazir*” offences as at present, but also with *qisas* and *diyat* and hudud. To enable the Shariah Court to have such jurisdiction, it will again be necessary to amend the Federal Constitution.

In order to enhance the position and status of the Shariah Courts it may be necessary to amend the Federal Constitution and State Constitutions to include Islamic law in the definition of law and to make provision for the Shariah Courts, the judges of the Shariah Court and the Shariah Judicial and Legal Service. As stated above the jurisdiction of the Shariah Courts should be increased to include probate and administration of Muslim estates, power should be given to the State enforcement officers to exercise powers of arrest and investigation and the Shariah Courts be empowered to deal with cases of *qisas*, *diyat* and hudud. All these will require amendments to the Federal Constitution and to the State Constitutions.

Conclusion

In conclusion, Shariah court in Malaysia are better nowadays, however it still needs an improvement. As mention by (Yang di-Pertuan Agong Al Sultan Abdullah Ri’ayatuddin Al Mustafa Billah Shah, 2023) The administration of Shariah courts, including the status of Shariah judges and lawyers, must be strengthened and improved to enhance the prestige of the Islamic legal system in Malaysia. Also, Shariah courts must exercise their discretion wisely and always be fair to all parties in their decisions, especially when deciding family matters and Shariah crimes. Shariah judges, court officials and Shariah lawyers are also responsible for the smooth running of court proceedings. Moreover, implement a continuous monitoring and evaluation system to ensure the efficiency and effectiveness of shariah courts. Involve stakeholders, including academics, in evaluating performance and providing recommendations for improvement. In addition, providing better information services to the public about the shariah court process, their rights, and the steps that can be taken in certain cases. The challenges and criticisms that Shariah courts often face can be used as a guideline for improvements that can be improved from time to time and are positive, rather than the influence of the media that Sharia courts are unnecessary and do not need to be determined by Sharia courts. is a burden on the government. aspects of Shariah Court human capital and innovation, then conclude that these two aspects are important factors in supporting Shariah Court governance excellence. In fact, these two aspects must coexist for the Shariah Court to become an Islamic legal and judicial institution that stands out in the public society, especially in the context of a pluralistic society like in Malaysia.

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