

STRENGTHENING ADMINISTRATIVE INSTITUTIONS OF ISLAMIC LAW IN MALAYSIA: AN OVERVIEW

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ABSTRACT

This article provides a review of institutions involved in the administration of Islamic law in Malaysia. It discusses briefly the historical background of the law in Malaysia that has close connections with the Malay Sultanates. The first institution that this article will consider is the Islamic Religious Council that is responsible for assisting the Sultan in administering Islamic law justly. The National Council of Islamic Religious Affairs, as a national body, should be fully utilised to help streamline the administration of Islamic law among the different states in Malaysia. Apart from issues regarding Muftī and fatwā the article proposes steps to strengthen the administration of justice in Syariah courts by looking at the tenure of judges, the status of prosecutors and the powers and jurisdiction of Syariah courts.

Keywords: *Islamic law, Syariah courts, non-Muslim, Malay Sultanate, fatwā*

INTRODUCTION

The Islamic administrative statute is a law that assembles various matters concerning Islam. The law deals with matters such as the establishment, roles and power of the Islamic Religious Council; the appointment and power of the *Muftī* as well as the State *Fatwā* Committee; the establishment of Syariah courts

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and appointment of judges; and the appointment and power of the Syariah Prosecutor. Apart from matters relating to Syariah courts, the law also makes provision relating to *Bayt al-Māl*, *zakāt*, *mu'allaf* and mosque management. This article will not touch on all the above. Focus will be given to the Islamic Religious Council institutions, *Muftī* and *fatwā* as well as the Syariah courts.

Some of the related matters have been previously discussed by exponents such as Ahmad Ibrahim on the upgrading of Islamic administration.¹ However, this paper will look at the current law and development which may give a different view and emphasis compared to the previous writings.

THE HISTORY, CONTINUATION AND EMPOWERMENT OF ADMINISTRATIVE INSTITUTIONS OF ISLAMIC LAW

Before we delve further into the issues, let us briefly look at the history of Islamic administration in Malaysia. The Islamic administration in Malaysia has developed continuously from the time of the Malay Sultanates until the present day. The Malay Sultanate of Malacca was frequently used as the starting point of reference on Islamic administration. However, it does not mean that the religion of Islam first came to Malacca but rather due to fact that the Malay Sultanate of Malacca was the epicentre of the Islamisation process in the Malay Archipelago.²

The ruling system of the Malay Sultanate was not based on the absolute power of the Sultan. The Sultan ruled by holding discussions with the state officers. If the Sultan ignored the state officers, his throne would be in peril as the state officers were also involved in recognising the legitimate crown of the Sultan.

Islam is not a religion that needs intermediaries in terms of the relationship between men and God such as in the Christian Church. In the country's administration, all leaders and the Sultan himself are capable of possessing knowledge and credibility in administering the country based on Islamic requirements. Historically, the rulers of the Kelantan and Terengganu Malay Sultanates in the 19th century themselves had in-depth knowledge of the

¹ See for example, Ahmad Ibrahim (2000), *The Administration of Islamic Law in Malaysia*, Kuala Lumpur: Institute of Islamic Understanding Malaysia (IKIM).

² Syed Naguib al-Attas (1969), *Preliminary Statement on a General Theory of the Islamization of the Malay-Indonesian Archipelago*, Kuala Lumpur: Dewan Bahasa dan Pustaka, p. 15.

religion and ruled the states based on that knowledge.³ However, the Sultan would usually have state officers who were well-versed in matters concerning Islam to advise them.

The administration of justice in the history of the Malacca Malay Sultanate was not properly recorded as the priority at the time was not on the judicial institution but rather on the judge himself. Thus, the Sultan and officers were said to possess power to hear and try cases. There was no necessity to create a separate judicial system such as a civil or Syariah court as all cases were decided based on Islamic law and customs.

Non-Muslim societies also existed during the Malay Sultanate. Generally, they were given the freedom to administer their own personal laws. It was recorded that during the time of the Johor-Riau Malay Sultanate, the Chinese people were given the freedom to administer their personal laws in their society. Therefore, the concept of legal pluralism had long been practised by the Malay Sultanate. This is in line with the practice of the Last Messenger as evident in the Constitution of Medina. The Constitution of Medina – or the treaty between the Messenger and the people in Medina – allowed the non-Muslim tribes of Medina to be governed by their own law. At the same time, all communities accepted the final authority of the Last Messenger.⁴

The arrival of colonising powers disrupted the Islamisation process in the Malay Archipelago. If taken from the date of the arrival of Islam in Malacca, the Islamisation process only happened within a decade before the Portuguese conquered Malacca.⁵ Although the transformation of man and institutions were taking place under the process of Islamisation, it was not completed yet.

The arrival of imperialists, particularly the British, brought together with them their own laws. Since the colonists were the dominant political and military forces, their laws dominated the administration of justice in all territories. A judicial system that was manned by British officers was also established. The British also brought over the mindset of prioritising codified laws. Therefore, Islamic law and customs – being largely unwritten - were marginalised.

