



## **Administration of Justice: Syariah Court**

**Zulkifli Hasan, PhD**

# + Introduction

- JSKM
- Syariah Court
- Jurisdiction of Syariah Court
  - Syariah Subordinate Court
  - Syariah High Court
  - Syariah Appeal Court
- Shariah Federal Appeal Court
- Issues

# + DEPARTMENT OF SYARIAH JUDICIARY (JKSM)

- On July 3, 1996 the Cabinet agreed to the proposal to Restructure Syariah Courts throughout Malaysia through the following measures:-
- To establish JKSM by the Federal Government headed by the Syariah Chief Justice of Malaysia, who is also Head of Open Service scheme for Syariah Officers.
- To create an organizational structure JKSM
- To create four (4) posts of Judge of the Syariah Court of Appeal to reconsider the appeals cases at the Court of Appeal in the states and federal territories.
- To Maintain the structure of the State Syariah Court and that of Federal Territories, including the commissioning of Syariah Chief Justice and Syariah Officers.
- To create a Open Service Scheme for Syariah Officer.
- The Federal Government will bear the cost of Syariah Officer.

## + Aims of JKSM

- To supervise and coordinate the administration of Islamic Law and Syariah Courts and
- To uphold and upgrade Islamic Judicial institutions.

## + *LIST II - STATE LIST*

- 1. Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the DEFINITION and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public places of worship,

## + Cont....

- creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, Organisation and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law, the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom

## + Article 121 (1A)

- "(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts."

*In force from: 10 June 1988*

## + ESTABLISHMENT OF SYARIAH COURTS

- State Legislatures have been vested with the powers to establish the Constitution, organization and procedures of the Syariah Courts in the respective states.
- see List 2-State List, Item 1 FC
- For the FT – similar powers were given to the Parliament in establishing the Syariah Courts in the FT, in which the establishment of the institution being similar to the other states in Malaysia.
- See List 1-Federal List, item 6(e) FC

## + Effect of Schedule 9 FC

- Making Shariah Court as State Court.
- As state Court
- the extent of the jurisdiction of the Shariah Court is thus territorial; limited within the boundaries of the respective states only.

## + JURISDICTION OF SHARIAH COURTS

- “..the Constitution, organisation and procedure of the Shariah Court which shall have jurisdiction only over persons professing the religion of Islam and in respect of any the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far conferred by federal law..”
- The Federal Court has decided that the Syariah Court obtains jurisdiction directly from Item 1 of the State List. This is because Item 1 itself clearly states that the Syariah court has jurisdiction over matters stated in Item 1. See *Majlis Ugama Islam Pulau Pinang Dan Seberang Perai lwn Shaik Zolkaffily Bin Shaik Natar & Ors* [2003] 3 MLJ 705; *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan Lain-lain* [2007] 4 MLJ 585.
- *Unresolved Issue: 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.

## + Cont...

- In pursuant thereto, it is concluded that:
  - 1. Jurisdiction of Syariah Courts is limited to Muslims only
  - 2. Jurisdiction is only in respect of matters enumerated in List 2 of the 9<sup>th</sup> Schedule of the FC
  - 3. The Syariah Court Criminal jurisdiction is only in respect of Creation and Punishment of Offences against the Precepts of Islam and in so far as conferred by federal law
  - 4. Syariah Court It is not a court of inherent jurisdiction.

## + SYARIAH COURTS (CRIMINAL JURISDICTION) ACT 1965

- An act to confer jurisdiction upon Courts constituted under any State law for the purpose of dealing with offences under Islamic law.

## + Criminal Jurisdiction of Syariah Courts

- The Syariah Courts duly constituted under any law in a State and invested with jurisdiction over persons professing the religion of Islam and in respect of any of the matters enumerated in List II of the State List of the Ninth Schedule to the Federal Constitution are hereby conferred jurisdiction in respect of offences against precepts of the religion of Islam by persons professing that religion which may be prescribed under any written law: Provided that such jurisdiction shall not be exercised in respect of any offence punishable with imprisonment for a term exceeding three years or with any fine exceeding five thousand ringgit or with whipping exceeding six strokes or with any combination thereof.

## + Cont...

- Validation
- All offences under Islamic law which before the commencement of this Act in relation to the States of Peninsular Malaysia and which before the commencement of the Syariah Courts (Criminal Jurisdiction) (Amendment and Extension) Act 1989 in relation to the States of Sabah and Sarawak, had been tried by any of the Courts aforesaid shall be deemed to have been validly tried as if jurisdiction in respect thereof had been conferred on those Courts by Federal law.

