



**International Seminar on
The Administration of Islamic Laws**

*Seminar Antarabangsa
Pentadbiran Undang-undang Islam*

July 23 & 24 1996

Paper 3

**Recent Developments
in the Administration of Islamic Law
in Malaysia**

*(Perkembangan Terkini Pentadbiran
Undang-undang Islam di Malaysia)*

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Organised by

Institute of Islamic Understanding Malaysia
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Islamic Law in Malaysia

The Federal Constitution of Malaysia provides that Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation. If the adherents of other religions claim to be able to practise their religion in peace and harmony, more so can the Muslims claim to be able to practise the religion of Islam in peace and harmony. Islam requires the Muslims to follow in all aspects of their life the teachings of Islam. In particular Muslims are required to follow and carry out the injunctions of the Shari'ah as revealed by Allah in the Holy Quran and as exemplified by the Prophet Muhammad (Peace and blessings of Allah be upon him).

Before the coming of the Colonial powers, the law which was applied in the Malay States was the Islamic Law, which had absorbed to some extent the rules of the Malay custom.¹ In Malacca the law was compiled in the Malacca Laws² and when the Malacca Empire fell versions of the Malacca Laws were applied in the other States, as for example in Pahang, Johore and Kedah.³ In Trengganu the Islamic Law was applied particularly in the time of Sultan Zainalabidin III.⁴ In Johore the Majallat al-Ahkam, a compendium of the civil law from Turkey, was translated into Malay, at the beginning of the twentieth century and ordered to be

applied in Johore. Similarly the Hanafite Code of Qadri Pasha in Egypt was adapted and translated into Malay as the Ahkam Shariyyah, Johore.⁵ However with the coming of the British and their influence in the Malay States, English Law was introduced in the form of codes taken from those enacted in India, including the Penal Code, the Contract Act, the Evidence Act, the Criminal Procedure Code, the Civil Procedure Code; and in the field of land law legislation based on the Torrens System was introduced. The introduction of these laws meant that the Islamic Law was no longer applicable in the areas covered by those laws. More significantly still, courts were set up headed by British judges trained in the English Common Law and the judges of these Courts tended to apply the English Law whenever there was no legislation which could be applied. In this way the law of torts and the rules of equity were introduced in the Malay States. The attitude taken by the British judges was confirmed by the Civil Law enactments of 1937 and 1951⁶ and finally the Civil Law Ordinance, 1956⁷, which stated that in the absence of any written law, the courts shall apply in West Malaysia the Common Law of England and the rules of equity as administered in England on the 7th day of April 1956. The Civil Law Ordinance, 1956 was extended to Sabah and Sarawak in 1971 with the effect that in the absence of any written law, the courts were to apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England, on the 1st day of December 1951 in the case of Sabah and the 12th day of December 1949 in the case of Sarawak.⁸ In the case of mercantile law the Civil Law Act

provided that in the absence of any written law, the law applicable in the Malay States would be the English Law as on the 7th day of April 1956 while the law applicable in Penang, Malacca, Sabah and Sarawak would be the law in England at the corresponding period.⁹ The result of this development is that while in theory it may be claimed that Islamic Law is the law of the land in the Malay States, in practice and in actual fact it is the English Law which has become the basic law and the law of the land in Malaysia. The Shariah Courts were placed in a Subordinate position, their jurisdiction was restricted and no efforts were made to raise the status of the courts or their judges and officers.

In the case of Ramah v Laton¹⁰ a majority of the Court of Appeal in the Malay States held that Islamic Law is not foreign law but it is the law of the land and as such it is the duty of the courts to declare and apply the law, and it is not competent for the courts to take evidence on what the Islamic Law is. If the judges of the civil courts had put into practice what they declared in that case, it would have meant that the Islamic Law will have to be administered in the civil courts. Fortunately or unfortunately the judges of the civil courts felt that they were incompetent to deal with questions of Islamic law and for a time the device was adopted of giving the civil courts power to refer questions of Islamic Law and Malay custom to the State Executive Councils of the various States. This power, given by the Determination of Muslim Law Enactment of 1930¹¹, was terminated when legislation for the administration of Muslim Law was enacted in the States

and the Shariah Courts set up to deal with cases under the enactments.¹² In this way a dual system of courts was set up in West Malaysia, that is the civil courts and the Shariah Courts. The Courts Ordinance, 1948,¹³ removed the Shariah Courts from the structure of courts under the Ordinance and they ceased to be federal courts.

