

The Qadi, His position and Jurisdiction

Introduction

The Syariah demands the establishment of the Islamic judicial institution without which the Syariah law cannot be properly practised. Justice and order stressed by the Syariah can only be maintained if the business will be spread.

POSITION OF THE SHARIAH
COURTS IN THE ADMINISTRATION
OF JUSTICE.

is entitled to them: if the institution exists, the institution fails to carry out its functions properly. The Islamic Judicial Institution is known as "Qadi".

Definition

Al-Qada, literally has various meanings: to fulfil, to solve, to counsel, to order, etc. which have been ordained.

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The literal meanings of linguistically.

Jurists have defined Al-Qada into several meanings:

- i. Judicial characteristic which encompasses the implementation of Syariah Law.
- ii. Solving cases and deciding matters.
- iii. deciding on disputes between two parties of law under the law of Allah.

Relying on the definitions given, it is felt that Al-Qada means solving any claims, resolving a peaceful dispute or preventing any clashes between two parties of law judicially under the Syariah Law. All the decisions and the process are binding upon the parties involved.

Undoubtedly, the Islamic Judicial Institution is an important element.

- 1. The regulation applicable in the judicial system based on the Syariah Law.

The Qadi, His position And Jurisdiction

Introduction

The Syariah demands the establishment of the Islamic Judicial Institution without which the Syariah Law can never be implemented and practised. Justice and fairplay which has always been hailed and stressed by the Syariah can never be upheld. Tyranny and arbitrariness will be spread. Rights can never be given to the person who is entitled to them in the absence of such institution or if it exists, the institution fails to carry out its functions expeditiously. The Islamic Judicial Institution is best known as "Wilayah Al-Qadi".

Definition

Al-Qada, literally has various meanings inter alia to complete, to fulfil, to solve, to compel, to order and to decide all the matters which have been ordained.¹

The literal meanings of Al-Qada elucidate the meaning of the word linguistically.

Jurists have defined Al-Qada into several meanings, namely:

- i Judicial characteristic which necessitates the implementation of Syariah Law.
- ii Solving cases and deciding conflicts.
- iii deciding on disputes between two parties or more based on the law of Allah.²

Relying on the definition given, it is free from ambiguity that Al-Qada means solving any claims, reaching a peaceful solution in a dispute or preventing any clashes between two parties or more judicially under the Syariah Law. All the decisions made through the process are binding upon the parties involved

Undoubtedly, the Islamic Judicial Institution involves several important elements, namely,

1. The regulation applicable in the judicial process must be based on the Syariah Law.

2 The authority to adjudge or to pass sentence is the Qadi.

3. Judgement or sentence passed is binding and must be carried out.

4 There exists a party for whom a judgement can be given in favour of it.

5 There exists a party against whom a judgement can be given.

During the life of Prophet Muhammad (s.a.w), he was the leader and the final decider in the Islamic Judicial Institution. Nevertheless, he also appointed several close companions to assist him in the administration of the law. For instance, Sayyidina Ali was appointed as Qadi in Yaman and so was Muaz ibn Jabal.³

During the reign of the Al-Rasyidin Caliphate, the Judicial Institution took the form similar to that in the period of the Prophet (s.a.w). There was no demarcation of Judicial powers with that of other powers. The Institution was headed by the Caliph with the assistance of several appointed deputies.⁴

However, there was a significant change in the period of the Abbasid Caliphate. All the judicial powers were transferred to a specially appointed person. Consequently, the Caliph no longer played an active role in the administration of Islamic Law and the operation of the Judicial Institution. This special appointed person was called Qadi al-Qudah. Abu Yusuf was the first person appointed.

This was indeed a healthy development to cater to the contemporary demands and needs. It placed the Institution in a more prominent and effective role in the government. Although the judicial authority had changed hands, the Caliph was still highly responsible in regard to the Institution.⁵

Appointment and Dismissal

The power of appointment is vested in the Caliph or in the persons empowered by him. On the other hand, the Qadi al-Qudah could appoint an assistant to help him in the administration of justice if he was given the prior authority to do so. Self-appointment of a Qadi was out of the question.⁶

In time of emergency, where there is no Caliph or non-existence of a government, the appointment of Qadi will be taken over by a group of learned men and tribe leader of the community. This is to ensure the continuity of the post so that the administration of justice and law is not affected.

It is also regarded as a valid appointment if the Qadi is appointed by a tyrant Caliph. Some jurists go so far as to recognise the appointment of Qadi by a non-Muslim Government. An appointment by a group of rebels who has seized power held by the rightful government is regarded as a valid appointment so long as the previous government fails to regain control of the country.⁷

The power of the Caliph to appoint Qadi shall not be exercised according to his whims and fancies. As the power vested in him is not personal, he is subject to several regulations and conditions laid down by the Syariah. The rationale is that the Caliph is acting on behalf of the "Ummah" and it goes without saying that his discretion is not unlimited in line with the spirit of Islam.

In relation to this matter the rule of feqah states that -

- 1 Any act that affects the people shall be based on rights and interests.⁸
- 2 Any act of an Imam shall be based on interest.⁹

The appointment can either be made orally or in writing or both.¹⁰ An oral together with a written appointment is said to be the clearest and the best method of appointing a Qadi. This is to ensure the smooth running of the institution and also to prevent recurring problems in the future.

The appointment must be witnessed by at least two impartial witnesses who are to acknowledge the process and also to give evidence in relation to the appointment if there arise any problem or doubt in the future.¹¹ In effect, it is traditionally practised among the Muslims that the appointment shall be officially announced attended by the ulamaks and the government Ministers.

It can only be a valid appointment if the appointee expressly accepts the appointment without any condition.¹²

Before an appointment can be made the Caliph must be positively satisfied that a thorough investigation and scrutiny had been made that the intended appointee possesses all the necessary qualification, quality and competency and is worthy of the selection. Willingness on the part of the nominee to shoulder all the responsibilities entrusted on him is another important factor.¹³

The Qadi's office is one of the important organs in an Islamic government and therefore it is highly important that the selection made by the Caliph is done with great care and diligence. It is essential that a candidate possesses all the requirements as required by Islam.

In overcoming any doubt that would arise, Islam demands that the appointment be made with clear and unambiguous words. This is to remove any inherent doubt and unwarranted interpretation as to the appointment in the future.

At the time of the appointment it must be explicitly explained to the appointee his powers, jurisdictions, and his place of jurisdiction. If there are limitations to his powers and jurisdictions they must be definitely explained to him.¹⁴

The news of the appointment must be communicated to the populace of the Qadi's intended place of jurisdiction. This is to ensure that the people know the Qadi who is appointed in their locality and to whom help can be conveniently sought. The publicity can be done by the witnesses to the appointment or by the mass-media. In the era of electronic and pointed medium of communication the problem of lack of publicity need not arise. The appointment can also be published in the government gazette.