As a reaction towards the British's voracity in controlling the administration of the country as well as the administration of justice, the Sultan had strengthened

³ See for example, Abdullah Alwi Hassan (1996), *The Administration of Islamic Law in Kelantan*, Kuala Lumpur: Dewan Bahasa dan Pustaka, p. 3.

⁴ Muhammad Hamidullah (2007), *The Prophet's Establishing a State and His Succession*, New Delhi: Adam Publishers and Distributors, pp. 61, 77.

⁵ That is if the date of the reception of Islam is taken as 812 *Hijrah* or 1409 A.D.. See Syed Naguib al-Attas (1969), *op. cit.*, p. 12.

the institutions that were under his jurisdiction, namely, institutions related to Islam and Malay customs. According to the treaty between the Malay Sultanates and the British, the Sultan must seek advice from the British officer – the Resident – stationed in the State and he must act based on the advice except in matters of Islam and Malay custom. Although the religion of Islam is not only confined to personal matters and this interpretation was based on the erroneous and unduly narrow British interpretation of “religion” and “Islam”, this was clearly a territory outside the operational limit of the British colonisation.

Thus, to strengthen the institutions of the Religious Council, *Mufti* and Syariah courts have to be understood based on the said historical sketch. The next step that has to be taken is how to add up to the strength of these Islamic institutions.

Federalism

Another thing that has to be appreciated is the importance of the Malay States, the previous Straits Settlements as well as Sabah and Sarawak in the birth of the Federation of Malaysia. Federalism is a concept of a federal institution that consists of states with limited freedom, which has consented to form a federation. Without the agreement of the Sultan and other states to unify and establish Malaysia, this Federation would not have existed.

In the constitution of this Federation, federal institutions such as the federal government and the federal legislature were formed. The federal executive power is vested in the Yang di-Pertuan Agong and performed by him and the cabinet.⁶ The power to legislate on federal laws is vested in the Parliament.⁷ At the same time the state government and state legislature still exist with their own powers.

Because Islamic matters are synonymous with the Sultanate, the religion of Islam is put under the jurisdiction of the States.⁸ Therefore, every state as well as the Federal Territories have their own Islamic Religious Council, *Mufti*, Syariah courts and religious administrative officers as well as their own administration of justice officers. The establishment, appointment and power of each office and institution within each own state. Each state has its own

⁶ Article 39 of the Federal Constitution.

⁷ Article 44 of the Federal Constitution.

⁸ Article 74, Item I State List of the Federal Constitution.

relevant laws.⁹

Although we sometimes complain of the complications of Islamic administration due to the state's separate administration, such diversity can be turned into strength that can produce a truly strong administration system.

Islamic Religious Council

The Sultan being the Head of Islamic Religion is assisted by the Islamic Religious Council in all matters but excluding Islam law and administration of justice which are within the function of the *Mufti* and Syariah courts.¹⁰ The importance of the Religious Council can be seen from the role of the Religious Council of Kelantan in empowering the Religious administration in Kelantan at beginning of 1915.¹¹ It has aided the Sultan in drawing administrative policies in the state. The Religious Council has the role of ensuring the welfare of Muslims from spiritual, social, educational and economical aspects.¹² The Islamic administration operation is carried out by the state's Religious Department headed by the Director of the Islamic Religious Department.

The Sultan is an institution that is above party politics. Therefore, the operation of the Council needs to also reflect the position of the Sultan who is the protector of everyone in each state and not of certain groups only. If the Council does not play its role prudently and is non-partisan,¹³ it would seem that the monarchy is seen as tainted and unjust. We have seen the importance of the monarchy in ensuring the harmony of states subsequent to the 2008

⁹ See for example the Administration of the Religion of Islam (State of Selangor) Enactment 2003 and the Administration of Islamic Law (Federal Territories) Act 1993. Hereinafter reference will only be made to the Administration of the Religion of Islam (State of Selangor) Enactment 2003. Although the provisions in other states take different forms, the objective of the discussion in this article can be met by taking the example of one enactment. Reference will be made to other states if necessary.

¹⁰ Section 6 Administration of the Religion of Islam (State of Selangor) Enactment 2003.

¹¹ Abdullah Alwi Hassan (1996), *op. cit.*, pp. 69-70.

¹² Section 7 Administration of the Religion of Islam (State of Selangor) Enactment 2003.

¹³ See for instance the view of Raja Muda of Perak Raja Dr Nazrin Shah for the Orang-Orang Besar Jajahan (territorial chiefs) to be non-partisan, "Chiefs urged to be the sultan's 'eyes and ears', *New Straits Times*, 3 July 2008.

general election in the formation of State Government whereby the Sultan carried out his duty without following any sentiments of party politics. If the Sultan were to follow the sentiment of party politics, surely the formation of a state government that was not made up of the ruling political party at the federal level would not have gone smoothly. We do not want the monarchy to face problems resulting from the imprudent use of power by the Religious Council. If the religious administration, like the administration of mosque, is seen as unjust and discriminatory, the monarchy might be put to blame.