Before Merdeka and when the Malay States were under the British influence, the position of the Shariah Courts and their judges and officers was truly subordinate. Their jurisdiction was limited and they were placed at the bottom of the court structure. In most states there were no proper court houses and the Shariah Courts and their staff were sadly neglected. After Merdeka, the Federal Constitution provided that the judicial power of the Federation shall be vested in the Federal Court (later for a time called the Supreme Court), the High Courts and inferior courts provided by federal law.¹⁴ Shariah Courts were ignored and even the definition of "law" in the Federal Constitution did not include the Islamic Law, although it included written law, the common law and custom and usage.¹⁵ The only mention of Shariah Courts was in the State List which provided -¹⁶

"Except with respect to the Federal Territories, 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 trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay Custom; Zakat, Fitrah and Bait-ul-Mal or similar Islamic religious revenue; mosques or any Islamic public place 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.

It can be seen that the jurisdiction given to the States and the Shariah Courts is limited. Even in regard to the subjects included, there are many Federal laws which extend the scope and application of Federal Laws. For example, in the field of succession, testate and intestate, account has to be taken of the Probate and Administration Act¹⁷ and the Small Estates (Distribution) Act¹⁸ with the result that the Kadhis 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 laws.¹⁹ Until 1984, the Muslim Courts (Criminal Jurisdiction) Act, 1965²⁰ had provided that such jurisdiction may only 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 1984²¹ 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 subordinate position given to the Shariah Courts is also shown by the fact that in many cases their decisions could be overridden by the decisions of the civil courts. The Selangor Administration of Muslim Law Enactment, 1952, provided after setting out the jurisdiction of the Courts of the Kathi Besar and the Kathi, that "Nothing in this Enactment contained shall effect the jurisdiction of any civil courts and in the event of any difference or conflict between the decision of a courts of Kathi Besar or a kathi and the decision of a civil court acting within its jurisdiction, the decision of the Civil Court shall prevail.."²² Indeed there were many cases reported which show that the decision of the civil courts would prevail over the decision of the Shariah Court and the rulings of the Mufti, the highest Muslim legal officer.²³

The unsatisfactory position of the Shariah Courts and its judges and officers led the Government to form a Committee under the Chairmanship of the late Tan Sri Syed Nasir Ismail to look into the position and suggest measures to be taken to raise their status and position. The Committee in its report recommended that (a) the Shariah Courts should be separated from the Council of Muslim Religion in the States and be independent of it (b) steps be taken to improve the training and recruitment of Shariah judicial and legal officers and (c) steps be taken to improve the facilities in the Shariah Courts, especially in regard to court buildings, supporting staff and facilities. The recommendations of the Committee were in general accepted by the Government and steps taken to implement them.

The most significant change has been made by the enactment of the amendment to Article 121 of the Federal Constitution which has modified the provision that the judicial power of the Federation shall be vested only in the civil courts and also provided that the Civil High Courts and courts subordinate to it shall have no jurisdiction in any matter which comes within the jurisdiction of the Shariah Courts.²⁴ It may be noted that with the establishment of the Federal Territories of Kuala Lumpur and Labuan, the Shariah Courts have become federal courts for these territories.

