

## INCULCATION OF ICT IN MALAYSIAN SYARIAH COURTS

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### ABSTRACT

*This paper explores the integration of Syariah Courts of various states in Malaysia for reasons of standardisation via the inculcation of information and communication technology (ICT). Methodology used is librarian and archived legal search with review on binding precedent decisions and exploratory discussions on major reported cases. It first introduces the legal system in Malaysia with focuses on the Syariah Courts. This is followed by an explanation on the inculcation of e-Syariah initiative by the judiciary. The next component is discussions on the inculcation of e-Syariah initiative and the interfaced problems with legal jurisdictions of the courts. It concludes with overall overview of inculcation of ICT in lieu with the legal frameworks.*

**Keywords:** *ICT, Syariah Courts, syariah laws, courts' standardisation, jurisdictions*

### INTRODUCTION

Information and communication technology (ICT) has been proposed and inculcated in Syariah Courts for a better and speedy management through standardisation of practice thus facilitates in resolving backlog cases. However, speedy manner does not automatically constitute speedy justice.

The most significant purpose of inculcation of information and communication technology (ICT) in Syariah Courts is the integration of Syariah Courts of various states in Malaysia which provides for the standardisation of practice. However, there are cases where the inculcation of ICT took a step behind from authoritative legal jurisdictions of syariah laws in different states. Parties were awarded with different courts' orders from different states on the same subject-matters. For instance, the High Court in Alor Setar granted the custody of children to the mother but the father obtained a custodial order for the same children from the Syariah Court in Shah Alam.

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This paper focuses on exploring the legal predicament still faced by parties although ICT has been inculcated in the Syariah Courts for better management of court records. The paper concludes with overall overview of inculcation of ICT in lieu of legal and policy frameworks that are best suited for better adjudication.

## **MALAYSIAN LEGAL SYSTEM**

Malaysia administered dual legal systems, based on both English common law and Islamic law. Civil Courts have jurisdiction over the majority of laws, including contracts, torts, property, crime, constitutional and administrative matters. Syariah Courts which are established and regulated by the states, have jurisdiction over Islamic family law matters and applies only to Muslims. A significant amendment in 1988, Article 121(1A) of the Federal Constitution states that the Civil Courts have no jurisdiction in matters that fall within the Syariah Courts jurisdiction. Nevertheless, the conflict of jurisdiction concerning Syariah and Civil Courts are not completely solved. The aim of the amendment which created in Article 121(1A) was in many ways to avoid for the future any conflict between the decisions of the Syariah Courts and the Civil Courts. Unfortunately, Ahmad Mohamed Ibrahim (1989) purported that it appeared to have caused even more confusion, uncertainty and conflict.

Islamic law applies only to Muslim citizens and includes only matters specified in the State List of the Federal Constitution such as matrimonial law, charitable endowments, bequests, inheritance, and offences that are not governed by federal law (matrimonial offences, khalwat (close proximity), and offences against the precepts of Islam). The power to legislate these matters lies with each state legislature and state Sultan, with the Federal Parliament only legislating such matters for the Federal Territories of Kuala Lumpur, Labuan and Putrajaya. Since there are 13 states and one federal jurisdiction, there are 14 different sets of Islamic laws in Malaysia. In 1984, the Federal Parliament enacted the Islamic Family Law (Federal Territories) Act 1984 (Act 303) for the Federal Territories that was designed to be a model law for the other states. Many of the states have adopted slightly altered versions of this model. Syariah law, therefore, varies from state to state.

The Federal Constitution clearly defines the separation of power between the Federal and State government. List 1 of Schedule 9 of the constitution provides that all matters of civil and criminal law and legal administration fall under the Federal's list, whereas List 2 provides that Islamic law matters are vested to State governments. As a result, Civil and Syariah Courts become separate independent entities with their own specific jurisdiction as provided by Article 121(1A) of the constitution.

ICT is inculcated as one of the many mediums to avoid encroachment by the State laws on the Federal legislative domain, or vice versa.