Qualification of Qadi

As it is stated above, the power of the Caliph to appoint Qadi is not an absolute one. It is subject to rules and regulations that must be adhered to. The appointment is made on behalf of the people; therefore, a person appointed must satisfy several necessary conditions namely:

1 Islam : A Qadi must be a Muslim. According to the Hanafi jurists, a non-Muslim can be appointed as a judge in a non-Muslim community.

2 Major: A child who has not attained the age of puberty cannot be appointed as Qadi. However, there is no limit to the age of retirement. This can be fixed by the administration.

3 Of sound mind: A person of unsound mind, imbecile or a person who is foolish, forgetful or subject to recurrent fits cannot be appointed as Qadi. Being one of the important organs in a government Islam requires a Qadi to be competent, able to think deeply and to possess strong memory, in executing his duties.

4 Free: A slave cannot be appointed as Qadi because a Qadi must be independent and possess authority. A slave has no authority upon himself. Consequently a slave is incompetent to decide and hold such an important post.

5 Male : In the opinion of many jurists, the Qadi must be a male person. An appointment of a female person to the post of Qadi is null and void. However the Hanafis opined that female Qadi can be appointed to deliberate on cases other than Hudud and Qisas offences. Ibn Jarir al-Tabari nevertheless felt that female Qadi could decide on all type of cases without any exception similar to their male counterparts.

6 Just: A Qadi must be just. To be just (adil) means that the person must abstain from deeds which are prohibited (haram), able to safeguard his good reputation, be honest and truthful in his words. It is improper to appoint a fasikh. However, the Hanafis are of the opinion that a sentence imposed by a Qadi who is fasikh is still a valid sentence and must be carried out as long as he is acting within the ambit of the Syariah. According to the Hanafis the requirement of adil is not mandatory to a valid appointment but only a condition to a perfect appointment.

7 **Ijtihad** A person appointed must be free from any impairment to his six senses. Defect (if any) must not hinder him to carry out his duty and the administration of justice effectively.

Application A deaf person cannot be appointed as it will prevent him from hearing the case before him. No mute person can be appointed due to his inability to voice out his opinion. Although sign language can be used, the defect can affect the smooth running of a trial.

Verdict A blind person is not qualified to be Qadi because good eye sight is an important instrument to administer a trial. It would enable a Qadi to observe the parties in a trial for instance, the reliability of the witnesses during the presentation of evidence. An experienced Qadi with his careful observation of the demeanour of the parties in a trial can help him to administer justice more effectively. A blind person is incapable to be called as witness more so to be appointed as Qadi. Nevertheless there are opinions to say that a blind person can be appointed a Qadi. Other kinds of infirmities of the limbs eg. broken hand, lame and others if it does not affect the carrying out of his duties would not be taken to disqualify him.

8 **Person** Mujtahid. Another important ability as was agreed by the jurists is that a Qadi must be able to exercise ijtihad. This is not agreed by the Hanafis.

Fourth It may be difficult today to pick a person who is really a Mujtahid who has achieved the standard of an absolute Mujtahid. But it must not be made an excuse to appoint a person who is less qualified where there is still a person who is more learned in Syariah.

If a person know that he is not qualified for the post. Needless to say that the most qualified and suitable candidate must be picked as Qadi. In a situation where none of the candidates is able to exercise ijtihad, the most pious may be appointed as Qadi.

by the Caliph on mutual consent, a Qadi can lose his post by any one. It is important to note that the ability to exercise ijtihad does not mean that the person must reach the very high standard of that of Imam Syafie. According to Al Mawardi the ability to exercise act of hostility towards the duty or abandonment of his appointment without any valid reason.

ijtihad will enable the Qadi to decide on any conflict, to distinguish between 'haq' and 'batil' and also to extract the law from its sources.¹⁶

Application for the post

It is preferable that the post of Qadi is not open to be applied by anybody. The Caliph should offer the post to any person who has or closely has fulfilled all the necessary requirements. Persuading the ulamaks to apply for the post may weaken their position and inadvertently may adversely effect the competency and integrity of the post in the eye of the public.

However there are situations where the post may be open for application - Firstly, Fard 'Ain. It has become Fard 'Ain (mandatory) if there is no qualified person to be appointed. Therefore it is a sin for a person who is fully qualified not to apply.

Secondly, Mustahab (recommended)

There are a few qualified candidates but one who is the most qualified and competent among them should apply for the post.

Thirdly, Harus (choice)

Where there are a few candidates with the same qualification. The person who has been selected has a choice whether to accept or to reject the appointment.

Fourthly, Makruh (abominable)

If the person appointed is qualified but there is another who is more qualified than him.

Fifthly, Haram (prohibited)

If a person knows that he is not qualified for the post.¹⁷

Due to the fact that the post of Qadi is for the interest of the public (ummah) and as an administrator of the Syariah Court appointed by the Caliph on mutual consent, a Qadi can lose his post by any one of the three ways;

Firstly, where he is no longer suitable for the duty either because of insanity, prolonged coma, imbecility, senility, paralysis, fasikh, an act of hostility towards the duty or denouncement of his appointment without any valid reason.

Secondly, the Caliph can dismiss the Qadi if he is no longer qualified to hold the post or for any other reasonable ground.

The consensus of jurists opined that the dismissal is invalid without any reasonable grounds. This was agreed by the Shafiis and the Hanafis.¹⁹

Thirdly, a Qadi can voluntarily apply to retire from his post but this is improper. According to the Al Imam Al Mawardi this kind of action without valid ground is uncalled for as the post itself is subject to the rights (haq) of the Muslims.²⁰

The duty of the Caliph and the State

It is the duty of the Caliph or the government to oversee and protect the competency of the Syariah Court, the supremacy of the Qadi and the rule of law. Therefore, it is the responsibility for the Caliph and the state to ensure the existence and the carrying out of these matters;

1. Upholding the independence of the judiciary without any encroachment by the Caliph himself or by any other influence.
2. A Qadi shall not be dismissed without valid reasons.
3. A mandatory duty in appointing the most qualified and suitable person to be Qadi.
4. Trials shall be held in open court unless circumstances demand that the proceeding be heard in camera.
5. Adequate remuneration shall be given to the person appointed as Qadi.
6. The court shall be built in a place where the public can have easy access to it. The court must be equipped with all the necessary facilities.
7. Providing the Qadi with all the necessary manpower namely:-
An Assistant Qadi, person(s) learned in feqah as reference, court's recorder, court's interpreter, security guards, and other helpers whose duty would be to ensure the smooth running of the court.²¹