Administrative measures have also been taken to separate the Shariah Courts from the Council of Muslim Religion. The judicial officers of the Shariah Court

have been placed in the professional group and most states now provide adequate buildings, staff and facilities for the Shariah Courts. With the assistance of the Public Service department, a one-year in service diploma course has been instituted in the International Islamic University to provide professional training to the serving officers of the Shariah Courts. This has since been extended to fresh graduates from the universities who are required to undergo a two year professional programme. In this way the professional competence of the officers of the Shariah Court has been enhanced, so as to make them better able to carry out their duties in the Shariah Courts.

In the past the only legislation on the administration of the Muslim Law in the States was the Administration of Muslim Law Enactment.²⁵ This dealt among other things with the constitution and powers of the Council of Muslim Religion, the Mufti and the power to issue fatwa or rulings on Muslim Law, the law relating to Muslim marriage and divorce, wakafs and baitulmal and the Shariah Courts. The provisions were very limited in their scope and in particular the laws relating to the procedure and evidence to be applied in the Shariah Courts were inadequate and required reference to the civil law applicable in the civil courts.²⁶ There was a need to have new laws to deal with the administration of the Islamic Family Law and the jurisdiction, powers and evidence and procedure applicable in the Shariah Courts in detail.

Before 1984 each State had its own legislation on the administration of the family law. There was a need to have a uniform law in this matter and a Committee headed by Tengku Zaid from the Attorney-General's Chambers was appointed to prepare a model enactment. This model code was later agreed to by the Council of Rulers and after that referred to the various States for enactment of the legislation. Unfortunately the hope to have a uniform Islamic family law in this way was not achieved, as some states particularly Kelantan, Kedah and Malacca,²⁷ made significant changes to the draft. In addition to the problem of lack of uniformity in the laws applied in the various states there was also the problem of conflicts between the civil law and the Shariah Law. It was necessary therefore that steps should be taken to suggest measures to reconcile and have uniformity in the Islamic Family Law applicable in the various states and to improve and strengthen the administration of the law in the Shariah Courts. In addition there was a need to examine the existing legislation, both Federal and States and suggest the removal of those provisions which are found to be in conflict with the Islamic law.

At present the most important jurisdiction of the Shariah Courts is in relation to the family law of the Muslims. In this respect an effort had been made earlier to have a uniform law for the various States in Malaysia but unfortunately this has not succeeded. One of the first tasks of the authorities was therefore to study the various Islamic family laws and to recommend various amendments to bring them

closer to one another. The two most important enactments were those enacted in Kelantan²⁸ and in the Federal Territory²⁹ and therefore amendments were suggested to the Kelantan and Federal Territory laws for adoption by them and the other states which followed one or other of them. A comprehensive table of amendments was prepared for each state or territory and these were discussed with the relevant authorities in the States or territory. Alhamdulillah many States have accepted the suggested amendments and it is hope that in time the Islamic family Law administered in Malaysia will be more uniform. Those states who have not yet enacted the Islamic Family legislation have been encouraged and assisted to enact them. In addition to bringing the laws nearer to one another, amendments have also been suggested to ensure that the civil courts will not continue to exercise jurisdiction in such matters as breach of promise of marriage, custody of children and the division of the harta sepencarian or jointly acquired property.³⁰

the rules of procedure and evidence to be applied and followed. The Shariah Courts Legislation has also been proposed to effect the administrative division already agreed between the three authorities, responsible for the administration of Islamic religion that is, the Council of Muslim Religion, the Mufti and the Shariah Courts. The proposed Administration of Muslim Law Enactment, which has already been adopted in a number of States, provide that there will be three independent authorities with their separate functions and duties, that is, the Council of Muslim Religion, the Mufti and the Courts.³¹