# + **ADMINISTRATION OF ISLAMIC LAW (FEDERAL TERRITORIES) ACT 1993**

- S.46 Jurisdiction of Syariah High Court
- S.47 Jurisdiction of Syariah Subordinate Courts
- S.48 Appeals to Syariah High Courts
- S.49 Application for leave to appeal
- s.51 Supervisory and Revisionary jurisdiction of the Syariah High Court
- s.52 Jurisdiction of Syariah Appeal Court
- S.53 Supervisory and Revisionary jurisdiction of the Syariah Appeal Court

## + Syariah subordinate courts

- The Syariah Subordinate Courts has only original jurisdiction.

- Civil

Jurisdiction covers all such proceedings as the Syariah Court is authorized to hear but limited to the proceeding in which the amount or value of the subject matter in dispute does not exceed RM50,000 or the monetary value cannot be estimated.

- Criminal

Jurisdiction over offences under the Syariah Criminal Offences (Federal Territories) Act 1997 or any other written law prescribing offences against the precepts of Islam for which the maximum punishment does not exceed RM2,000 or imprisonment of 1 year or both.

## + Syariah High Court

- The Syariah High Courts has:
  - a. original
  - b. appellate
  - c. supervisory and revisionary jurisdiction.

# + SHC: Original Jurisdiction

## ■ Civil

- To hear all matters provided under the Administration of Islamic Law (Federal Territories) Act 1993 and other matters where jurisdiction is conferred by any written law.

## ■ Criminal

- Over offences punishable under the Syariah Criminal Offences (Federal Territories) Act 1997, the Islamic Family Law (Federal Territories) Act 1984 or any other written law prescribing offences against the precepts of Islam.

## + SHC: Appellate Jurisdiction

- **Appeals against the decision of the Syariah Subordinate Courts**
  - **in civil and criminal matters.**
- **Civil**—where the amount is not less than RM1,000, concerns the status or maintenance of a dependant. However, no hearing of appeals against decision made by consent.

- **Criminal** -

**Hearing of appeals against the acquittal, conviction or sentence**

**Powers to dismiss appeals, convictions or sentence**

**Order the trial court to make further inquiry**

**Reverse any order of the trial court; or**

**Order a retrial.**

## + SHC: Supervisory and Revisionary Jurisdiction

- **The Syariah Court may at its own motion or at the instance of any interested party in any stage of any proceedings in any Syariah Courts, call for and examine any records and give such directives as justice may require.**

## + Syariah appeal court

- **Syariah Appeal Court has Appellate ; and Supervisory & Revisionary Jurisdiction.**
- **Appellate Jurisdiction**
- **Hearing of appeals from the Syariah High Courts.**
- **It may also determine question of law of public interest arising in the course of appeal in the High Court from the Subordinate Courts.**

## + SAC: Supervisory & Revisionary Jurisdiction

- **The Syariah Appeal Court may call for and examine, at any stage of any proceedings (civil & criminal) in the Syariah Court the records of such proceedings and give such directions as justice may require.**
- **The court may do so either on its own motion or at the instance of any party. In such a case, the proceedings in the Syariah High Courts shall be stayed pending further order of the Syariah Appeal Court**

+ Q1 Whether Article 121 (1A) resolves the issue of conflict of jurisdiction?

- *No: Shahamin Faizal Kung v Asma Haji Junus* (1991) 3 CLJ 220
- The civil court had jurisdiction over matters custody of the children involving muslim parties because the Article 121 (1A) was not made retrospective.

## + Cont...

- Yes: *Mohamed Habibullah v Faridah Dato Talib* (1992) 2 MLJ 793
  - The Supreme Court concluded that the application of the concept of the supremacy of the FC under Art 4 (1) does not require for the amendment of the FC to be made retrospectively. Once it is determined tht Sy Ct have jurisdictions on a matter, Civil ct's jurisdiction is excluded.
- *Dalip Kaur v Pegawai Polis Daerah* (1992) 1 MLJ 7
- The correct approach is to firstly see wtr the syariah court has jurisdiction and not wtr state legislature has power to enact the law conferring jurisdiction of the syariah court.