Adab al-Qadi

The Adab al-Qadi must be observed by the Qadi to achieve the aim of justice and also to maintain the integrity of the profession ensuring

that its judicial decision and pronouncement be respected and upheld free from syubhah (doubt) and fitnah (defamation). Adab al-Qadi can be generally divided into two:-

Firstly, whether it is within or outside the court, Adab al-Qadi generally means-

- i) to administer justice as required by Islam because a Qadi is a symbol of an institution of justice.
- ii) Qadi must be placed where people from every walk of life can have easy access to present their problems.
- iii) Qadi shall not be allowed to accept or to attend special functions.
- iv) Equal treatment in every aspect of the matters involved to the parties concerned eg. manner of speech, sign, voice, tone and others.
- v) Abstaining from accepting gifts because it can raise syubhah and fitnah except in special situations for example a gift from a son to a father.
- vi) Abstaining from accepting bribes.
- vii) Disassociate himself from any business interest or involvement. Some say that it is merely abominable (makruh).
- viii) No requirement to give fatwas because it may be used by a party in a trial to strengthen their argument.
- ix) Abstaining from debt, public debate or war of words with the people in the public.
- x) Abstaining from going on shopping alone. It is inadvisable to deal with only one shopkeeper or vendor to prevent personal bias.
- xi) Abstaining from having close rapport with the public or walking along with them unless there is an immediate need.
- xii) Cutting down on jokes and laughter or complete abstinence from the practice.
- xiii) When a Qadi feels that he is no longer capable of holding on to his post or has lost all the necessary qualification as a Qadi, he must tender his resignation.

Secondly, Adab al-Qadi in court.

- i) Judgement must be based on the principle of Syariah. At the time of giving out the judgement one must be calm.

- ii) A Qadi must be punctual and diligently observe the time and date of a trial to ensure the smooth running of the court.
- iii) Trial must be held at proper time and date. Avoid holding it during the night or public holidays.
- iv) Do not proceed with a trial when he is not in the right frame of mind and emotion due to hunger, thirst, anguish, sleepiness, tiredness, anger or not in the best state of health or other infirmities.
- v) A Qadi shall not preside over matters in which he cannot become witness namely matters that involve his children or his parent.
- vi) A Qadi shall not give decision on matters where his enemy is involved.
- vii) A Qadi must be firm and impartial. He must not be influenced by the circumstances or the people around him.
- viii) He must be diligent and careful when dealing with the parties before him who might use all the methods and tricks to win their case.
- ix) He must exercise patience, possess a clear mind and be calm on hearing the evidence from the parties in the trial. Judgment or sentence can only be passed after hearing all the evidence from both sides.
- x) He must be in command of the court and able to control the proceeding.
- xi) Before any judgement is made, a Qadi must try to persuade the parties in conflict to compromise in reaching a peaceful settlement.
- xii) Utmost respect and courtesy must be given to the witnesses in a proceeding.
- xiii) Trial is carried out on first come first serve basis but this can be forsaken if the situation demands. ²²

Jurisdiction

The jurisdiction of a Qadi Court covers or all matters and all sorts of conflicts. Al Imam al-Mawardi divides the jurisdiction into two categories.

Firstly, solving conflicts and deciding on disputes.

Secondly, preventing tyranny and safeguarding the rights of those whose rights have been infringed.

Thirdly, administration of property of the person who has no capacity to administer them namely orphan, infant, lunatic, and person who has been deprived of his power to administer his/her own property. It also includes preventing irresponsible person from administering any property by supervising the administration of such property.

Fourthly, administering waqaf property by protecting it and also to ensure its development economically if there is no such administration. If the giver of the waqaf entrusted the Qadi with the waqaf property, the Qadi's court will be its sole administration.

Fifthly, executing a will in accordance with the terms stipulated in it to the extent which is permissible by the Syariah.

Sixthly, acting as Wali Hakim to a woman who has no wali provided that the couple who intend to marry are kufu (compatible). According to the Hanafi this is unnecessary because a woman can give consent to marry on her own behalf.

Seventhly, a decision can be given against those who has infringed the right of Allah (haq Allah) without prior prosecution by any party. However if a right of a person (haq ibad) has been infringed, it all depends on the person aggrieved whether to prosecute the offender or not.

Eighthly, removing any obstacles on the public road or on an open area and also to remove any extension of the building which obstructs public street or alley. A Qadi can take action on his own accord without waiting for a request or report.

Ninthly, decide and scrutinize on a person who must satisfy the necessary requirements to be called as witness in a trial. A Qadi can also disqualify a witness who has defects according to Syariah. If the evidence is going to be given by a weak witness, the Qadi has alternatives either;

- 1 Choose a stronger and more competent witness or
- 2 to corroborate all the witnesses present with a stronger and more competent witness. This is the best and the most favoured method.

Part II - The Background of Syariah Courts in Malaysia

Tenthly, ensure that the judgement or sentence is passed impartially notwithstanding the fact that the party is strong or weak. Impartiality of judgement among the respected or the lowly must be observed.²³

It is clear that the jurisdiction of a Qadi is very wide indeed and it is not dissimilar to that of the jurisdiction of a territorial Madzalim although the territorial Madzalim is not bound to any strict procedure and regulation.

The demands for efficient and smooth running of the administration of Islamic Law forced the Caliph to appoint Qadis with limited and special powers. This is known as Ikhtisas al-Qadi. Ikhtisas al-Qadi takes a form in which a Qadi is appointed to preside only on criminal law, muamalat or family law. The specialisation in several fields prevent the Qadi from going outside the ambit of his jurisdiction. This is called "Al Ikhtisas al-Nawi". Where the Qadi's jurisdiction is limited to a certain place it is known as "Al Ikhtisas al-Makani". Where his jurisdiction does not extend to certain amount, it is known as "al-Ikhtisas bi al-Miqdar Munin"²⁴.