The close relationship between the Islamic Religious Council and the monarchy is demonstrated by the 2008 incident on the retraction of the transfer of the Director of the Islamic Religious Department of Perak. In this incident the Menteri Besar (Chief Minister) of Perak directed for the transfer of the Director of the Islamic Religious Department without consulting the Sultan. The Sultan of Perak issued a statement that such an action was contrary to the constitutional practice of the State of Perak. The Director of the Islamic Religious Department is also the secretary of the Islamic Religious Council of Perak. Therefore, according to the Sultan, changes in his position as Director would first require the consent of the Sultan. The Menteri Besar in this case apologised and restored the position of Director.

Looking at the close relationship between the Islamic Religious Department and the Sultanate, it was perplexing to see the post of the chairman of the Islamic Religious Council being slotted to the Menteri Besar.¹⁴ Several laws provide that the Sultan appoints the chairman on the advice of the Menteri Besar.¹⁵ However, there are also states that provide for the Sultan to appoint without the advice of the Menteri Besar.¹⁶ The Menteri Besar is surely hard to ignore unrelenting influences of party politics in drawing and executing policies. This would probably tarnish the impartiality of running the Council which is supposed to be reflecting the position of the Sultan who is above the gutter world of party politics. The Islamic Religious Council needs to reaffirm its position as the main authority in each state concerning Islam with the Sultan as the first authority and should not allow the government to take over

¹⁴ Section 11(1)(a) Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003.

¹⁵ Section 11(2) Administration of the Religion of Islam (State of Selangor) Enactment 2003. See also Section 10(2) Administration of Islamic Law (Federal Territories) Act 1993.

¹⁶ Section 11(2) Administration of the Religion of Islam (State of Johor) Enactment 2003.

such a role.¹⁷ In this respect, the Director of the Islamic Department should be appointed at the behest of the Sultan or the Yang di-Pertuan Agong, whichever applicable.¹⁸

At the same time we need to ensure that the Islamic Religious Department always operates parallel with the policies of the Islamic Religious Council. The Islamic Religious Department obtains the mandate to perform its duties based on the powers of the Islamic Religious Council which in turn derives its legitimacy from the Sultan. Therefore, it is better for the Director of the Islamic Religious Department to be the secretary of the Islamic Religious Council so that the policies and the implementation of such policies would go hand in hand. Since the position of Director of the Islamic Religious Department is essential, his appointment needs to be done after due consultation with the Islamic Religious Council.

The National Council Of Islamic Religious Affairs

The National Council of Islamic Religious Affairs, or *Majlis Kebangsaan Hal Ehwal Islam Malaysia* (MKI), is a national coordinating body of the State Islamic Religious Councils. The National Council was created in 1968 at the behest of the Conference of Rulers¹⁹ in recognising the need to have a national body to streamline the development and advancement of Islamic affairs. The secretariat for the National Council is the Department of Islamic Development of Malaysia, popularly known as *Pusat Islam*, under the Prime Minister's Department.

The first function of the National Council is to discuss, deliberate and recommend on matters referred to it by the Conference of Rulers, the State Islamic Religious Council, the State government or any member of the National Council. Another function of the National Council is to advise the Conference of Rulers, the State government, the Council of Islamic Religious Affairs on administration of Islam, Islamic education and Islamic law to improve and to standardise such matters.

The National Council's creation is closely connected to the Sultan since it was established at the behest of the Conference of Rulers which is a constitutional

¹⁷ Section 6 Administration of the Religion of Islam (State of Selangor) Enactment 2003.

¹⁸ "Call to mirror Sultans as protectors of Islam and Muslims", *Bernama*, 2 April 2008, via www.bernama.com.my.

¹⁹ Article 38(1) of the Federal Constitution.

body on the administration of Islam at the national level.²⁰ Thus, it is fitting for the National Council to provide recommendation to the Conference of Rulers on matters relating to Islam.

The importance of the National Council is evident by having the Prime Minister as the chairperson. The members are the Menteri Besar and Chief Minister. This reflects the high powered stature of the Council. However, it is unfortunate if in matters of Islam, party politics still intrude to the detriment of the underlying function of the National Council. Irrespective of political party making up the State government, the State administration should be represented in the National Council. It is if Only this is done that the original function of the Council can be realised.

Mufī And Fatwā

There are references made on the existence of learned persons in Islamic law as officers in state administration during the Malacca Malay Sultanate in *Sejarah Melayu*.²¹ Such persons are referred to as *qāḍī* in those times.²² The *Mufī* as a qualified person and having the duty to issue opinions regarding the Islamic law is very important as an aid to the Sultan.²³ Even before the British intervention in the Malay States in 19th century, the Malay Sultanates had instituted the *Mufī* and State Fatwa Committee.²⁴ The State of Kelantan is among the first to appoint a *Mufī*.²⁵

The process of issuing a *fatwā* is not an individual process but a collective one. The law on Islamic Administration provides the detailed procedure on the

²⁰ Article 38(2) of the Federal Constitution.

²¹ N.a. (1998), *The Malay Annals*, n.p.: The Malaysian Branch of Royal Asiatic Society, Reprint No. 17, pp. 185, 221-222.