The Council of Muslims Religion is the general body which will be responsible for the administration of the Islamic religion, except in regard to the Hukum Syarak and the administration of justice,³² the Mufti will be responsible for the determination of the Hukum Syarak and the Shariah Courts for the administration of justice.³³ The Shariah Courts will be organised in three tiers, the Shariah Subordinate Court, the Shariah High Court and the Syariah Court of Appeal.³⁴ The qualifications status and position of the Shariah Court judges and other judicial and legal officers will it is hoped be improved. In order to assist the Shariah Court in its functions, laws relating to the Syariah law of Evidence,³⁵ the Shariah Code of Criminal Procedure³⁶ and the Shariah Civil Procedure³⁷ have been drafted and some states have already adopted and enacted the legislation. With the enactment of these laws, the judges and officers of the Shariah Court and the lawyers and parties who appear before them will have adequate guidance on the rules of procedure and evidence to be applied and followed. The Shariah Courts of Appeal will also have an important function in hearing appeals from and reviewing the decisions of the other Shariah Courts. A law journal, the Jurnal Hukum, has been produced to report the decisions of the Shariah Courts.

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.³⁸

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 peguam syarie to assist the parties to the litigation and the courts. Provision has therefore been recommended for the admission and control of peguam syarie.³⁹ It is also necessary to provide for the education and training of the persons who will be the judicial and legal officers and the peguam syarie in the Shariah Courts. In this respect the International Islamic University has played 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; 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 peguam syarie 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.

Proposals have also been made for the increase in the jurisdiction of the Shariah Courts especially in regard to probate and the administration of Muslim estates. These will need the amendment of the Federal Constitution but laws have already been drafted on wills and the administration of estates 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 Courts needs to be increased. Powers of arrest and criminal investigation need to be provided for and in time the jurisdiction of the Shariah Courts should be extended 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.⁴⁰

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.

At present although the Federal Constitution provides that the Islamic Law relating to succession, testate and intestate, comes within the State List and so within the jurisdiction of the Shariah Courts,⁴¹ in fact because probate and letters of administration are placed in the Federal List⁴² it is the Civil Courts which have jurisdiction to deal with the administration of Muslim estates. This has created an unsatisfactory state of affairs as the judges of the civil courts are not familiar with the Islamic Law of succession. The result of this and because of the delay in dealing with such cases is that many Muslim estates are left unadministered and when they come to be divided, the division is into minute shares in the land. Sometimes the Islamic Law is blamed for this when in fact it is the administration of the law which is to be blamed. Under Islamic law the estate of a deceased person should in fact be distributed among the next of kin as soon as possible. It is hoped therefore that the grant of probate and letters of administration of Muslim estates be transferred to the Shariah Courts.

Apart from improving and enhancing the powers, jurisdiction and

capabilities of the Shariah Court it is necessary to look at the civil laws and remove any conflicts with the Islamic Law.

Section 112 of the Evidence Act, 1956⁴³ dealing with the presumption of legitimacy of a child is clearly in conflict with the Islamic Law and therefore should be made not applicable to Muslims. Similarly section 100 of the Act which provides that the interpretation of wills in Malacca, Penang, Sabah and Sarawak should be made in accordance with English Law should not be applicable to wills made by Muslims.

The Guardianship of Infants Act, 1960⁴⁴ should not be made applicable to Muslims. The provisions of the Act are in conflict with the Islamic Law and there are already adequate and detailed provisions relating to the custody and guardianship of infants in the Islamic Family Law legislation of the States.

Section 51 of the Law Reform (Marriage and Divorce) Act, 1976,⁴⁵ which in effect makes conversion to Islam a matrimonial offence which would entitle the other party, who has not converted to Islam to apply for divorce, should be amended to provide that in such cases both parties to the marriage are entitled to apply for divorce. It may be said that where one party becomes a Muslim but the other party does not wish to do so, the marriage has irretrievably broken down and thus either party can apply for divorce. At present the person who has become a

Muslim has no remedy, as he cannot apply for divorce under the Law Reform (Marriage and Divorce) Act, 1976 nor can he apply to the Shariah Court for a divorce.

