

History of syariah law and structure law constitutional administrative essay

Law



**ASSIGN
BUSTER**

One of special law that has been practiced and utilized in Malaysian Judiciary System is Syariah Law. The word Syariah is an alphabetical word from Arabic language means ' path' or ' way'. It is a path or way guiding the Muslim and the revealed law governing all these matters. On the other hand, ' law' in classical Islamic theory is the revealed will of Allah. It is a divinely ordained system preceding and not preceded by the Muslim state. It is controlling and not controlled by Muslim society. Thus, there is no notation of the law itself evolving as an historical phenomenon closely tied with the society progression. Since direct access to revelation of the divine will have ceased upon the death of the Prophet Muhammad, the Syariah which having once achieved perfection of expression is in principle absolute or static and immutable. Muslim jurists come from various schools of law or Mazhabs which means school of Jurisprudence and divided into Sunni and Shiah. Malaysian law only recognizes the Mazhab of Shafie, Maliki, Hanafi and Hanbali which are Sunni Mazhab. The objective of Syariah Law is to protect the religion as the priority as well as blood lineage, dignity, life and property. Moreover, other academia defines syariah at slightly different dimension but still inline in context of meaning of Islamic Law. These are several examples of their definition of Syariah Law. First, Maudoodi said Shari'ah is means path and mode. Muslim have acknowledged their sovereign is Allah and have also admitted that the Muhammad is His Messenger holding authority on His behalf and Al-Quran has been sent by Him, thus they have entered Deen. After this, the mode in which they have to serve God and the path they have to traverse in order to obey Him is called Shari'ah. Besides that, Khurram Murad defines the word of Syariah is synonymous and interchangeably with

the word Din which means life's way, abreast or the way. Man should obey the Shari'ah in order to realize the divine will. To live in Islam is to live according to the Shari'ah. To refuse the Shari'ah or any part of it knowingly, deliberately is to refuse Islam. Moreover, Sayyid Qutb stated that Syariah is everything legislated by Allah for ordering man's life. It includes the principles of morality and human relationships, principles of administration and justice, principles of belief, and principles of knowledge. Finally, all people agree that this law is a way to always obedient to Allah and there are causes and effects of every action of a Muslim. Primarily, this law concerned to regulate the relationship of the individual Muslim with his God, the jurists had formulated standards of conduct which represents a system of private, not of public, law and which they conceived it to be the duty of the established political power to ratify and enforce. This law is applicable for both Muslim and non-Muslim citizens but more widely applied for the Muslim whose stays in this country for broad issues from general to personal case. These variations of the issues will be brought to the Syariah Court and were divided into either civil or criminal cases. It tries to describe in detail all possible human acts, dividing them into permitted (halal) and prohibited (haram). All the consequences of the law violation in Islamic Law are primarily based on the Syariah Law contained in the holy Quran as the primary source and Sunnah of Prophet Muhammad that is fix and cannot be changed by anyone with any arguments. Furthermore, there is also a collective opinion agreement by the group of religion experts called ijma' and ' qias' that construct the development of Syariah Law from time to time.

1. 1 History of Syariah Law

Geographically, strategic location of continent of Peninsular Malaysia especially Malacca with neighboring country such as Indonesia has brought the impact of the Islam knowledge successfully penetrate the local system. This was occurred through several ways. One of the ways Islam enter this region was through the Arabic traders in the Malacca harbor since 7th century. This theory supported by John Crawford in his book " History of the Indian Archipelago Volume 2" and Al-Masudi in his book called Muruj al-Zahab written in year of 943. In certain season, there preferred to rest for a while and to protect themselves from severe meteorological condition on the ocean with big wave during the Monsoon season and it takes a few months. In this harbor, they normally sell their things with other trader from whole over the world such as trader form China, Italy and India. This makes Malacca as the multi-national trade for many kinds of material as one country has one main product to be offered to other trader from different region. For example, China's trader was well-known for their tea product, silk and classical plate or teapot. This is the reason why Malacca at one time was very well-known as one of the largest trading market for traders from whole over the world. Therefore, it was said that Malacca harbor at one time has 84 different communication languages. Surprisingly, the main interaction language between them is Malay Language and was called as lingua-franca. Arabic trader has vital change to Malacca society and beginning point of Islamic way of life to Southeast Asia region when they have married local women and this causes the presence of Malay-Islamic community and this also in turn change the way of their life in terms of religion, dressing,