## **INCULCATION OF ICT IN MALAYSIAN SYARIAH COURTS**

The backlog of syariah cases shuns society from referring their cases to the Syariah Courts. There are various reasons the courts took lengthy time to settle a case such as limited number of Syariah Courts' judges, officials and staffs comparing to the high volume of syariah cases and limited budget allocated for syariah departments resulting in poor infrastructures, misunderstanding of court's instructions, lack of customer friendly attitude, vague understanding of legal procedures, etc. The Federal government does not have direct control over the administration and functioning of Syariah Courts. On the other hand, State governments are dependent on the Federal government for budget allocations. Wan, M. S. W. S. & Haider, A. (2012) stressed that the most significant reason was the unavailability of complete information relating to the case as and when required. In certain scenario, the cases lingered on for more than a year just because of the fact that information available to the judges was incomplete, hence they could not arrive at a conclusive decision.

Over the years, there has been significant discrepancy and mismatch between the administration and functioning of Syariah Courts throughout the country. This discrepancy and mismatch is restricted to the workflow of the courts rather than in the decisions carried out by the courts. Thus, since early 2000, Malaysian government has been proactive with its e-government initiative. This e-government initiative has been introduced to maintain the steady flow of Multimedia Super Corridor (MSC) flagship application. Under this initiative, Syariah Courts were selected to become the pilot project named e-Syariah project. With the implementation of e-Syariah, the Syariah Judiciary Department of Malaysia or *Jabatan Kehakiman Syariah Malaysia* (JKSM) is the department responsible for all affairs relating to syariah law enforcement including provision of staff, facilities, physical and logistics instruments, procedures and service quality improvement. In consistent with the government's aspiration in ICT development efforts for all sectors in Malaysia, JKSM was given the mandate as the main driving force in realising the 7th E-Government Prime Application, the e-Syariah Project. Referring to Wan, M. S. W. S. & Haider, A. (2012), its administration has become the reference point not only for Malaysian public organizations such as the National Registration Department and Police Department but also by various overseas organizations whom interested in learning and sharing the experienced gained by the courts.

## **ICT : ELECTRONIC SYSTEM IMPLEMENTATION**

### **ICT: e-Syariah Initiative**

The quality of information relating to a case is essential in reaching a conclusive and fair verdict. This would rely on the comprehensiveness and availableness of records. All relevant documentation relating to the case conforms to certain standard of quality and is accessible, available, retrievable and dependable as and when required. The pervasiveness of information and communication technologies (ICTs) provides new opportunities for court automation and information management in judiciary. Improperly managed records deprived the aim of judicial institutions to bestow legal rights to individuals and society.

### ***ICT: Electronic Records Management***

The lifecycle management of court records is the centerpiece of e-Syariah initiative. These records are further integrated with other e-government initiatives so as to ensure speedy and effective service for various government department as well as society at large. Using these integrated records, other departments such as the religious departments, home ministry, police, immigration and customs are able to identify potential hazards and areas of concern. Furthermore, with the availability of information to general public, *qadhis* around the country are able to access information relating to the same or different cases which is a great uplift in reviewing, understanding and applying interpretation or sources of syariah laws.

### ***ICT: Interfaced Problems***

Responding to these opportunities and pressures, courts of law are embracing ICT at various levels to provide faster, reliable and consistent service to the society. While the courts of law embrace ICT, few problems arose such as:

- there are increased demands on government to provide information to citizen for awareness of ICTs.
- records in court system consists of various magnitudes in terms of significance, consequences, cruxes and substances. There are court proceedings, evidences, statutory declarations, precedents from old cases and even references to different and variuos sources of law.
- IT literacy among the public still exist thus not all information are accessible, available or retrievable.

This makes information management in general, and record retrieval in particular an intricate task.

### ***ICT: Contextually Court Records Management***

A research question was posed by Wan, M. S. W. S. & Haider, A. (2012), on how can ICTs allow for better management of court records in Malaysia. This is due on the fact that records management has technical, organizational, social and cultural dimensions. Therefore our knowledge of reality can only be gained through social constructions such as consciousness, shared meanings, documents, tools and other artifacts. Thus method of qualitative interpretive approach was suggested which do not predefined dependent and independent variables but focuses on the complexity of human sense plus common sense as the situation emerges. In this case, it is the way people manage the life cycle of records management in Syariah Courts is imperative. An interpretive task which provided a rich understanding of the contextually oriented court records management issues was crucial. Documents should be reviewed and workflows should be observed on how records are managed, inspected, stored, retrieved and retired in Syariah Courts.