Although wakaf comes under the jurisdiction of the States and the Shariah Court, as wakafs are usually created by a will or a trust, disputes relating to wakafs are dealt with by the civil courts as it is argued they are trusts. It is therefore suggested that the Trustees Act should be amended to provide that "wakaf" be excluded from the definition of trust. This will follow the provision in section 4 of the National Land Code, 1965.⁴⁶

In many statutes, as for example the National Land Code,⁴⁷ the word "court" is defined to mean only the civil courts. The National Land Code has recently been amended to provide that the definition of "court" includes the Shariah Court. This will enable the orders of the Shariah Court relating to harta sepencarian to be registered in the Land Registry. Similar amendments should be made to other Acts where necessary, including the Police Act.⁴⁸

The Married Women and Children (Enforcement of Maintenance) Act, 1968,⁴⁹ needs to be amended to enable the maintenance orders made by the Shariah Court in a state to be enforced by the making of attachment of earnings orders, which will have effect not only in the State but also outside it. The

position where the employer is a non-Muslim needs also to be provided for.

The Civil Law Act, 1956,⁵⁰ should be amended to provide that the civil courts are not bound to refer to the Common Law of England and the rules of equity administered in England. Rather it should give power to the civil courts to formulate and apply the Malaysian common law, which can be modified to meet the needs of the inhabitants in Malaysia, and as far as the Muslims are concerned to allow a reference to the Islamic Law. Similarly section 27 of the Civil Law Act, 1956, relating to the guardianship and custody of children should be repealed, as there is adequate legislation for Muslims and non-Muslims in this respect.

There have been a number of cases decided in the civil courts where it has been held that the civil courts have jurisdiction in the matter of harta sepencarian, as this is a matter of Malay custom not of Islamic Law - see Roberts v Ummi Kalthum⁵¹ and Boto' v Jaafar⁵². In the Islamic Family Law Act of the Federal Territory harta sepencarian is defined as property jointly acquired by husband and wife during the subsistence of marriage in accordance with the conditions stipulated by Hukum Syara.⁵³ The judges and lawyers in the Shariah Court should clearly state that it is the Islamic Law which is applicable in this matter and it is hoped that this will also be accepted in the Civil Courts and such cases will no longer be dealt with in the civil courts.⁵⁴

Another matter relates to the conversion to Islam and the question when a person becomes an apostate or murtad. The Supreme Court has recently in the case of Dalip Kaur v Pegawai Polis, Bt. Mertajam⁵⁵ held that this question should be decided by the Shariah Courts or the Majlis Agama Islam. It is hoped that this view of the Supreme Court will be maintained.

There have been proposals to incorporate Islamic principles in the land law. These have been considered by the government and some have been accepted, including the inclusion of the Shariah Court in the definition of court and the registration of wakaf and harta sepencarian.⁵⁶ It is hoped that other suggestions relating to ihya al-mawat, jual janji and shufaah will also be accepted.

The Contract Act, 1950⁵⁷ and the Sale of Goods Ordinance 1967⁵⁸ follow the English Law which has the principle of caveat emptor, that is, the onus is in the buyer to ensure that he gets a good bargain. Section 23 provides that a contract is not voidable because it was caused by one of the parties to it being under a mistake as to a matter of fact. The Explanation to section 17 of the Act provides that mere silence as to the facts likely to affect the willingness of a person to enter into a contract is not generally fraud. Again the Exception to section 19 of the Act provides that if a consent was caused by misrepresentation or by silence fraudulent within the meaning of section 17, the contract nevertheless is not voidable, if the party whose consent was so caused had the means of discovering

the truth with ordinary diligence. It has therefore been suggested that the explanation to section 17 and the exception to section 19 should be repealed and that it should be clearly provided as required in Islamic Law that a person should inform the other party if there is any known defect in the articles the subject of the contract. Similar provisions should also be inserted in the Sale of Goods Ordinance, 1957 and provision be made that the seller be under a duty to inform the buyer of any defects in the goods. In this respect we may learn from the experience of Pakistan where the Federal Shariah Court has suggested the amendments to the Contracts Act to bring it into line with the Islamic Law.⁵⁹

When Muslims enters into a contract or an agreement they can provide that the contract should be interpreted according to the Islamic Law and that any dispute which arises shall be referred to the decision of arbitrators or hakam according to the Islamic Law. The arbitration can be held under the Arbitration Act⁶⁰ but the Act should be amended to enable the appointment of arbitrators who are conversant with the Islamic Law and to provide for appeals from the arbitration to the Shariah Court.