education system like madrasah or pondok, types of food and many more. Other than that, Parameswara which the inventors of Malacca has belief and Islam and become a Muslim during his time about 1411. All these factors were main elements to regulate society regulation. As the result, Malacca Law contains effect of Islamic knowledge. This is the strongest theory of Islamic penetration into Malay society. Actually, there were other theories that Islam that comes from India. An historian from Netherland named Snouch Hurgronje claimed that Islam comes to Malay Archipelago from India but this theory is not has much evident. Brian Harrison in his book, "Southeast Asia a Short History" stated that traders from Gujerat, India at Cambay Harbor comes to this region and spread the Islam since 13th century. Moreover, S. Q Fatimi states Sultan Malik al-Salih of Pasai has the Indian blood descent from Benggala but it does not have any strong evident or proof. One of the proofs was the discovery of gravestone of Maulana Malik Ibrahim in Pasai believed comes from Cambay Harbor, Gujerat. In contrast, Islam in Southeast region also was said brought from China by its traders since year of 1613. A scientist from Spain named Emanuel Godinho Eradia claimed Islam was accepted by the people of Pattani, Thailand before it was spreaded to Malacca by Parameswara in 1411. The proof of evidence to support this theory is the discovery of gold dinar in 577 Hijrah (year of 1156) with words " al-Julus Kelantan". Good diplomatic relationship between China and Arab causes the expension of trading power in Canton Harbor as the center of trading market as stated in Al-Masudi in the book of " Muruj al-Zahab". When there is a small war during Dinasti Tang and mostly Arabic people were killed. The rest was escape and immediately went to Malacca.

Few artifacts like gravestone with year of 1082 was found in Pahang. However, among these theories, all agreed that Malacca is the origin and center of rapid expansion of Islamic community in Southeast Asia region. Normally, there was a change of verbal statement into a black and white statement on the paper before a law is implemented into the system of local society. In fact, if the presence of non-written law in an area, there will be more illegal issue and bias judgment made without wise control. The word of Sultan also is the influence of Arab word which means the King. Influence of Sultan who has highest power of authority in Malacca frequently met Ulama'. Sultan Muzaffar Shah tried to propose and implement Islamic Law through the regulation of Malacca Canon Law and Malacca Law about 1446 to 1457. Both of this law encourages the implementation of Islamic Law in other state such as contents in Johor Law, Kedah Law, Sungai Ujong Law and 99 Perak Law. Besides text of Malay History, source of law in Malacca was regard to two types of law such as Malacca Law and Maritime Law of Malacca. Maritime Law of Malacca with 25 sections was implemented before Malacca Law because Malacca economy is much concentrate on the business near the ocean and harbor but this law was considered as miserable, not properly arranged as there were unclear division of criminal, civil and constitution law. For example, incest which means people who engaged with illicit sex or zinah, there was no clear division of Islamic Law and Common Law locally. The decision was depend fully on the judges to choose the law. Due to this reason, this law was called as digest by several Western historians like Wilkinson and Hooker. During the mighty time of Sultan Muzaffar Shah, Malacca Law has change over the time from 19 to 22 and lastly to 44

sections. As we know, many historians agreed that there were 44 sections of Malacca Law. Influence of Syariah law in this law was obvious. For example, Sultan Alauddin Riayat Shah effectively implements the law of steal case where the defendant will be penalized to become a veil. The values of Islamic Law already absorbed in the Malay society since the beginning of the implementation of Malacca Law. In Malaysia, Syariah law has been introduced as one of legal law implemented for Malaya citizen before the era of British colonization but it is called Malay-Muslim Law because of the mixture of Malay custom and Islamic elements. Besides that, there was slightly collision between Islamic law and common law such as Adat Pepatih and Adat Temenggung a couple of decades ago since 13th century. Since British colonization, all related to the Islamic Law was not permitted to mix with other contemporary law (administrative law) because it is their colonization principal. To use the term Islamic Law in the sense of the laws which govern the lives of Muslims is a distinction between ideal doctrine and the actual practice of Syariah Law as expounded by the classical jurists and the positive law administered by the court. The standards of religious law and the demands of political expediency often did not coincide and perhaps the arbitrary power of the political authority induced the jurists to adopt a discretionary policy of ignoring rather than denying. Johor has become the first state that introduced the Islamic Constitution since 1895 in 20th century under the power of Sultan Abu Bakar called Undang-undang Tubuh Kerajaan Johor 1895. Through this constitution, Islam has officially become an official religion in this state. Recently, it was developed and more noticeably being considered as special law and any other law implemented in this country

cannot make intervention to this law. Although this law regulates law in all aspects, however in Malaysia, it seems obviously only applicable for certain issues and not well-rounded. In Malaysia, this law is limited only for personal matters, marriage and divorces law, wealth division before or after death, tithe and criminal matter. Act 505 under the Administration of Islamic Law (Federal Territories) Act 1993 emphasizing Islamic Law's enforcement and administration, the constitution and organization of the Syariah Courts and its related matters.