## + Q2 Whether the state needs to express confer jurisdiction?

- The State must enact those legislation
- “Article 74(2): Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.”
- To what extent did State Legislatures enact?

## + Must Confer Jurisdiction

- **Ng Wan Chan v MAIWP (1991) 3 MLJ 487**
- **Orders to declare that the deceased was not a Muslim.**
- **Since there is nothing to show that the Syariah court has the jurisdictions conferred on it by any written law to determine the issue of whether a person is or is not a muslim at the time of his death, this HC is not precluded from determining that issue and consequently to hear this application.**

## + Cont...

- **Lim Chan Seng v Pengarah JAIPP (1996) 3 CLJ 231**
- **The blame for the inability of Syariah courts to exclusively decide such an issue should be born by State Legislative Assemblies because of their failure of conferring the required jurisdiction.**
- **See Barkath Ali v Anwar Kabir (1997) 4 MLJ 389**
- **In the estate of Tunku Abd Rahman Putra (1998) 4 MLJ 623**

## + Cont..

- **Shaikh Zolkaffily Bin Shaik Natar & Ors (Re Estate Of Shaik Yusof) V. Majlis Agama Islam (1997)**
- Did Article 121 (1A) give jurisdiction to Syariah Court or only to the State to make such laws conferring Syariah Court jurisdiction on matters in the State List.
- Decision: There is no State Law in Penang granting Syariah Court jurisdiction to adjudicate the will of and the deed of settlement by the deceased.
- Civil Court has jurisdiction to decide

# + Implied Conferment of Jurisdiction

- *Md Hakim Lee v MAIWP* (1998) 1 MLJ 681
- Declaration of renunciation of Islam by a deed poll.
- Syariah courts may derive jurisdiction directly from Item 1 of the State List without any express conferment of jurisdiction from the state legislatures.
- Even no express provisions provided under the Act. Art 74- it is within the competency of the legislature to legislate on the matter.
- Absence from the express provision in the Act would not confer the jurisdiction in the civil court.

## + Cont....

- **Soon Singh V Perkim (1994) 1 MLJ 690**
- Applied for declaration he was not Muslim. No express provision in the Kedah Enactment conferring jurisdiction of the Sy Court.
- Civil has no jurisdiction. Sy Court has jurisdiction to hear the application by implication. Jurisdiction vested in the Syariah Court by implication.
- General rule of construction- construction by implication- language used, from the context and from the application of external rule.

## + Q2 Powers and Jurisdiction?

- Sy court may have jurisdiction over a particular matter but it does not necessarily mean that Sy cts have the power to grant relief by the parties.
- MAIPP v Isa Abd Rahman (1992) 2 MLJ 244
- Waqf am. To demolish mosque. Applied for perpetual injunction.
- The supreme court decided that perpetual injunction can only be granted by the HC under the Specific Relief Act 1950. Although the sy ct has jurisdiction over waqf but it has no power to grant the order.

## + Cont..

- **Abd Shaik Md Ibrahim v Hussein Ibrahim (1999) 5 MLJ 518**
- **Issue: Should the court look at the Subject matter of the action or the remedies prayed for.**
- **Federal Court in the case of Soon Singh considered the question of jurisdiction purely on the subject matter approach.**

## + Q3: What about Hudud and Qisas Offence?

- Schedule 9 List II para 1 says that Syariah Courts “shall not have jurisdiction in respect of offences except in so far as conferred by federal law”.
- The Syariah Courts (Criminal Jurisdiction) Act 1965 imposes limits on penalties that the Syariah Courts can impose. These are maximum three years jail, RM5,000 fine and six lashes or combination thereof.
- Criminal law and procedure, administration of justice, jurisdiction and powers of all courts, creation of offences in respect of any of the matters included in the Federal List or *dealt with by federal law* are in federal hands.
- Theft, robbery, rape, murder, incest and unnatural sex are all dealt with by the federal Penal Code

## + Q4: Jurisdiction over Non-Muslim and Non-Individual?

- Syariah Courts shall have jurisdiction only over persons professing the religion of Islam.
- This means that Syariah Courts have no power to apply the to non-Muslims even if the non-Muslims consent to be so subject.
- Jurisdiction is a matter of law and not of submission or acquiescence.