²² Abdullah @ Alwi Hj. Hassan (2005), "Pelaksanaan Undang-undang Syariah Pada Zaman Pramerdeka: Aspek Sejarah dan Pelaksanaan" in Siti Shamsiah Md Supi (ed.), *Asas dan Kerangka Perundangan Negara Islam – Malaysia*, Kuala Lumpur: Institute of Islamic Understanding Malaysia, p. 25. See further Farid Sufian Shuaib (2008), *Powers and Jurisdiction of Syariah Courts in Malaysia*, 2nd Edn., Kuala Lumpur: LexisNexis, p. 73.

²³ Raja Azlan Shah (1986), "The Role of Constitutional Rulers in Malaysia", in FA Trindade & HP Lee (Eds.), *The Constitution of Malaysia: Further Perspectives and Developments*, Singapore: Oxford University Press, p. 85.

²⁴ Abdullah Alwi Haji Hassan (1996), *op. cit.*, pp. 16, 84.

²⁵ *Ibid*, p. 148.

process of issuing a *fatwā*. It involves the *Muftī*, the *Fatwā* Committee, the Religious Council and the consent of the Sultan.²⁶ Firstly, the *Muftī* will give directions for research to be done and working paper to be prepared. Then the matter will be discussed in the *Fatwā* Committee which then will prepare the *fatwā* to be forwarded to the Religious Council. The Religious Council will thereafter make a recommendation to the Sultan for his consent to publish the *fatwā* in the *Gazette*. This is an orderly process that is useful in ensuring proper deliberation of *fatwā*.

A matter that it is related to federalism is the possible existence of different *fatwā* issued by different states since the power to publish a *fatwā* is under the state's power. There is proposal for the establishment of the position of a Grand *Muftī* in order to overcome this problem.²⁷ This means that there would be a *Muftī* who is able to make *fatwā* for the whole of Malaysia. This proposal requires amendment to the Federal Constitution. Furthermore, the *Muftī* is closely related to the power of the Sultan as the Head of the Islamic Religion. However, the possibility of such an amendment is small. Rulers have shown their readiness to be firm in situation related to their position and power as seen in the process of forming State governments after the 2008 general elections.

This does not mean that the problem of variance of *fatwā* cannot be overcome. The National Fatwa Committee which was established by the Conference of Rulers is able to play the role in ensuring uniformity of *fatwā*.²⁸ The National Council of Islamic Religious Affairs is directly responsible for the establishment of the National Fatwa Committee.²⁹ The Conference of Rulers as an institution that brings together the head of states in Malaysia should be fully utilised in its unifying power.³⁰ We need to emphasize more on the unifying power of the Conference of Rulers than the position of the National Fatwa Committee as a national institution.

²⁶ Section 48 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003.

²⁷ Wan Azhar Wan Ahmad, "IKIM: Growing need for Grand Mufti", *The Star*, 20th March 2007.

²⁸ Section 2 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003.

²⁹ Suwaid Tapah (2004), "Perundangan dan Penguatkuasaan Fatwa", in Ahmad Hidayat Buang (ed.), *Fatwa di Malaysia*, Kuala Lumpur: Jabatan Syariah dan Undang-Undang Universiti Malaya, p. 27.

³⁰ Article 38 of the Federal Constitution. See also Abdul Aziz Bari (2002), *Majlis Raja-Raja: Kedudukan dan Peranan dalam Perlembagaan Malaysia*, Kuala Lumpur: Dewan Bahasa dan Pustaka.

The law has also provided for the State Fatwa Committee to receive advice from the National Fatwa Committee.³¹ In this matter, the law has stressed again the importance of the Conference of Rulers by stating that the advice of the National Fatwa Committee needs the consent of the Conference of Rulers to make a *fatwā* to cover the whole of Malaysia.³² To strengthen the role of the Conference of Rulers, the chairman of National Fatwa Committee Council must be appointed by the Conference.

Another matter that needs to be improved in relation to *fatwā* is in publicising the *fatwā*. Since gazetted *fatwā* are binding for Muslims,³³ the dissemination of *fatwā* must be prompt and widespread. The search for *fatwā* must also be simplified. Currently there is a portal for accessing published *fatwā*.³⁴ However, the coverage and accessibility perhaps could be improved.

JURISDICTION OF SYARIAH COURTS

The Syariah court is the fulcrum of the Syariah administration of justice. Therefore, there is a need for us to observe the related issues in the context of the importance of Syariah courts to apply Islamic law in resolving disputes. An issue that often arises is regarding its jurisdiction.

An issue on the jurisdiction of the Syariah court that has been continuously debated inside and outside the courts is on whether Item 1 of the State List under the Ninth Schedule of the Federal Constitution can be the direct source of Syariah courts' jurisdiction without the need to include it expressly in the relevant enactments. The Ninth Schedule of the Federal Constitution contains the State List and the Federal List which enumerates the matters over which the State government and the Federal government has competency to legislate and govern.³⁵

³¹ Section 52(1) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003.

³² Article 38(2)(b) of the Federal Constitution.

³³ Section 49 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003.

³⁴ www.e-fatwa.gov.my.

³⁵ Article 74 of the Federal Constitution. See also the Concurrent List and the Supplement Lists for States of Sabah and Sarawak.