Briefly, the Ikhtisas Qadi can be divided into:-

1. Al-Ikhtisas Al Naui^C
2. Al-Ikhtisas Bimiqdar Muiayyan
3. Al-Ikhtisas Biqadiyyah Mua^Cyyanah
4. Al-Istithna Bad Al Waqai^C wa Al Hawadith
5. Al-Ikhtisas Al-Makani
6. Ikhtisas Al-Qadi Bizaman Mua'yyan
7. Ikhtisas Al-Qudah inda Jaaduddihim
8. Ikhtisas Al-Qadi Bil Madhab Muayyan

Part II - The Background of Syariah Courts in Malaysia

Evidence shows that during the reigns of Malacca Malay Sultans and Malay kings and before the arrival of western juristic influence there was a form of regulations called Old Malay Laws (Undang-Undang Melayu Lama). It can be said that every state had their respective law texts.

iii. Adulatory offence

1) The Malacca Malay Sultanate

Among the texts used at that time, besides Negeri Sembilan were - Risalah Hukum Kanun Melaka. Laws of Pahang, Laws of Kedah, Laws of Johore and the ninety-nine laws from Perak. Among the above texts, the Risalah Hukum Kanun Melaka is regarded the earliest and main text. It is believed that the Risalah was written during the reign of Sultan Muhammad Shah or the latest during the reign of Sultan Muzafar Shah.²⁵

Negeri Sembilan and other areas which follow the matrilineal customs have customary sayings which are called 'Pembilangan'. Now these sayings have been compiled as in "Kata-kata Adat daripada Sungai Ujong", An Old Minangkabau Legal Digest" and others.

In general the regulations in these texts show clearly two forms of system, that is custom and Islam. Therefore the laws for the Malay Society and rulers at that time were Malay customs and shariah. This can be seen in Risalah Hukum Kanun and as an example below is part of the text.

In criminal matters -

- i. Theft offences : (Clause seven)

"If he steals ...

According to the law of Allah people who steals will not be killed but his hand will be severed.

ii. Murder offence

"According to the law of Allah those who kill must be killed so that justice be achieved.

iii. Adultery offence

... according to the law of Allah if he is married he shall be staved to death ... if he is single he shall be flogged eighty times.

The provisions for punishment in the Risalah Hukum shared a strong Islamic influence in the criminal field. This proves the acceptance by the rulers of that time of Islamic law

Islamic law influence was more clearly seen in marriages divorce and estate distribution. In fact the Muslims in this country from then uptill now have been marrying according to the shariah.

It is difficult to ascertain when was the Islamic Judicial Institution or better known as Kathis Court formally formed. However it can be deduced that the Kadthi's Courts were in existence in the 17th century. This possibility is accepted by scholars and it is based on the Old Malay Laws which made provisions for shariah. As such there must have been courts that administered the workings of these laws without having to take into account the name of the courts as Kathi's Court or Malay Courts.²⁷ This is because in the Old Malay law texts there were provisions for punishments according to Malay Customs and shariah.

The enforcement of Islam during the Malacca Malay Sultanate depended

This digest too states the duties of Qadli and Minister. It is on the understanding and whether the form of government abides by the principle of justice. During the reign of Sultan Alaudin Riakyat Shah, the position of Islamic law was much better than the previous government.²⁸

What one can see definitely is that Islamic law was a part of the system of Malay law at that time.

In Kedah from 1650 - 1784 several written laws were made. Among The judicial power was in the hands of the state dignitaries such as the Bendahara, Temenggong and the strongest judicial power was in the hands of the reigning king. The King was entitled to carry out whatever laws he likes whether according to the existing laws or laws that were thought necessary.²⁹

2) The reign of the Malay Kings

After the fall of the Malacca Malay Sultanate other Malay governments were formed such as in Pahang, Johore, Kedah, Kelantan and Terengganu. The position of Islamic law in the legislative system of those states was increasingly clear.

In Pahang during the reign of Sultan Abdul Ghafur Mahzuddin Shah from 1592 - 1614 a law was formulated known as the "Undang-Undang Pahang".³⁰ This law was not only enforced in Pahang but also include the states of Perak and Johore.³¹

This digest had 100 clauses which included a variety of civil and criminal law areas. Most provisions that were made were based on Islamic law. In fact clauses 24 to 66 can be said to have followed what were in the Shafie school.³²

This digest too states the duties of faqih and minister. It is understood that faqih and minister were on par in handling the system of government.³³

While in Johore there was a book called "Al-Majallah al-Ahkam al-Adliyah" according to Hanafi school and it was used in the courts in Johore. This text has been translated to Malay.³⁴

In Kedah from 1650 - 1784 several written laws were made. Among others were the Part Laws, Dato Seri Paduka Tuan Laws, Dato Star Code laws, Bunga Emas laws and Kedah laws. These texts too had Islamic law provisions as in marriage and offence of adultery. Beside that there were several provisions to prevent acts contrary to Islamic law such as gambling and theft. These texts too put the responsibilities on the village heads to order the people to obey prayers, fasting and to pay their zakat.³⁵

In the introduction to the Kedah laws 1650, it was stated that the reason why the text was made was to determine the administrative system for a Muslim State. Under these laws courts in Kedah were to be divided into several types and be called "Balai" as in "Balai Panglima Besar", "Balai Shahbandar", Balai Masjid and Balai Orang Kaya Khan-khan. Balai Masjid dan Balai Orang Kaya Khan-khan can be regarded as Kathi's courts but Balak Khan-khan have greater jurisdiction as this Balai could adjudicate on cases under the jurisdiction of Balai Panglima Besar. In Kedah Criminal Law 1336 H. too there were several criminal punishment provisions such as qiyas.³⁶

In Kelantan during the 18th centuries, the Sultan himself handled adjudication. This was acknowledged by a Chinese traveller named Hsieh Ching who visited Kelantan in 1782. According to Hsieh Ching the Sultan adjudicated in the Balai with the presence of dignitaries

with the ranks of "Waris" and "Tuan".³⁷ According to Roff, the Sultan adjudicated in the Balai Rong Seri and this was more like an appeal court - Mahkamah Balai which considered appeals from Mahkamah Hakim and Kathi's Courts.³⁸

In eighteen-thirties or much earlier in Kota Baharu there were established posts such as Mufti and Hakim. The job of a Mufti involved the running of the judicial powers with the assistance of the Kathis in the Kathi's Courts. The jurisdiction of this court was limited to Muslims with regard to marriage, divorce and administration of estates.³⁹

In Terengganu during the 19 centuries there were three kings who governed Terengganu. These were Sultan Baziud Duna (1827), Sultan Ahmad 11 (1867) and Sultan Zainal Af'dah III (1881). During the reign of Sultan Baginda Omar the enforcement of Islamic law was every clear, in which the Sultan himself enforced the judicial powers in the Balai everyday. In general the criminal cases were decided and punished according to Islamic law. Death sentence entailed "compensation" and punishment for theft was the "cutting off" hand. Sultan Zainal Abidin III continued with the same method. In fact His Highness himself had made it easy for those who wanted to follow Islamic Law. During his reign all forms of gambling and cock-fighting were made illegal.