## + Q5 Involve a Non-Muslim but the Subject Matter is Within the Sy Ct's Jurisdiction

- **G Rethiansamy v MAIPP (1993) 2 MLJ 166**
- **Declaration as the registered owner for a plot of land. The Respondents claimed that the land is waqf land consisting of mosque and Muslims' burial ground.**
- **The civil court decided that the HC's jurisdiction is not excluded because issues of civil law such as estoppel need to be considered and Sy ct has no jurisdiction over the non-Muslim's Pt.**

## + Q6: Total Restriction over non-Muslim?

- Sy Ct shall have jurisdiction over matters wherein all parties are Muslims. Section 61(3)(b) Administration of the Religion of Islam (State of Selangor) Enactment 2003.
- The decision of the Sy Ct must not involve the rights or properties of a non-Muslim. (Section 74(1))
- FC only restricts prosecution of non-Muslims for Syariah offences; not that Syariah court proceedings and orders could not impinge non-Muslims at all. See *Dalam Perkara Permohonan Perisytiharan Status Agama Si Mati Nyonya binti Tahir, Permohonan Ex-Parte Majlis Agama Islam N9 dan 2 yang Lain* (2006) 21:2 JH 221.
- Eg: Maintenance orders may need to be executed against corporations or employers who are non-Muslims. Information needed from a non-Muslim doctor who treated a wife for physical abuse in an application to dissolve a marriage.

## + Q7: Conversion?

- 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.
- *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
- Section 51 of Law Reform (Marriage and Divorce) Act 1976 allows only the non-Muslim spouse to apply for dissolution. 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. . There is no remedy for the spouse who has converted to Islam.

## + Q8: Power to Determine the Status of Muslim?

- Syariah courts has the exclusive jurisdiction to decide whether a person is still a Muslim.
- (1) In cases where a person alleges that he or she has renounced Islam
  - *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.

## + Cont...

- (2) Disputes on whether a person died as a Muslim.
  - *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.

## + Cont....

- (3) In cases deciding on whether the deceased is a Muslim
- *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.*

## + Q9: Secure of Tenure of Syariah Court Judges

- Security of tenure for judges is important to ensure independence and transparency of judicial making process.
- The current Enactments do not state anything concerning the security of tenure in contrast with provisions to superior civil court judges (Article 125 of the Federal Constitution)
- The Enactments only provide processes of appointment. (Section 58 Administration of the Religion of Islam (State of Selangor) Enactment 2003)

## + Q10: Independence of Syariah Prosecutor?

- Syariah Prosecutors have the discretion to institute, carry out or discontinue any criminal proceedings at Syariah courts. Section 78(2) Administration of the Religion of Islam (State of Selangor) Enactment 2003.
- Whether administratively a Syariah Prosecutor is independent or is subjected to higher authorities.
  - 1. A Syariah Prosecution Department needs to be established separately from the State Islamic Religious Department.
  - 2. Security for tenure for Syarie Prosecutor
- Security for tenure for the AG: Article 145 of the Federal Constitution as amended by Act 26/1963.

## + Q11: Execution Order?

- 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.
- Eg. For warrant and summons to be capable of service and enforcement in other states it must be validated by judge. (Section 75 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003.)

## + Q12: Inherent Power of the Syariah Court?

- Syariah courts do not have Enactments or special provisions relating to the power to grant declaration and specific relief in cases heard before them as in the case of civil courts which have the Specific Relief Act 1950.
- Only Enactments on Syariah civil procedures have provided that *Syar`ie* judges have the inherent powers to issue necessary orders to ensure justice is attained. (Section 244 of the Syariah Court Civil Procedure (State of Selangor) Enactment 2003)

## + Q13 Jurisdiction over offences

- **Sukma Darmawan V Ketua Pengarah Penjara (1999) 2 MLJ 241**
- Applicant convicted of sodomy.
- Challenged that because it is also offence under Syariah court, being Muslim he cannot be tried by civil court.
- Under Penal Code gross indecency between any two persons is also an offence.
- Section 59 of Interpretation Act where there are more than one similar offence person can be tried under any one.
- Since Gross Indecency s 377D is a separate offence and jurisdiction over it has not been conferred upon the Sy Ct by any Federal Law, art 121 1A cannot come into operation to remove the jurisdiction of the Sessions Court.
- Art 145 (3) power of AG, it is not the Court to question.

## + Q14 The Federal Syariah Appeal Court?

- The Malaysian Department of Syariah Judiciary
- By instituting a panel of appeal judges who are ready to hear appeals from any state.
- 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.