1. 2 The Sources of Syariah Law

The study of law and theology in Islam went hand-on-hand. No distinction was made between rules of law and rules of religion. The term ' fiqh' or ' understanding' applied to this joint body of learning which is understand of the word of God and of man's duties under it. The discipline of the law rather than theology played the primary part in the development of this understanding, for law became the central discipline of Islam. The term ' fiqh' thus came to have exclusively legal understone. Later the word " syariah" or the ' the way' became the accepted expression for describing this discipline. It is important to remember of Islamic Law that it deals with two broas aspects of regulation. First, there is the set of law dealing with man's duties towards God (' ibadah'). There are 5 pillars of Islam such as the profession of the faith, prayer, fasting, almsgiving and pilgrimage. This is always dealt with first in the ' fqh' book. Then, it follows the laws governing human relations (muamalat) such as trading and munakahat like marriage, divorce and succession. The primary sources of Islamic jurisprudence are the Quran and the Sunnah. Besides that, there are also dependent sources of the

law such as ' Ijma' (Consensus) and Qiyas ((reasoning by analogy). The Quran is the bedrock of Islamic jurisprudence. Amidst the vast mass of juristic writing one turns again and again to the basic words of Quran to ensure that argumentation and the deductive process have not taken one astray from the foundation of it all. The earlier revelations during the Meccan period deal largely with questions of belief and morals. After the prophet Muhammad migrate to Medina, that Muslims live in an organized society and it is mainly during this period that the principles regarding such as matters as contracts, torts, crime, succession, mercantile law, constitutional law and international law were revealed. In Islamic law, the role of the interpreter assumes even more importance in the light of the view that the Quran contains many layers of meaning. The more devout and learned the interpreter, the more the meaning of each Quran passage expands. The word means literally a manner of acting, a rule of conduct and a mode of life. All of these were referred to prophets Muhammad Abdullah, his word, his conduct and his action as narrated in hadith (report of particular occurrence) on tradition. Both of them was integrated as sunnah support or explain in detail the Quran's meaning. In addition of Syariah Law's resources, ' ijma' or consensus is one of its sources where if one cannot find either a passage from Quran or a hadith bearing on the matter in hand, then one turns to a third source. There is certainty of freedom from error in the communal mind, thus it is a detail explanation of primary sources. An obvious limitation upon the authority of ijma' is that is must not be in conflict with Quran or the Sunna. Ijma' played a most important role as it provide development of the law to meet the needs of changing times rather than freezing it into an

unyielding and static mold. Qiyas is the source of law that used when all these tree sources before are fail to provide a rule to solve the problem in hand. Jurist must strive by devoted study to derive appropriate rule by logical inferences and analogy. Logical reasoning by analogy was known as qiyas and was the subject of philosophical inquiry in sorting out the underlying principle and separating it from the particular facts of the past and present cases. Nowadays, the pressures for modernization are at such a level of intensity that sometimes extended into areas which on later reflection were deemed to have gone too far. Therefore, there is a need of solution to ensure the Syariah Law still can implemented into the society regardless of the time and place.

1. 3 Structure of the Syariah Court and its Jurisdiction

Syariah Law has been implemented in most of the states in Malaysia. In order to make this law more efficient and reliable to solve any issues related to Islamic matter for Muslim, Syariah Court has been established legally in the Judiciary System in this country under the enactment of Malaysian Constitution. Generally, it is smaller court and being considered as low-level court if compared to other kind of court in Malaysia due to its limited aspect of cases and mostly applicable for Muslim community only which is relatively the largest community than other religion. Every state has slightly different aspect of implementation of Syariah Law especially for civil matter but all Syariah Law in Malaysia was controlled and monitored by the Jabatan Kehakiman Syariah Malaysia (JKSM). JKSM is led by Syariah Chief Judge of Malaysia. The motto of JKSM is ' Syariah is the Basic Justice'. One of JKSM function is to formulate policies and strategies to improve the coordination of