The Federal Court has decided that the Syariah Court obtains jurisdiction directly from Item 1 of the State List.³⁶ This is because Item 1 itself clearly states that the Syariah court has jurisdiction over matters stated in Item 1. However, this issue is still debated and its correctness questioned in subsequent cases.³⁷ This issue is supposed to be resolved as the Federal Court has clarified it.³⁸ The Federal Constitution states that the Syariah court has jurisdiction over matters stated in Item 1 of the State List.³⁹

However, in order to avoid this issue from being raised again, there is a need for a general provision to be included in the administration of Islamic religion enactments to state that:

*For the avoidance of doubt, the Syariah court shall have jurisdiction over matters stated in Item 1 of the State List.*⁴⁰

There is no provision providing as such in the enactments yet.

Jurisdiction Over Non-Muslims

The life of a Muslim is not limited to other Muslims only. Issue of *waqf* land may involve claims by non-Muslims as in the case of *G Rethianasamy*.⁴¹ Maintenance orders may need to be executed against corporations or employers

³⁶ *Majlis Ugama Islam Pulau Pinang Dan Seberang Perai lwn Shaik Zolkaffily Bin Shaik Natar & Ors* [2003] 3 MLJ 705, p. 719; *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan Lain-lain* [2007] 4 MLJ 585, p. 616.

³⁷ *Latifah bte Mat Zin v. Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101, (Federal Court), p. 114; *Subashini a/p Rajasingam v. Saravanan a/l Thangathoray and other Appeals* [2008] 2 MLJ 147.

³⁸ *Majlis Ugama Islam Pulau Pinang Dan Seberang Perai lwn Shaik Zolkaffily Bin Shaik Natar & Ors* [2003] 3 MLJ 705, p. 719; *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan Lain-lain* [2007] 4 MLJ 585, p. 616.

³⁹ Item 1 of the State List of the Federal Constitution; Farid Sufian Shuaib, *op. cit.*, pp. 87-88.

⁴⁰ See also the judgment of YA Abdul Hamid Mohamad (as he then was) in *Lim Chan Seng v. Director of Islamic Religious Department Pulau Pinang & Anor.* [1996] 3 CLJ 231.

⁴¹ *G Rethianasamy v. Islamic Religious Council, Islam, Pulau Pinang and Anor* [1993] 2 MLJ 166, p. 177.

who are non-Muslims.⁴² Non-Muslims might also have information needed in cases before Syariah courts such as from a non-Muslim doctor who treated a wife for physical abuse in an application to dissolve a marriage.⁴³

Therefore, it would be difficult if the course of trials and execution of court orders are restricted to Muslims only. However, Item I of the State List provides that Syariah courts shall have jurisdiction only over Muslims.⁴⁴ Administration of Islamic Law Enactment provides that Syariah courts shall have jurisdiction over matters wherein all parties are Muslims.⁴⁵ The Enactment also clearly provides that the decision of the Syariah court must not involve the rights or properties of a non-Muslim.⁴⁶ Such provisions should not exist because the Federal Constitution only restricts prosecution of non-Muslims for Syariah offences; not that Syariah court proceedings and orders could not impinge non-Muslims at all.⁴⁷

Another relevant issue which is more complicated is when only one spouse from a couple who was not originally Muslims converts to Islam. *Subashini* as the most recent case still fails to give a final solution for this problem.⁴⁸ What was decided by the Federal Court is for the non-Muslim spouse to make an application at the civil court for the dissolution of marriage and other applications such as custody and maintenance. Meanwhile, the spouse who converted to Islam is free to go to the Syariah court to make similar applications.⁴⁹

⁴² See Shamsuriah Sulaiman (2006), “Penguatkuasaan Perintah Mahkamah Syariah berkenaan Kes-Kes Kekeluargaan Islam”, in Abdul Monir Yaacob & Siti Shamsiah Md Supi (Eds.), *Manual Undang-Undang Keluarga Islam*, Kuala Lumpur: Institute of Islamic Understanding Malaysia (IKIM).

⁴³ For instance, in application under *fasakh* to dissolve the marriage where the wife may claim her husband had physically abused her. See section 52(1)(h) of the Islamic Family Law (Federal Territory) Act 1984.

⁴⁴ Item I of State List in the Ninth Schedule of the Federal Constitution.

⁴⁵ See for example section 61(3)(b) Administration of the Religion of Islam (State of Selangor) Enactment 2003.

⁴⁶ Section 74(1) Administration of the Religion of Islam (State of Selangor) Enactment 2003.

⁴⁷ Farid Sufian Shuaib (2008), *op. cit.*, pp. 131-135.

⁴⁸ *Subashini a/p Rajasingam v. Saravanan a/l Thangathoray and other Appeals* [2008] 2 MLJ 147.

⁴⁹ See *Saravanan Thangathoray v. Subashini Rajasingam and Another Appeal* [2007] *The Law Review* 246; *Shamala a/p Sathiyaseelan v. Dr Jeyaganesh a/l C Mogarajah* [2004] 2 MLJ 241; Farid Sufian Shuaib (2008), *op. cit.*, p. 142.