3) The English Colonial Era Stage

a) The Straits Settlements

The early history of the arrival of the English to this country started when Captain Francis Light arrived. His arrival brought a new era in the development of legislative system in the country. Several requests were made to the British Government to recognise

the East India Company in Penang. Light was advised to negotiate with Sultan Kedah to obtain the said island and finally in 1786 he succeeded in obtaining it from Sultan Kedah. Based on that lesson a Charter of Justice in 1807 was issued and this enabled the enforcement of English Law. The enforcement of English law in Penang and other straits settlements was subjected to compatibility and the position of Islamic law with regard to marriage and divorce was recognised. During the early stage of the enforcement of English law in the Straits Settlements, the position of courts jurisdiction in enforcing the Islamic family law was not clear. Only in 1880 a law regarding the enforcement of Islamic law courts was formulated - the Mohamedan Marriage Ordinance (1808). This Ordinance introduced registration of marriage and divorce and the estates of the bride. Also for the first time it gave recognition to the Kathi's post and gave it limited jurisdiction. However there were provisions for Islamic law and text books for it. This ordinance was later amended several times.⁴²

Prior to this the court in the case of 'In the Goods of Abdullah'⁴³ decided that the Muslims can leave all their estates through a will. This is contrary to Islamic law. In general provisions of law prepared by the Englishman with regard to Islamic law merely touched on administrative matters, such as appointments of Kathis and jurisdiction as well as rules in connection with matrimonial property, action for fasah, khulu divorce, dowry and other related matters.⁴⁴

Nevertheless the enforcement of Islamic law in courts was still unclear. In Nordin M.M. vs. Shaikh Mohd. Maah⁴⁵ Noordin the courts decided that age of marriage should follow Islam whereas in Mong v. Daing Mokhah,⁴⁶ an action for breach of promise to marry can be instituted in civil courts by Muslim women. Courts can uphold

English principles. In another case with regard to action for "tebus talak" or "khulu" :- enabled the courts to enforce Islamic the husband declined to agreed to the kathi's direction and registration of khulu divorce was made when the dowry was returned. The court decided that the marriage was still valid and the wife did not obtain any damages.⁴⁷

At this stage the civil courts which administered Islamic law in kathi's courts were invited to explain or give opinion when it was necessary as in Tijah vs Mat Ali.⁴⁸

b) Federated Malay States

The Federated Malay States, Perak, Pahang, Selangor and Negeri Sembilan had received English advisers.⁴⁹ Under this system the Sultans were asked to accept British Residence in which their advice will be used and acted in all administrative and financial matters except religion and the Malay customs.

With the unification of the four states the English revised all laws in the states including Islamic law. Every state had laws for the adminsitration of Islamic Law. Perak; Muhammadan Divorce Rules 1893, Adultery by Muhammadan 1894, Muhammadan to pray in Mosques on Friday 1885. Selangor : Appointment of Kathi 1884, Muhammadan Cemetary Reserve 1902. Prevention of Adultery Among Muhammadan 1894. Negeri Sembilan: Mosque Attendance, 1887, Dowry 1888, Muhammadan Inheritance 1893. After 1900 the laws introduced were as Muhammadan Marriage and Divorce Registration Enactment 1900, Chapter 197. Muhammadan law, Chapter 1980. Court Enactment (Court Chapter 2). Determination of Muhammadan Law Chapter 196 and Muhammadan Law and Malay custom (Determination) Enactment 1930.⁵⁰

With the above provisions it enabled the courts to enforce Islamic law to the extent provided for by the power. In Re Timah binte Abdullah⁵¹, the court decided that a non-Muslim beneficiary is not entitled to the estate. This is different from the Straits Settlements where non-Muslims were entitled to the estates.⁵²

The position of Islamic law in the respective states can be examined through the case of Ramah vs Laton⁵³ where Mr. Justice Thorne said that Islamic law is the law of the land and not foreign law. In the Official Administration F.M.S. vs Maghri Mohihiko⁵⁴ Mr. Justice Gordon - Smith said Islamic law is part of the law enforced in Penang.

c. Unfederated Malay States

Perlis, Kedah, Kelantan, Terengganu and Johore were Unfederated Malay States. Between 1910 - 1923 these states received English advisers.⁵⁵ The background and position of Islamic law in these states were the same as in Federated Malay States. In Fatimah binti Harris vs Hj. Ismail bin Tamin⁵⁶ Mr. Justice Mills was of the opinion that Islamic law was part of the law in Johore.

Among the laws which related to Islamic law were :

Johore : Muhammadan Marriage Enactment, 1914. Offences by

Muhammadan Enactment 1919.

Perlis : Muhammadan Marriage and Divorce (Registration) Enactment

No. 1/1913.

Kedah : Shariah Courts Enactment No. 109/1934

Trengganu : Registration of Muhammadan Marriage and Divorce Enactment

no 6/1922.

Kelanta : Muslim Marriage and Divorce Enactment No. 22/1938

All law provisions made for the respective states were quite similar. It limited the jurisdiction of the kathi's courts of matrimonial matters, divorce and several Islamic offences.

Based on the existing law provisions, Islamic Religious Administration Enactment in this country was revised and provisions were made for Kathi's Courts, the Chief Kathis Courts, the Appeal Committee and its jurisdiction

The Chief Kathis Courts in civil matters, have jurisdiction to hear As in the colonial era and after independence, matters concerning enforcement of Islamic law are in the hands of each state government where the Sultan is the head of religion. Today any amendments to the Syariah Courts jurisdiction are under the jurisdiction of the state assemblies which are bound to the Malaysian Constitution and the relevant acts of Parliament. Although the jurisdiction of the Syariah Courts in the whole country is not uniform, there are many similarities between the states.⁵⁷

Islamic Religious Administration laws of each state have provisions for the establishment of Shariah Courts in the respective states. The person who becomes the judge in the Syariah court is called Kathi. Kathis and Chief Kathis are elected by the relevant Sultan of the state or by the Yang di Pertuan Agong for states without Rulers and Federal Territory. There is no specific qualification for those who are going to be elected as kathis.

The Chief Kathis Courts have jurisdiction to adjudicate on criminal and civil cases. The chief Kathis Courts could adjudicate or any offences committed by Muslims that can be punished under the Administration of Islamic law in each state.⁵⁸ However the Muslim Courts

(Criminal Jurisdiction) (Amendment) Act 1984 empowers the maximum of three years imprisonment or not more than \$5,000 fine or 6 strokes of the cane or any combination of the said punishment.