Section 6 of the National Language Act, 1963/67⁶¹ provides that the texts of all bills, Acts, enactments and subsidiary legislation shall be in the national language and in the English language. It is suggested that where a law deals with the Islamic Law and is to be administered in the Shariah Courts, the text of the law

needs to be in the National Language only.

The Government in Malaysia has striven to enforce Islamic values in all aspects of our life in Malaysia. This is in line with the statement of our Prime Minister in his vision 2020 expressed in his working paper "Malaysia the Way Forward". One of the challenges that will be faced in striving to achieve this vision, he said, is that of establishing a fully moral and ethical society, whose citizens are strong in religious and spiritual values and imbued with the highest of ethical standards. In Malaysia therefore various steps have been taken to introduce and apply Islamic values in the fields of economy and trade. We have now in Malaysia a well developed system of Islamic banking, takaful, Rahn and Amanah Saham and all these has shown how the teachings of Islam can be successfully applied in practice and we are happy that this development in Malaysia has been followed by similar developments in these fields in Indonesia, Brunei Darussalam and the Philippines. The system of commercial transactions following the teachings of Islam has also been accepted and applied by other banks and insurance companies in Malaysia. The Government and many other public and private bodies including the Universities have applied the principles of Islam in giving loans including housing loans to their employees.

It is a pity that the principles of Islam have not yet been infused in the same way in the judicial and legal fields in Malaysia. At present it is the civil courts

which have been given more prominence by the Government. The constitution of the civil courts, the appointment of the judges of the civil courts, the tenure of office and remuneration of the judges of the civil courts are set out in the Federal Constitution and the judges of the civil courts are placed in a privileged position and their position and remuneration are safeguarded in the Constitution.

In contrast the Shariah Courts were placed in a subordinate position in the structure of the courts during the period of colonial rule and even today the Shariah Courts and their judges and officers are considered to be inferior to the civil courts, their judges and officials. It may be that one of the reasons why the Shariah Courts and their judges and officials are considered inferior to the civil courts and their judges and officers is that the Shariah Courts are State Courts. If the Shariah Courts can be made Federal Courts, then perhaps the courts can be given their due attention. Many of the problems at present faced by the Shariah Courts in respect of their status and jurisdiction and the appointment and tenure of office of their judges and officials can be solved if the courts are made Federal Courts like the civil courts. In this respect we may say that Indonesia and the Philippines are more advanced than us and we should follow their example. In Indonesia for example the judges and officials of the civil courts and the religious courts are given the same status, remuneration and terms of science.

At present appeals from the Shariah Court in a state are heard by the

Shariah Appeal Court or Appeal Committee in the State. It may be advisable to provide for a Federal Shariah Court to hear appeals from the states. In order not to affect the position of the Yang di Pertuan Agong or the Ruler as Head of the Islamic Religion, it may be provided that the appeal should be to the Yang di Pertuan Agong or Ruler who will refer the appeal to the Federal Shariah Court for it to advise the Yang di Pertuan Agong or Ruler. It may be advisable to have the members of the Federal Shariah Court chosen from the various states and to provide that where the appeal is from a State, it should be heard by a panel including a representative of the State. The idea of having a Federal Shariah Court is to have some uniformity of decisions throughout Malaysia and in this way build up a common Malaysian Islamic law.