What is more important for us to understand is that the spouse who has converted to Islam is compelled to go to Syariah court because there is no other choice. The applicable law to the previous marriage allows only the non-Muslim spouse to apply for dissolution. There is no remedy for the spouse who has converted to Islam. In the event that the non-Muslim spouse does not apply for the dissolution of marriage, the marriage - according to civil law - still exists and the spouse who has converted to Islam still has an obligation towards the marriage including fulfilling conjugal and financial obligations.

Therefore, Section 51 of Law Reform (Marriage and Divorce) Act 1976, which allows only the spouse who has not converted to Islam to apply for dissolution of marriage, needs to be amended to give both parties the choice of applying for dissolution. The suggestion for an amendment has been made nineteen years ago but to no avail.⁵⁰

The discussion on non-Muslims may not be complete without touching on the problem of deciding whether a person is a Muslim or not. The court has clearly stated that Syariah courts has the exclusive jurisdiction to decide whether a person is still a Muslim in cases where a person alleges that he or she has renounced Islam⁵¹ or disputes on whether a person died as a Muslim.⁵²

However the problem - in cases deciding on whether the deceased is a Muslim - is how to get non-Muslim relatives to be involved in the trial because of the perception that the Syariah court have jurisdiction only over Muslims.

The case of *Nyonya Tahir* provides a solution by making the non-Muslim party a witness.⁵³ In this case, the deceased was raised by her grandfather, a Chinese convert, since she was small. She married a Chinese at the age of 18 years old and had never lived as a Muslim since her marriage till she died at the

⁵⁰ Ahmad Ibrahim (1990), "The Need to Amend Section 51 of the Law Reform (Marriage and Divorce) Act 1976", *MLJ*, Vol. 2, lviii.

⁵¹ *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan Lain-lain* [2007] 4 *MLJ* 585; *Kamariah Bte Ali dan Lain-lain lwn Kerajaan Negeri Kelantan, Malaysia dan Satu Lagi* [2002] 3 *MLJ* 657.

⁵² *Kaliammal a/p Sinnasamy lwn Pengarah Jabatan Agama Islam Wilayah Persekutuan (JAWI) dan Lain-lain* [2006] 1 *MLJ* 685; *Dalam Perkara Permohonan Perisytiharan Status Agama Si Mati Mohammad Abdullah @ Moorthy a/l Maniam, Permohonan Ex-Parte Majlis Agama Islam Wilayah Persekutuan Kuala Lumpur* (2006) 21 JH 210.

⁵³ *Dalam Perkara Permohonan Perisytiharan Status Agama Si Mati Nyonya binti Tahir; Permohonan Ex-Parte Majlis Agama Islam Negeri Sembilan dan 2 yang Lain* (2006) 21:2 JH 221.

age of 88. All of these were testified by the deceased's non-Muslim children during a proceeding at the Syariah court. Evidence was also tendered that the deceased requested to be laid to rest as a non-Muslim. The Syariah court decided that the deceased has died as a non-Muslim based on the testimonies.

However, it is better for us to take the approach of allowing a non-Muslim to be one of the disputing parties in a case before the Syariah court, not only as a witness. This would make it easier for them to make appropriate applications and to give evidence. If this position is not taken, there may be obstacles in obtaining justice in cases involving non-Muslims.

Sentencing Powers

States have the power to enact offences against the precepts of Islam.⁵⁴ The power of sentencing are only up to the 3-5-6 formula, being 3 years imprisonment, RM5,000 fine and 6 lashes.⁵⁵ The power of sentencing was enacted in 1965; about 45 years ago. With the empowerment of Syariah courts and the development of the administration of justice of Syariah courts, it is time to increase the sentencing power of Syariah courts.

If the evolutionary process is to be used, the sentencing power of Syariah courts could be quadrupled. The sentencing power could be increased to 12 years imprisonment, RM20,000 fine and 24 lashes. Increase in the sentencing power can ensure sentencing impose by Syariah courts deter others from committing the same offence. At the same time, facility in terms of personnel and other infrastructure also needs to be upgraded.

Security Of Tenure For Judges

Security of tenure for judges is important to ensure independence and transparency of judicial making process. Judges should feel that giving decisions not in favour of influential groups would not prejudice his judicial office. This would help judges to discharge their duties without fear and favour. The provision for security of tenure can be made in the form of security of holding the office until retirement. He could only be dismissed from the office after a tribunal of judges recommends to the Sultan that he should be dismissed either for misconduct or inability to discharge his duties as a judge due to health.

⁵⁴ Item I State List; Syariah Court (Criminal Jurisdiction) Act 1965. See further Farid Sufian Shuaib (2008), *op. cit.*, p. 177.

⁵⁵ Section 2 Syariah Courts (Criminal Jurisdiction) Act 1965 (Revised 1988).