In turn the Kathis Courts in criminal matters could adjudicate on any offences committed in which the maximum punishment is 2 months imprisonment or \$200 fine or both.⁵⁹

The Chief Kathis Courts in civil matters, have jurisdiction to hear and decide all matters on trial against Muslims with regard to⁶⁰

- i) Engagement, marriage, divorce, invalid marriages a divorce by courts.
- ii) Any misunderstandings or action against the estate connected with the above.
- iii) Maintenance for dependents, legitimate child, and child custody.
- iv) Division on actions on matrimonial properties.⁶¹
- v) Determination for persons entitled to the estate of a deceased Muslim on the divisions that they are entitled to.
- vi) Gift-Wills from a dying Muslim.
- vii) Gifts which are made without the demand for money or things by a Muslim
- viii) Charitable gifts or nazar
- ix) Any other powers for it given by any written laws.

Kathis Courts in civil matters could hear and decide on all matters empowered by the powers given to Chief Kathis Courts. However the total amount of dispute or the subject-matter must not exceed \$1,000⁶² or could not be valued in money terms.

According to the provisions in the Administration of Islamic law of the states any appeal from the decisions of the Chief Kathis Courts and Kathi's Courts can be made to the Appeal Committee/ Shariah Appeal

Committee/Appeal Board. This Appeal Committee consist of 3 persons.

Among them is the Mufti and he will be the Chairman and 2 others

elected By the Sultan and one of them is or has been a judge.⁶³

The Appeal Courts could :-⁶⁴

a) In criminal matters annul or reduce or increase the sentence or order or retrial.

b) In civil matters, certify, reverse the decision of the trial court or order or retrial.

The Kelantan Shariah Courts law clearly states that no appeal can

be made on the decision given by the Appeal Board.⁶⁵

Introduction :-
The language used in court is Bahasa Malaysia and lawyers are allowed to represent any parties in the trial. In certain states lawyers must be registered with the Islamic Religious Council in the respective states and will be given a Qualifying Certificate.⁶⁶

In matters that are within the jurisdiction of the Kathi's Courts and civil courts,⁶⁷ whenever there is a conflict between the decision of the Chief Kathis Courts or Kathi's Courts with the Civil Courts, the decision of the Civil Courts will prevail. The superior position of the civil courts is because they are enacted through the Federal Law/ Constitution⁶⁹ while Shariah Courts are enacted through state laws.

The case from Malacca Nafsiah vs Abd Majid is about breach of promise to marry. It was argued in this case that Section 40 (3) (b) of the Malacca Administration of Islamic Religious laws ousted the jurisdiction of the civil courts. The court rejected this argument. Firstly because section 24(a) and 25(1)(a) of the Courts of Judicature Act 1964 specifically empowers the civil courts jurisdiction in damages claims. In Myriam vs Mohamed Ariff too the court had jurisdiction in custody of child matter. Civil Courts too have jurisdiction for actions on matrimonial property.⁷²

In several Islamic law/Shariah Courts seminar and conference pleas have been made so that the Shariah Courts decisions shall be final and that the civil courts do not have jurisdiction on matters that have been decided and matters listed in the Administration of Islamic Religious law enactments of the states. This can only happen of the relevant laws and amended especially the Courts of Judicature Act.

May the endeavour to upgrade the status of Kathis and the recommendations to revise the Shariah Courts structure put these courts in its rightful position.

The Relevant Law

Part 3 - The Role of the Judiciary since 1952 until now:

Introduction :-

The Judiciary in the enforcement of Islamic laws in Malaysia with the exception of the Federal Territory is under the jurisdiction of the state government such as in Selangor, Pahang, Kedah, Kelantan, Perlis, Trengganu, Perak, Negeri Sembilan and Johore. It becomes part of the administration of the religious matters for the above states.⁷³

For the states of Malacca, Penang, Sabah and Sarawak which do not have the Sultan as the Head of State, the jurisdiction belongs to Yang Di Pertuan Agong.⁷⁴

The Jurisdiction of the Islamic Judiciary

In short, the jurisdiction of the Islamic judiciary in Malaysia could be divided into two parts :

1. Criminal
2. Civil matters.⁷⁵

For the criminal jurisdiction, the power of the judiciary to try on matters that are punishable with the maximum sentence being one to six months imprisonment or a fine between two hundred and six hundred dollars.⁷⁶

In the second part of the civil matters, the court has jurisdiction to deal with matters connected with :

- a. Family, engagement, marriage, divorce and property claims related to it, financial support after divorce, custody.
- b. Distribution of Harta Sepencarian.
- c. Wakaf or nazar
- d. Others as empowered by any law.⁷⁷

Since the establishment of the Syariah Courts, the Syariah judges have jurisdiction to deal with both criminal and civil matters.⁷⁸

The Relevant Law

In Malaysia, in order to perform the judicial role in the Syariah Court knowledge and understanding of the law is required at least of the following areas :

- 1. Islamic Law
- 2. Islamic Evidence Law
- 3. Islamic Procedural law.
- 4. Islamic Civil Procedure
- 5. Islamic Family Law
- 6. Islamic law in the form of Acts or Enactment presently in force.⁷⁹
- 7. Evidence Act 1956
- 8. Criminal Procedure Code [F.M.S. Cap. 6]
- 9. Married Woman and Children (Enforcement of Maintenance) No. 8, 1988
- 10. Federal Constitution
- 11. Syariah Court Act (Criminal Jurisdiction) 1965, (Amended) 1984 (Acts A 162, 1968)
- 12. Islamic Family methods.
- 13. Malaysian Legal System
- 14. Subordinate Court [Act 92]
- 15. Other laws

One important consideration in the judicial system is how these laws are linked and loosely related to each other and how they can operate harmoniously.

This means that in the present Malaysian context, an effective Islamic judiciary requires sufficient understanding in both aspects of the law; that is the basic law for the Islamic judiciary and other laws which are closely linked and related to this basic law. In the case of NAFSIAH v ABDUL MAJID⁸⁰ both parties were Muslims and engaged with a promise of marriage. During the engagement period, they were involved in unlawful intercourse and the wife was pregnant. The man failed to marry the lady. She brought an action for damages and the High Court accepted her contention that there has been a breach of promise of marriage by the Defendant. Prior to this, her claim has been rejected by the Chief Kadhi. In my view the decision of the Chief Kadhi to reject her claims for damages was correct on several grounds :

1. Both the Plaintiff and the Defendant are Muslims.
2. Although there is a provision under the Administration of Muslim law for the state of Malacca, the said provision is too short.
3. A promise to marry under Islamic law is permissible to both parties.
4. A promise to marry is not included in the meaning of an ordinary contract. It is no more than a mere promise.⁸¹

Furthermore under the Islamic law what is permissible by Hukum Sharak cannot give rise to a cause of action for damages⁸² and therefore the rejection by the Chief Kadhi of the Plaintiff's argument ought to be respected.