In the recent Supreme Court case of Mohamed Habibullah v Faridah⁶²

Harun Hashim SCJ said -

"Taking an objective view of the Constitution, it is obvious from the very beginning that the makers of the constitution clearly intended that the Muslims of this country shall be governed by the Islamic family law as evident from the 9th Schedule to the Constitution, Item 1 of the State List - "Muslim Law and personal and family law of persons professing the Muslim religion - the constitution, organization and procedure of Muslim Courts - the determination of matters of Muslim Law and doctrine and Malay custom". Indeed Muslims in this country are governed by Islamic personal and family laws which have been in existence since

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the coming of Islam to this country in the 15th century. Such laws have been administered not only by the Shariah Courts but also by the civil courts. What Article 121(1A) has done is to grant exclusive jurisdiction to the Shariah Courts in the administration of such Islamic laws. In other words Article 121(1A) is a provision to prevent conflicting jurisdiction between the civil courts and the Shariah Courts".

Earlier the learned Judge said⁶³ "It is obvious that the intention of Parliament by Article 121 (1A) is to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the Shariah Court -- I am therefore of opinion that when there is a challenge to jurisdiction, as here, the correct approach is to firstly see whether the Shariah Court has jurisdiction and not whether the State Legislature has power to enact the law conferring jurisdiction on the Shariah Court."

It would seem that the Shariah Courts have become an integral part of the court system in Malaysia. In order for it to be accepted as such, it is necessary for the judges and officials of the Shariah Courts to show that they are as capable of dispensing justice as the civil courts. In the past when they were treated as inferior courts and neglected in many ways, there were no doubt grounds for criticising the system of justice in the Shariah Courts. Now that they have become better organised, equipped and respected it will be possible for the Shariah Courts

to show their worth and capabilities. In order to make the public and especially the non-Muslims citizens in Malaysia less apprehensive and critical of their existence and work, it will be necessary for the Shariah Courts to show that they are capable of giving fair and equitable justice. It is not enough to speak about Islamic justice, it is necessary to demonstrate it. For those who judge the Shariah Courts it is necessary not only to hear with their ears but to see or hear with their eyes. It is only if the Shariah Court judges and officials can show that they are capable of dispensing fair and equitable justice to all, that the prejudice and apprehension against them will be removed. It is up to the Shariah Courts to show that they are capable of attaining what is stated in the Holy Quran -

6. "Allah has commanded you to render back your trusts to those to whom they are due' and when you judge between mankind that you judge with justice. Verily how excellent is the teaching which he gives you. For Allah is He who hears and sees all things".

8. (Surah An-Nisaa (4) : 58)

1. Ahmad Ibrahim and Ahilemah Joned. The Malaysian Legal System, 1987, Chapters 1 - 3 and Shaik Abdul Latif and Others v Shaikh Elias Bux [1915] 1 F.M.S.L.R. 204 at p. 214
2. Liaw Yock Fang (Editor) Undang-Undang Melaka, The Haque, 1976.
3. J.E. Kempe and R.O. Winstedt, A Malay Legal Digest of Pahang JMBRAS 21 Part I (1948) pp. 1-67; J.R. Logan, A Translation of the Malayan Laws of the Principality of Johore, J.I. A EA (1855) p. 71-95; R.O. Winstedt Kedah Laws JMBRAS 2 1928 pp. 1-44
4. See Zubir Embong, Sejarah Undang-Undang dan Kehakiman Islam Terengganu sebelum campurtangan British, Project Paper, University of Malaya, 1978/79 and Shaik Ahmad Ismail. Pelaksanaan Hukuman Hudud dan Kesannya di negeri Terengganu, Project Paper, International Islamic University 1990/1991
5. Majallah Ahkam Johore 1331 AH and Ahkam Shariyyah Johore 1949. See Hapipah Monel, Pentadbiran Undang-Undang Islam, Johore, Project Paper University of Malaya, 1978/80
6. Civil Law Enactment, 1937, Federated Malay States, extended to the Unfederated Malay States by the Civil Law (Extension) Ordinance, 1951
7. Civil Law Ordinance, 1956, Federation of Malaya Ordinance No. 5 of 1956, modified and extended to Sabah and Sarawak by PU(A) 424/1971
8. Civil Law Act, 1956 (Act 67), S. 3
9. Civil Law Act, 1956, S. 5
10. (1927) 6 FMSLR 128
11. Cap. 196 of the Revised Edition, 1935 replaced in Selangor by Selangor Enactment No. 3 of 1952, in Pahang by Pahang Enactment No. 5 of 1956 and in Negeri Sembilan by Negeri Sembilan No. 1 of 1957
12. Selangor Administration of Islamic Law Enactment, 1952.
13. No. 43 of 1948
14. Federal Constitution, Article 121(1)
15. Federal Constitution, Article 160 - Definition of "law"