However, the current Enactments do not state anything concerning the security of tenure in contrast with provisions to superior civil court judges.⁵⁶ The Enactments only provide processes of appointment.⁵⁷ Previously there were provisions in the Enactments on retirement age and the requirement for the establishment of a tribunal for dismissing judges.⁵⁸ Sabah and Sarawak still retain Syariah courts Enactments that provides for security of tenure for judges.⁵⁹

It is not clear as to the reason why provisions on the security of tenure are missing in the new Enactments.⁶⁰ This is a step backward because the security of tenure is core to the independence, credibility and integrity of the judicial system. Syariah courts adjudicate high-ranking government officers and politicians. Indeed, mere provisions on the security of tenure might not safeguard the judicial institutions, like what seems to be indicated by the *ex-gratia* payment given to Tun Salleh Abas who was dismissed as the Lord President and the finding-of-the Lingam video clip controversy.⁶¹ It is the judges that will determine the integrity and transparency of judgment. However, for Syariah courts to be respected, we have to provide an environment where judges are able to make decisions without fear or favour.

***Syar'ie* Lawyers**

The administration of Islamic law has provided for those who are admitted as *Syar'ie* lawyers at a particular state to be admitted also as *Syar'ie* lawyers at other states after submitting evidence of their admission at the relevant state.⁶² Apparently, according to the law, there is no need for a person to undergo the

⁵⁶ See Article 125 of the Federal Constitution.

⁵⁷ See for example, Section 58 Administration of the Religion of Islam (State of Selangor) Enactment 2003.

⁵⁸ See Enactments that has been repealed like the Administration of Islamic Law (Negeri Sembilan) Enactment 1991, section 38(1), (3).

⁵⁹ Section 7 of the Syariah Courts Ordinance 2001 (Sarawak); section 8 of the Syariah Courts Enactment 2004 (Sabah).

⁶⁰ See for instance Administration of the Religion of Islam (State of Selangor) Enactment 2003.

⁶¹ "Zaid: Govt has to apologise to victims of 1988 judicial crisis", *The Star*, 23 March 2008.

⁶² Section 80(4) Administration of the Religion of Islam (State of Selangor) Enactment 2003.

long process of applying as a *Syar'ie* lawyer for every state if they intend to practise in those states. However, such provisions have not been fully applied by the state authorities. Applicants are still required to be interviewed and to take examinations even though they have been admitted as *Syar'ie* lawyers in another state.⁶³

A matter that has often been discussed is the need to establish a national Council of *Syar'ie* Lawyers to supervise them.⁶⁴ There is readiness on the part of the Government to establish such a body in 2004.⁶⁵ In 2008, the Government indicated that a *Syar'ie* Lawyers' Council will be established.⁶⁶ The exact nature of the council is unclear. The existence of such a body will help in supervising *Syar'ie* lawyers as is being done by the Malaysian Bar.⁶⁷

However, another option in reaching the same objective is to establish a National *Syar'ie* Lawyers Committee under the Conference of Rulers. This Committee can operate similar to the National Fatwa Committee for co-ordinating matters pertaining to *Syar'ie* lawyers. This would not necessitate any constitutional amendment.

Syariah Prosecutor

Concurrent to the expansion of Syariah offences in the Syariah Offences Enactments, the position of Syariah Prosecutors need to be strengthened. Syariah Prosecutors have the discretion to institute, carry out or discontinue any criminal proceedings at Syariah courts.⁶⁸ The existence of such wide powers must come together with the ability to make decisions with prudence, integrity and transparency.

⁶³ Information from a Syarie lawyer at the *Seminar Semakan Semula Korpus Undang-undang Islam di Malaysia: Keperluan dan Cabaran*, organised by Institute of Islamic Understanding Malaysia (IKIM) and Department of Syariah Judiciary Malaysia (JKSM), 1-2 April 2008, Kuala Lumpur.

⁶⁴ Farid Sufian Shuaib, Tajul Aris Ahmad Bustami & Mohd Hisham Mohd Kamal (2001), *Administration of Islamic Law in Malaysia: Text and Material*, Kuala Lumpur: Malayan Law Journal, pp. 297-306.

⁶⁵ "Government considering Syariah Lawyers Council", *New Straits Times*, 27 November 2004, p. 6.

⁶⁶ "Enforcing Syariah court decisions", *New Sunday Times*, 15 June 2008.

⁶⁷ Section 41 and 42 Legal Profession Act 1976.

⁶⁸ Section 78(2) Administration of the Religion of Islam (State of Selangor) Enactment 2003.

It is a bit odd if we see a Syariah Prosecutor making press statements jointly with a Director of State Islamic Religious Department concerning the decision to drop charges or prosecute or Syariah offences. A Syariah Prosecutor makes decision without fear or favour, and is not subjected to administrative directions because the law provides him with the discretion. Thus, his decision must be independent and be seen as such.

Therefore, it needs to be contemplated whether administratively a Syariah Prosecutor is independent or is subjected to higher authorities. Similarly, Deputy Syariah Prosecutors are subjected to directives of the Syariah Public, and not legally or administratively to other officers and authorities. To achieve the independence of the prosecuting officers, a Syariah Prosecution Department needs to be established separately from the State Islamic Religious Department. As the Syariah Prosecutor cum Head of Department, he will not be answerable administratively to the Director of State Islamic Religious Department.