organizational performance Syariah courts in the states. In Article 121(1A), Constitution of Malaysia has prominently shows on how special the Syariah Court is. Syariah Court was constructed under the ordinance of Islamic administration of each state for the sake of Muslim community and justification of their cases. Islamic law that has been applied is the Islamic principle of justice that has been regulated to become a law. Despite of possibly different implementation of justification of Syariah Law in particular states, this court has limited authority and power for certain issue, restricted by the local authorities regulation. The Syariah Court is classified into three categories Syariah Subordinate/Lower Court, Syariah High Court and the highest level is Syariah Appeal Court. Each of these levels was approved by DYMM Sultan Agong of Malaysia for state with no King or Sultan such as Malacca, Penang and Negeri Sembilan. Meanwhile, Syariah Court is under the power of the King/Sultan for the state who has their own King or Sultan like Johor, Terengganu and Selangor with advises from their Great Minister. Previously, Syariah Court actually was handled by State Islamic Council (Majlis Agama Islam Negeri) with utilization of former name such as Kadi Court and Great Qadi Court which are recently known as Syariah Subordinate/Lower Court and Syariah High Court respectively. Each level of courts has their own authority and power of justification for any cases related to Muslim matter. The jurisdiction of the Syariah Court is distinguished into criminal and civil. There are different procedures apply in both jurisdictions. This law applied on only a Muslim. A person is a Muslim by birth or by way of conversion to Islam. Thus, they can go to the Syariah Court. One of important thing to notice is the Syariah Court can hear cases

where a non-Muslim is also a party to the proceedings. The Federal Constitution does not clearly state that the non-Muslim cannot be called as a witness.

1. 3. 1 Syariah Subordinate Court

Syariah Subordinate Court is judging all the cases that occur inside the districts in a particular state. Besides that, Syariah High Court is handling more serious matter and cases in state-level. It also can revise the judge decision made in level of Syariah Subordinate Court. Meanwhile, Syariah Appeal Court is the highest level of court in Malaysian Syariah Law that functions to hear appeals from the Syariah High Court. The decision of this court will be final and cannot be revised again or objected by any other court. In aspect of Syariah Court Membership, generally this courts is comprises of Syariah Judge Leader and Syariah Court Judges. Syariah Judge Leader is inaugurated by the DYMM Sultan Yang Dipertuan Agong of Malaysia with advice from the Prime Minister after negotiation with Majlis Agama Islam or Islamic Council. There are the criteria to be selected as Syariah Judge Leader such as the person must be Malaysian citizen, expert and knowledgeable with Syarak Law and has been hold the title as Judge of Syariah High Court or Qadi or Syariah Defender for at least 10 years in a row. In addition, Syariah Court Officer is consists of a Islamic Defender as Defender for criminal issue and Officer of Checker and Avoider of Sexual Immoral Officer which function as investigator, adviser and receiving complaints from the public so that they can help the investigation of all cases that has been reported to the Syariah Court. Syariah Subordinate Court is the place of most cases related to Syariah Law, except on matters

pertaining to custody of children and the division of matrimonial assets which are handled under the jurisdiction of the Syariah High Court. This court has jurisdiction as indicated by state legislation over criminal suits liable to punishment up to RM2000 and/or imprisonment up to two years and civil suits in which the value of the subject in dispute is up to RM100000 or rights not estimable in cash. However, in Selangor, the minimum amount is RM100000.

1. 3. 2 Syariah High Court

This court is higher level court than Syariah Subordinate Court. One of the functions of the Syariah High Court hears appeals from the Syariah Subordinate Court that then will make a new decision of the previous judge decision in lower court. This court also has appellate jurisdiction over Subordinate court decisions in civil suits of RM500 or more and criminal suits. At this court, the punishment must exceed RM3000 and maximum of 2 years in imprisonment. This court has original jurisdiction as indicated by state legislation in criminal suits and civil jurisdiction over family matters, intestate and testate succession, gifts and waqaf, in cases where all the parties are Muslim. Furthermore, any claim above RM50000 is also heard in the Syariah High Court. For matters related to custody of children and the division of matrimonial assets, these would directly be heard and judged by the judges in Syariah High Court, not Syariah Subordinate Court. It is the same with other state in Malaysia. In this court, the member consists of Chief Judges of Syariah High Court. The criteria of selected Judges are Malaysian citizen, 10 years or more as a Judge, Qadhi, Registration Officer in Syariah

Subordinate Court, and should minimum of 10 years worked as Syariah Lawyer.

1. 3. 3 Syariah Appeal Court

The Syariah Appeal Court hears appeals from the Syariah High Court. There are 4 judges to judge any matter in Syariah Appeal Court. They are a Chairman and two Syarie Judges as specified by the Chief Syarie Judge. This court gives similar punishment of Syariah High Court and not be exceeded of any cases that needs to re-evaluate the decision made by judges at Syariah High Court. Mostly, the high-profile cases would refer this court to satisfy their rights and insists what they think they should get from the court.