16. Federal Constitution, 9th Schedule, List II(1)
17. No. 97 of 1959 (Revised 1972) and numbered Act 97
18. No. 98 of 1955 (Revised 1972) and numbered Act 98
19. Federal Constitution, 9th Schedule, List II(1)
20. Act 23 of 1965, now revised and known as the Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355)
21. Muslim Courts (Criminal Jurisdiction)(Amendment) Act, 1984
22. Selangor Administration of Muslim law Enactment, 1952, S. 45(6)
23. See Myriam v Mohamed Ariff [1971] 1 MLJ 265; Tengku Mariam v Commissioner of Religious Affairs, Trengganu & Ors [1969] 1 MLJ 10; [1970] 1 MLJ 222
24. Federal Constitution, Article 121 (1A)
25. See for example the Selangor Administration of Muslim Law Enactment, 1952
26. Selangor Administration of Muslim Law Enactment, 1952, Ss. 53, 74 and 93
27. Kelantan Islamic Family Law Enactment, 1983, Kedah Islamic Family Law Enactment, 1979 and Malacca Islamic Family Law Enactment, 1983
28. Kelantan Islamic Family Law Enactment, 1983, as amended in 1985 and 1987
29. Islamic Family Law (Federal Territory) Act, 1984. The Selangor Islamic Family Law Act, 1984 which follows the Federal Territory Law has now been amended accordingly - see Islamic Family Law (Amendment) Enactment, 1988
30. See Nafsiah v Abdul Majid [1969] 2 MLJ 174; Myriam v Mohamed Ariff [1971] 1 MLJ 265 and Roberts v Umi Kalthom [1966] 1 MLJ 163
31. See Selangor Administration of Muslim Law Enactment, 1989 (No. 2 of 1989)
32. *Ibid.*, S. 28
33. *Ibid.*, S. 30
34. *Ibid.*, Part III

35. See Kelantan Evidence Enactment of the Shariah Court, 1991 (No. 2 of 1991)
36. See Selangor Syariah Criminal Procedure Code, 1991 (No. 6 of 1991)
37. See Selangor Syariah Civil Procedure Code, 1991 (No. 7 of 1991)
38. Draft Enforcement of Summons, Warrants and Orders Bills
39. Pahang Peguam Syarie Rules, 1990; Johore Peguam Syarie Rules, 1982; Kedah Peguam Syarie Rules, 1988

40. Federal Constitution, 9th Schedule, List II (1)
41. Ibid.
42. Federal Constitution, 9th Schedule, List I(4)(e)
43. Revised as Act 56
44. Revised as Act 351
45. Act 164
46. National Land Code (Act 56 of 1965), S. 4, definition of trust.
47. Ibid., S. 4, definition of court.

48. Act 344, S. 20
49. Act 263
50. Act 67
51. [1966] 1 MLJ 163
52. [1985] 2 MLJ 98
53. Islamic Family Law (Federal Territory) Act, 1984, S. 2(1)
54. See Mansjur v Kamariah [1988] 7 JH 289
55. [1992] 1 MLJ 1
56. National Land Code (Amendment) Bill
57. Act 136
58. Act 382

59. In the Contract Act, Partnership Act and Sale of Goods Act, SSM NO. 1 - 3
60. Act 93
61. Act 32
62. [1992] 2 MLJ 793 at p. 803
63. Ibid at p. 800