We may also consider inserting a provision on securing tenures for Syariah Prosecutors in order for them to discharge their legal duties with integrity. References could be made to the previous position on the security of tenure for the Attorney General which stated that he can only be dismissed on the like grounds and manner as with the dismissal of judges. However such a provision for the Attorney General was repealed.⁶⁹ Such security of tenure could ensure his decisions are made without fear or favour.

Another matter that has been brought up is the creation of a Syariah Prosecutor General to act as the prosecuting officer for the whole of Federation. This proposal, although has its own merit, is too engrossed in the supposed virtue of centralisation. What is more important is a coordinating body for Syariah prosecution. A federal Department of Syariah Prosecution might be better suited to improve the prosecution office.

Nationwide Execution Of Order

Another matter that has arisen out of the distinct jurisdiction of Syariah courts according to states is the problem of service and execution of warrant, summons, and order. An instrument extracted from the Syariah court of a particular state is not enforceable in another state.

The current Enactments have provided for reciprocal recognition to enable service and enforcement in other states. For example, it has provided for warrant and summons to be capable of service and enforcement in other states

⁶⁹ Article 145 of the Federal Constitution as amended by Act 26/1963.

after validation by a Syariah judge.⁷⁰ According to this mechanism, a particular instrument needs to be validated by a Syariah judge before it can be executed. Do we need to simplify this process by constituting reciprocal recognition dispensing with the need for validation? The Enactments of all states and the Federal Territories could provide that:

*All summonses, warrants, orders, rules, notices and other processes whatsoever, whether civil or criminal, issued or made by or by the authority of any Syariah court respecting any cause or matter within its jurisdiction shall have full force and effect and may be served or executed in this state (or "in the Federal Territories").*⁷¹

This can aid the federal administration of justice in Syariah courts. According to this formula, no endorsement is necessitated because direct acknowledgement upon summons, warrant order and judgment by any Syariah court in Malaysia is provided by the State Enactment.

Inherent Power, Declaration And Injunction

Syariah courts do not have Enactments or special provisions relating to the power to grant declaration and specific relief in cases heard before them. This is different from civil courts which have the Specific Relief Act 1950 that enumerates the power of the court to make specific orders.⁷²

Even without any specific provision, Syariah courts as courts of law do indeed have the power to make appropriate orders in ensuring that justice is carried out. Additionally, Enactments on Syariah civil procedures have provided that *Syar'ie* judges have the inherent powers to issue necessary orders to ensure justice is attained.⁷³ This provision is general and wide enough to provide *Syar'ie* judges with necessary powers to issue relevant orders.

Nevertheless, it is better to have a clearer basis for such powers because of the tendency of the courts to sometimes rely more on specific provisions in the written law. Although inherent power is an adequate basis for issuing necessary orders, the courts sometime hesitate to use their power.

⁷⁰ Section 75 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003.

⁷¹ Corresponding to section 5(2) of the Subordinate Courts Act 1948. See Farid Sufian Shuaib (2008), *op.cit.*, pp. 56-57.

⁷² Specific Relief Act 1950 (Revised 1974).

⁷³ Section 244 of the Syariah Court Civil Procedure (State of Selangor) Enactment 2003.

THE FEDERAL SYARIAH APPEAL COURT

Uniformity of judicial decisions in the Federation of Malaysia has its merits. Therefore, there is a suggestion to establish a Federal Syariah Court or to be more exact, the Federal Syariah Appeal Court. This court can hear appeals from Syariah courts from all states in Malaysia. The decision of this appeal court can contribute towards uniformity in the application of the law from different states.

With regards to the mechanism, appeal can be made to the Sultan of a particular state who will then refer the matter to the Federal Syariah Appeal Court for the court to give its advisory opinion.⁷⁴ In other words, the decision of the Court would be the decision of the Sultan. The same mechanism is used for appeals to the Privy Council when an appeal is made by the civil court to the Yang di-Pertuan Agong. The Yang di-Pertuan Agong would then refer the appeal to the Privy Council for their advisory opinion. Such mechanism is used because the Privy Council is not a Malaysian court. It would be awkward for a court of one country to dispose appeals from another.

In the context of Syariah courts, the courts can “advise” the state religious authority, namely, the Sultan, concerning the decision of the appeal. To maintain the relationship between the appeal and the state from where it originates, a judge from that state should be one of members of the panel sitting for the appeal.

The suggestion above is the establishment of a new court. Perhaps, what is currently being done by the Malaysian Department of Syariah Judiciary is by instituting a panel of appeal judges who are ready to hear appeals from any state (that recognises the judges constituted in the said panel). This is another form that may achieve the objective of uniformity since appeals will be heard by the same pool of judges.

CONCLUSION

In the effort of advancing the administration of Islam, there is a need for us to re-think the way to empower the existing institutions. At the same time, ways to strengthen its operation and mechanism may also be considered. What is presented above is only some suggestions and proposals for strengthening the institution and laws.

⁷⁴ Mohamed Dzaidin Hj. Abdullah (2002), “Development of Islamic Law in Malaysia – An Overview”, *IJUMMLJ*, Vol. 10, Issue 1, p. 6.

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