### ***ICT: Efficient Service Delivery.***

In court administration, the large quantity of records and lack of human resource gives the utmost challenge to the court officials to handle case management effectively (Hamzah 2010). Given such a situation, the need for effective records management system is mounting. There is also a pressing need for a clear definition of legal framework (Johare 2007). Moreover, the increase demands of the public need to be catered to. Any shortcomings resulted from the poor management in public service delivery may lead to the question of integrity of public sector, as well as the issue of survival, respect and vigor as a nation (Wan, M. S. W. S. & Haider, A. 2012).

## **MAJOR REPORTED AUTHORITIES**

### **Custodial dispute**

Several case laws provide a general background against which problems in relation to child custody might be assessed. Pertinent cases deal with custody and the rights of a non-converting spouse against a converted spouse when one spouse converts to Islam and “crosses over from one jurisdiction to another”, and typically include disputes where the children of the converted spouse are themselves converted to Islam without the knowledge or consent of the non-converting spouse as a ploy to secure custody through the Syariah Court system.

In the case of *Ganga Devi a/p Chelliah v Santanam Damodaram* [2000] 2 AMR 1485, the parties were Hindus and married in 1987 according to Hindu rights. The husband converted to Islam and obtained an order of the Alor Setar Syariah Court giving custody of the son to the husband. It was held that because of Article 121 (1A) [of the

Constitution] the High Court has no jurisdiction to set aside the order of the Syariah Court (Teoh, L. 2003).

In *Shamala Sathiyaseelan v Dr Jeyaganesh C. Mogarajah & Anor* [2004] 2 CLJ 416, the parties were Hindus and married in 1998 according to Hindu rights. After divorce, the High Court initially granted Shamala the custody of her two children. However, the father, Ridzuan, who converted to Islam, obtained a custodial order (ex parte) for the same children from the Syariah Court in Shah Alam. The Civil Court cited the defendant (Ridzuan) for contempt and ordered that the children be returned to the plaintiff (Shamala). The Civil Court also declared that the Syariah Court order was not binding on a non-Muslim and set aside the warrant of arrest issued by the Syariah Court.

Subsequent to this High Court decision, Shamala applied to the Civil High Court for a declaration that the conversion of the minor children to Islam was a nullity. The Civil Court dismissed Shamala's application on the ground that the Civil Court did not have the jurisdiction to hear the matter and only the Syariah Court could adjudicate on such matters. Further, the learned Judge agreed that Shamala did not have the locus to appear in the Syariah Court.

While cases of *Ganga Devi a/p Chelliah v Santanam Damodaram* and *Shamala Sathiyaseelan v Dr Jeyaganesh C. Mogarajah & Anor* both addressed situations where one spouse in a custody dispute "crosses over from one jurisdiction to another", they are only ostensibly relevant to the situation where a spouse in a custody dispute converts out of Islam and anticipates denial of parental contact by reason of being an apostate (Ngo, F. Y. (undated)). This accord with the structure of Malaysia's dual legal system where the practice of Civil Courts relinquishing jurisdiction in cases where state Syariah Courts have concurrent jurisdiction in accordance with Article 121(1A) of the Federal Constitution.

The inculcation of ICT in such cases does not weight much merits. The paramount argument lies in the issue of jurisdictions and states' authorities. ICT as yet has to be enhanced and upgraded to follow along this line. This was pointed out by Zin, N. M (2005), in order to avoid a tug of war situation since both parents are equally responsible for their children.

Referring to the case of *Latifah Bte Mat Zin v Rosmawati Binti Sharibun* [Civil Appeal No 02-39-2006(W)], that if laws are made by Parliament and State legislatures in strict compliance with the Federal List and State List there should not be any situation where both courts have jurisdiction over the same matter or issue.