Examples of decided cases

When a case is brought before a Syariah court, especially those of civil matters, the judge would usually suggest to the parties in dispute that the disagreement be solved amicably (sulh). This practice⁸³ is followed under the provisions of the laws especially cases involving custody of the children, divorce, financial support, mut'ah and distributing of Harta Sepencarian.⁸⁴ In circumstances where sulh is not followed, the court would be left with no option but to proceed and settle the dispute in the ordinary ways or through adjudication/trial.⁸⁵

In the case of HUSSIN v. MOH⁸⁶ the Appellant and the Respondent agreed to marry their respective son and daughter, \$500 being the amount of dower. The Kadhi accepted the contention of the Appellant for damages for breach of promise since the respondent paid cash and jewellery (\$300 cash and jewellery) instead of \$500 cash. The dower given was rejected since it was argued that the total value was less than the agreed \$500. It was decided that there was no valid reason for such refusal and the decision of the kadhi was set aside.

In AZIZAH BT MAT v MAT BIN SALLEH⁸⁷ the father of the applicant refused to become a wali for the daughter's marriage with a man who was employed and was willing to pay the dower and expenses valued at \$1,001/-, the reason being 'until the Applicant obtains employment'. It was held he was not justified in doing so.

In the case of AEDULKADIR v HAJJAH FATIMAH⁸⁸ the Chief Kadhi of the Syariah Court ordered the claimant be sworn on oath and the case was decided in her favour (the case being one of financial support) based on the testimony of one witness. In another case CIK AH v. RAMLI⁸⁹ the issue was a claim for financial support during eddah and the Kadhi accepted her claim that she be paid the relevant financial support

during eddah which she was entitled to under syarak. Beside that contribution under Section 104(3)⁹⁰ a lady divorced without justification can ask for a court order that the financial support be paid monthly as long as she does not remarry or be guilty of gross misconduct.

In another case of SYED BULAT B SYED ALWI v INTAN BT OTHMAN⁹¹ under the same Section 104(3) the court ordered that such payment be made monthly until the wife remarries. The judge stated that Section 104(3) does not contain element of syarak but it was enacted specifically to enable a divorced woman to obtain financial support from the former husband subject to her remarriage on the conditions that :

1. She is not guilty of gross misconduct.
2. She had been divorced without reasonable or adequate grounds.

In HASNAH BT HASHIM v SAAB B AROF⁹² the court on the application of the claimant made use of its jurisdiction under section 87(8)⁹³ and decided that both parties were separated on the ground of excessive beatings of the wife by the husband. In another case of MOHAMAD SALLEH v. AZIZAH⁹⁴ the issue was the custody of the parties' children aged between 2 months and 5 years. Earlier the parties have reached an agreement that the custody was to be given to the father. Nevertheless the Syariah Appeal Court decided that the mother was not bound by this agreement and decided that the custody was to be given to her instead.

The issue in HASNAH BT MAT v. HUSSEIN BIN MUSA⁹⁵ was the wife's share in the case of harta Sepencarian. The properties involved was a piece of land worth \$3,000/- and a house valued at \$2,000/- bought from the husband's salary and the wife's contributions from her income as a vegetable and fruits seller. The contributions were unequal. The Kadhi deciding this case held that the properties is to be divided into four parts and the claimant was entitled to one share. In ABDUL RAHMAN B. HJ. BAHARUDDIN v CHIEF KADHI, KEDAH, the applicant was a follower of

Ahmadi (Qadyani) and applied to the Civil Court for an order that the Syariah Court be stopped from hearing the case against him pursuant to Section 41(3) Administration of Muslim Law Kedah⁹⁷ on the ground that the said court does not have jurisdiction over non-Muslims.

Approaches adopted by the Judiciary

Based on the cases and examples given above, we can see that the judiciary played its role in a number of ways :-

1. From Hussin v Moh, Azizah bt Mat v Mat bin Salleh and Abdulkadir v. Hajjah Fatimah, the judiciary plays its role to uphold the present approaches used in Islamic legal system. For example dower may now be given from any item of value as long as it is spiritually clean [suci]⁹⁸. It maybe tendered in the form of cash alone or cash together with any valuable item or its alternatives. The Kadhi also has reinforced the elements of an Islamic marriage by the adoption of official wali (wali raja) when a wali to a lady refused to marry her with a suitable man without adequate justification but to wait until the lady could secure a job. The approach adopted here is in line and consistent with Islamic law that provides authority to marry a lady if the wali refused to do so without adequate reasons.⁹⁹ In the case of AbdulKadir v Hajjah Fatimah on the claims of financial support from the husband, the applicant called only one witness. According to Islamic law, a person claiming his rights in court must produce at least two witnesses. Nevertheless if this not possible and only one witness is called and the case is a civil one, he may still bring an action with that sole witness provided he gives evidence on oath.¹⁰⁰ As such in the above case, the court was allow to accept his claims.

2) In the case of Cik Ah and Syed Bulat, both applicants brought action for financial support under Section 104(1)(2)¹⁰¹ which they are entitled to do so under Syarak. Furthermore a claim is also made for payment under the provisions of Section 104(3) which provides that -

"In addition to the maintenance specified in sub-section (2) a woman who has been divorced may be application to the court obtain an order against her former husband for maintenance payable monthly, for so long she remains unmarried or does not commit any misconduct. The Kadhi shall before making an order under this sub-section satisfy himself that the woman has been divorced without good cause or reason."

The judge in both cases acknowledged that the provision of section 103(5) does not contain elements of syarak. The judiciary is bound by its provisions and therefore can award to divorced wives monthly payment so long as she does not remarry or be guilty of any gross misconduct. Under Islamic law, there are two types of payment, first is the support that is compulsory (wajib) to be paid in the following circumstances :

1. Where the lady is a lawful wife of the husband, is willing and capable of fulfilling her duties towards the husband and not nushuz¹⁰²
2. the lady was divorced ra'i and in eddah or been divorced 'putus' and pregnant,¹⁰³ then she would be entitled to support of eddah or support of pregnancy.

Secondly, the mut'ah payment being a form of payment imposed on the husband or divorce for reasons unrelated to the wife¹⁰⁴ Allah s.w.t. commanded in the Holy Book.

لا جناح عليكم إن طلقتم النساء ما لم تكونوا أو ترضوا
 لهن ربيعة وبقوهن على الموضع قدرن وعلى المقتر
 قدرن متاعا بالمعروف حقا على المؤمنين

"There is no blame on you if you divorce women before consummation or the fixation of their dower, But bestow on them (a suitable gift), The wealthy according to his means, and the poor according to his means; A gift of a reasonable amount Is due from those who wish to do the right thing"

3. And from the case of Abdul Rahim b. Hj. Bahaudin v. Chief Kadhi, Kedah the role of judiciary becomes less clear when the civil court ordered the syariah court not to proceed with the case under section 41(3)¹⁰⁶ the reason being that they do not have jurisdiction over non-Muslims.