### **Polygamous Marriages**

Each state in the country decides on its own Muslim family law. All states in Malaysia have chosen to allow polygamy albeit conditions. Muslim men face several restrictions

under the law before they can marry a second (or third or fourth) wife. However, these conditions are not strictly applied. In Perak, for example, the decision to contract polygamous marriage is made solely by the husband and the Syariah Court is not required to grant permission. Kelantan and Terengganu have deleted the specific conditions for polygamy, leaving the Syariah judge to use his own discretion to decide on whether a husband is eligible to take another wife. Perlis allowed polygamous marriages without the consent of the existing wife.

This means that the laws are more stringent in some states than others which has created some loopholes. For example, in order to avoid the laws in their own state, some husbands have gone across to states within Malaysia, and even across international borders, to contract polygamy without the consent of the existing wife. As some state laws require the courts to seek the views of the existing wife or wives, some husbands have gone across borders to marry another woman to avoid the law in their own states.

Again, the significant of inculcation of ICT in such cases are futile. In this matter, it is not possible to check if your intended husband is already married or not although the law imposed that the husband has to register his marriage. There is still no common computerized register of Muslim marriages, which means that the Courts and State Religious Departments are not able to establish immediately if the intended husband is already married or not. So, it is actually very difficult to ascertain the marital status of the intended husband. One would actually end up having to check every state to find this information.

### **The Encroachment of State Legislatures into Federal Matters**

Pursuant to Schedule 9, List II, Item 1 of the Constitution, State assemblies are empowered to create and punish offences against the precepts of Islam, except as regards matters included in the Federal List. The Federal Court has made clear there are two constitutional qualifications to the exercise of this power:

(a) Where an offence is already in existence in the Federal Penal Code, for example, a state assembly cannot create a similar offence, for to do so would offend against the exception in Item 1 that no further state legislation is allowable where ‘matters [are already] included in the Federal List’.

(b) Moreover, since Item 4(k) provides that ascertainment of Islamic law and other personal law is a federal matter, there are swaths of Islamic matters which come under Federal purview. The Federal Court pointed out that banking, finance and insurance are matters listed in the Federal List, accordingly the question whether a particular product of banking, finance or insurance is syariah-compliant falls within Item 4(k) and is a federal matter.

As stated by Professor Shad Saleem Faruq (Malaysian Bar, 2007), many examples of state criminal enactments which contravene both the spirit and letter of Schedule 9, List II, Item 1. For example, the Syariah Criminal Offences (State of Penang) Enactment 1996 contains many provisions that overlap with federal criminal offences. Among them are:

- Section 7 on insulting or bringing into contempt the religion of Islam. This overlaps with section 298 of the federal Penal Code;
- Section 8 on deriding Quranic verses or Hadith. This too may be covered by section 298 of the Penal Code;
- Section 18 on gambling. This overlaps with the federal Gaming Tax Act 1972 (Act 65);
- Section 25 and 26 relating to *liwat* and *musahaqah*. These are covered by sections 377A to 377C Penal Code;
- Section 30 about giving false evidence which is also covered by section 191 of the Penal Code;
- Section 32 relating to the defiling of a mosque. This is similar to section 295 of the Penal Code;
- Sections 43 to 46 on Abetment. These sections overlap with sections 107 to 114 of the Penal Code.

There are many encroachment of State Legislatures into Federal matters which still unsolved by the inculcation of ICT.

## **CONCLUSION**

Both Civil and Syariah Courts stood side by side complementing each other in the best interest of the parties amidst few conflicting decisions in resolving the case. How best interests of the parties are best served in Syariah Courts with special inculcation of ICT? ICT via its electronic system implementation has increased the disposal rate of backlog cases in Syariah Courts. However, e-Syariah initiative does not inculcate blanket standardisation as there are a number of issues yet to be resolved such as jurisdictional conflict between Syariah Courts and Civil Courts. Legal jurisdictions of states should be given paramount studies since it regulates technology instruments in the legal framework of courts. Uniformity in ICT needed to be clarified, enhanced and standardized in all Syariah Courts with consideration of anticipated problems in relation of all syariah



matters and legal consequences and uniformity between the relevant law as well as the supporting mechanism of local law enforcement.

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