In this case, the court did not decide on the actual status of a person who claimed to be a Muslim. In other words the court left open to question whether a follower of Ahmadi (Qadyani) automatically would mean that the person is no longer a Muslim. If this is so, what would be the criteria to be used. Is it sufficient to decide the issue solely on fatwa which are general or should the matter be heard on the argument put forward. The judge should give his opinions on the matter and in deciding the case, the judge ought to ensure the presence or absence of an intention on the part of the follower.¹⁰⁷

Amendments to the Laws Involved

In Malaysia, related to the Judicial function is the existence of the relevant Administrative Laws or regulations which are supplemented and improved from time to time, for example :

For Malacca

Since independence (August 1957) up to 1980, the Administration of the Religious matters laws have been amended four times (1966, 1967, 1971 and 1974). Penang during the same duration has amended the relevant laws twice (1964 and 1967). Selangor on the other end amended it seven times (1957, 1960, 1961, 1962, 1966, 1972 and 1979). Negeri Sembilan

for the same period amended it four times in 1961, 1963, 1968 and 1974. Pahang amended it twice in 1960 and 1963. Kedah amended the relevant laws five times (1963, 1965, 1970, 1975 and 1980). Nevertheless the above amendments are not really related to the role of the Judiciary in the development of Islamic law; the reason being that these amendments are more related to the Administrative matters.

From another angle, the role of Judiciary involves other areas of the laws such as Procedure and Evidence. The state of Kedah leads the other states, in this matter, in having the laws on Civil matters known as the Islamic Civil Procedure Enactment No. 2, 1979. Kelantan has introduced a criminal procedure laws known as that Kelantan Syariah Criminal Procedure Enactment, No. 9, 1983. Both these enactments, in my view, are more a reflection of the spirit and intendment of the Civil Procedure laws taken from the Rules of High Court 1980, Rules of Subordinate Court 1981, Criminal Procedure Code (FMS Cap. 6) as modified taking into account the jurisdiction of the Syariah Court. For example section 96(1)¹⁰⁸ which empowers the Prosecuting officer to withdraw the remaining charges or to postpone the trial of the charges. Section 97(1)¹⁰⁹ provides authority for the Prosecution after a person charged has been found guilty to take into consideration the other charges yet to be tried before sentencing him and Section 106(1)¹¹⁰ empowers the Prosecution at any time before sentencing to withdraw the charges against the accused.

In civil procedure the applicant maybe required to pay to court as deposit a sum sufficient in the court's view as the cost of the detainment¹¹¹ and the imposition of fees for all actions, matters and trial in court.¹¹²

Procedure laws that are presently applicable in the syariah courts do not contain any provisions relating to the degree of offences, no provision as to the number of witness required for each degree of offences etc.

Opinion and suggestion

The Latest Effort

The whole Muslim community, beside those efforts being made, should be optimistic on the ability and competency of the Islamic judicial system in upholding the principles of Justice. The Islamic judicial system that exists in practice should be implemented in Malaysia in the spirit and principle of the Islamic legal system. In Malaysia steps are now being taken so that the Islamic judiciary is consistent with the spirit and the principles of the Islamic legal system. These laws it is hoped will reflect the character of an Islamic judiciary and is in the final part of its compilation are :

1. Syariah Court Evidence Act.
2. Syariah Court Criminal Procedure Code.
3. Syariah Court Procedure Code.
4. The Administration of the Islamic Law Act.
5. Islamic Family Law Act.
6. Others.

They are carried out by the Religious Department, Federal Territory with the cooperation of a committee. Together with this, a one year course called 'Diploma in Law, Administration and Islamic Judiciary Course' has been introduced commencing 1986/86 session for kadhis from the whole of Malaysia. The course involves special emphasis on areas of law related to the functions of the Judiciary in courts.

These areas are :

1. Syariah Court Civil Procedure
2. Syariah Court Criminal Procedure
3. Syariah Court Evidence Laws
4. Malaysian Legal System
5. General Paper and Moot
6. Project Paper.

This course is organised by the International Islamic University, Federal Religious Council (under the Prime Minister's Department), and the Public Services Department (PSD).

Opinion and suggestion

The whole Muslim community, beside those efforts being made, should be optimistic on the ability and competency of the Islamic judicial system in upholding the principles of Justice. The principle of sulh that exists in practice should be implemented more widely in our judicial system in both areas of civil and criminal law by taking into account the boundaries and Procedure of the sulh especially for cases involving custody of the children, divorce, claims for support (nafkah), mut'ah, the distribution of harta sepencarian etc. This fulfils the intendment of ayat 128 Al-Nisa' which means :

"And such settlement is best".

The effect and essence of the ayat has been explained by 'Umar Ibn al-Khatab the translation being

"Do ask the conflicting parties in a dispute so to enable them to reach an amicable settlement (sulh) for a decision made by court would result in hostility and ill-feeling (of the parties to the dispute)"¹¹³

It is suggested therefore that provisions be made for the principles of sulh in those related areas.

b. In areas where the court finds that a provision or section is not in line with syarak, this matter should be clearly stated.

c. Whenever there is a clear inconsistency between the law relevant to the Islamic judiciary and Shari'at the judge should refer this to an Islamic legal method that is :

"There is no place for ijtihad in areas covered by nass".¹¹⁴

This means that whenever inconsistency exists between two laws, preference is to be given to the original law and this is the law to be applied. It follows that when such inconsistency exists, the judge should say so and that it cannot be followed. It is not sufficient merely to say that the relevant section is not consistent with syarak but the judge himself should enforce the relevant provisions.

d. Every effort to compile Islamic law either generally or specifically related to the Islamic judiciary should be continued vigorously and with more efforts and commitments. Reference should be made to the vast amount of Islamic literature and this necessarily requires sufficient expertise if it is to be released in the form of law. Unless this is done, it is feared that the laws enacted would do no more than reflect the spirit and principles of the laws already in existence and to be copied.

e. In areas of fundamental importance such as of those involved in the teachings of Ahmadi (Qadyani), a very thorough and thoughtful analysis must be carried out. This would require those involved to explain in detail individually their case in Court. So long as the case is not decided judicially, the question whether such a follower is already murtad or otherwise will not arise. This means that such a person is to be considered still a Muslim and could therefore be tried. That more important element from such cases is the attempt rather dishonestly, to escape from being tried in syariah court. Without a single disrespect to the State Fatwa Councils, the relevant fatwas from such cases should be produced after the case has been decided. The result would be that both the court and Fatwas would contribute significantly in upholding the Islamic judicial principles in this country.

WASSALAM.