
Submission date: 1 Nov 2023

Acceptance date: 20 Oct 2024

Publication date: 31 Dec 2024

CHALLENGES OF THE SHARIAH COURT IN MALAYSIA: REFORMING ISLAMIC LAWS FROM A SHARIAH PERSPECTIVE

^{i,*}Che Nur Amni Che Amram & ⁱAhmad Wifaq Mokhtar

ⁱFaculty of Syariah and Law, Universiti Sains Islam Malaysia (USIM), 71800, Nilai, Negeri Sembilan, Malaysia

*(Corresponding author) e-mail: nuramni179@gmail.com

ABSTRACT

This article highlights the challenges faced by the Shariah Courts in Malaysia, which continue to encounter issues in the application of Islamic law. As Muslims, adhering to Islamic law is both a duty and an obligation that cannot be separated from daily life. Islam strictly opposes any form of tyranny and injustice, ensuring that cruelty is never tolerated. This study also aims to counter the negative perception that Shariah Courts are secondary in terms of power and effectiveness compared to other judicial institutions in Malaysia. Using a qualitative approach, this research relies on secondary sources, including statutory provisions, scholarly articles, and online resources. It examines existing legal provisions and suggests improvements in key areas to establish a more systematic approach to alternative sentencing in the Shariah Courts. The findings of this study reinforce the role of Shariah Courts as a primary legal reference for Muslims in matters such as criminal offenses, marriage, and property disputes. Strengthening the Shariah judicial system ensures that justice is properly administered, and that the Shariah Courts are respected institutions, upheld by all communities. Ultimately, as Islamic law is derived from Allah SWT, it remains the most just and perfect legal system for humanity.

Keywords: *Shariah court, Malaysia, challenges, Islamic criminal law*

Cite as: Che Amram, C. N. A., & Mokhtar, A. W. (2024). Challenges of the shariah court in Malaysia: Reforming Islamic laws from a Shariah perspective. *SALAM Digest*, 2(1), 134-147. Retrieved from <https://salam.usim.edu.my/index.php/salamdigest/article/view/143>

Introduction

In 2020, 63.5 percent of the Malaysian population professed the Islamic faith. (Statista Research Department, 2022). As the majority of Malaysians are Muslim. Therefore, Malaysia has applied Islamic law in Shariah court. Shariah means ‘the correct path’ in Arabic. In Islam, it refers to the divine counsel that Muslims follow to live moral lives and grow closer to God. Sharia is derived from two main sources: the Quran, which is considered the direct word of God, and hadith—thousands of sayings and practices attributed to the Prophet Mohammed that collectively form the Sunna. As stated in Al-Quran:

Meaning: “Then We put you, [O Muhammad], on an ordained way concerning the matter [of religion]; so, follow it and do not follow the inclinations of those who do not know”.

(Al-Quran, Surah Al Jathiyah 45:18)

M. Kamal (2015) reviewed the works of scholars of the Quran namely al-Tabari’s *Tafsir Jami’ al-Bayan*; Abd al-Rahman al-Sa’di’s *al-Tafsir al-Karim al-Rahman fi Tafsir Kalam al-Manan*; Al-Shawkani’s *Fath al-Qadir* and Mutawwali al-Sha’rawi’s *Tafsir Khawatir* respectively and listed the meanings of the term “Shariah”, namely:

Shariah is the religious obligations (al-fara’id), and the divinely prescribed limits “(al-hudud), and commandments” (al-amr) and prohibitions (al-nahy) (which Allah has clearly laid down for human beings to follow). There were those who equated al-Shariah with al-Din (the religion of man’s complete submission to the One True God).

Shariah isn’t the same as Islamic law. Muslims believe shariah refers to the perfect, immutable values understood only by God, while Islamic laws are those based on interpretations of shariah. Interpreting shariah requires deep knowledge of the Quran and Sunna, fluency in Arabic, and expertise in legal theory. However, modern Islamic seminaries have not standardized the level of competency nor the length of study necessary to qualify as a jurist (Khaled Abou El Fadl) a Muslim jurist and law professor at the University of California, Los Angeles.

Malaysia has been declared as an Islamic country as stated in the Federal Constitution. Based on the Federal Constitution (2009), according to Article 3, Islam certified as the Federal religion; however, other religions can practice their religion in peace and harmony without interfering with Islam. Through this information, we can relate that application of Islamic law in Malaysia is influenced by the legal context such as the legal system in Malaysia. Malaysia has a legal system based on Islamic principles that reflect its identity as an Islamic country. For this reason, the understanding of applying the Islamic law based on shariah perspective interpreted by considering the Islamic view prevailing in Malaysia especially for amend Islamic law in the Shariah court in Malaysia.

The Malaysian Constitution has stipulated that the implementation of shariah law is placed under the authority of the State Religious Authority. Each state (14) has its own shariah law (Islamic religious administration, Islamic Family Law, Property Procedure, Criminal Procedure, Criminal Offenses, Shariah Evidence) and each state has 3 hierarchies of shariah courts: Sharia Court of Appeal, Shariah High Court, Lower Shariah Court. Shariah courts can only try Muslims. Shariah courts have been established under the Enactment of the Administration of Islamic Religion in the States, in accordance with item 1, List II, Ninth Schedule of the Federal Constitution. There are several institutions involved in the implementation of Islamic law, namely, the Islamic Religious Council, the Department of Islamic Religion, the Mufti, and the Shariah Court.

Amendments to Article 121 and Article 5 of the Constitution in 1988 are seen to give new life especially to the jurisdiction of shariah courts. Article 121 clause (1) states that there are two high courts with concurrent and equal jurisdiction. The effect of the amendment was to remove or separate the shariah court from being under the civil court. Whatever is within the jurisdiction of the shariah court, the high (civil) court cannot interfere. The amendment to Article 5 of the Federal Constitution gives higher recognition to shariah courts, when a new proviso has been inserted in clause (4) of Article 5 for sharia courts namely; "And with the further condition that in the case of an arrest for an offense that can be

tried by Shariah Court, references in this clause about a Magistrate shall be interpreted as including references about a Shariah Court judge."

What can be concluded is that shariah and Islamic law is important for Muslim as it is a way of life that has been set by Allah SWT. Allah SWT is the creator, and he know what the best for the people is. We just have to obey and follow. As mentioned in Al Quran:

Translation: "Whoever obeys Allah and His Messenger will be in the company of those blessed by Allah: the prophets, the people of truth, the martyrs, and the righteous- how excellent these companions are!".

(Surah An-Nisa, 4:69)

Problem Statement

Along with the advancement of technology, the world is becoming more advanced causing a few people who appear as if the religion of Islam is ancient, has limitations and is not free to do something especially when something contradicts the religion of Islam. This represent a liberal ideology where individuals are free to do as they please regardless of what is good and bad, halal and haram. Therefore, the widespread liberal perspective in Malaysia poses a significant challenge to the faith of Muslims. As we know, the judiciary in Malaysia is divided into two, namely civil law and shariah law, and the shariah court is also free from the interference by civil court since the Federal Constitution Amendment in 1988. Similarly, from an administrative perspective, the shariah court has been separated from the Islamic religious department since the beginning the 1990s where shariah law in Malaysia is designed specifically for Muslims. If this liberal thinking is not curbed it disturbs and threatens Muslims because they will influence and say shariah law does not need to be implemented because they think it is no longer relevant to be practiced nowadays. The effect if not addressed, it will affect the status of Shariah courts and may lead to a negative perception among certain groups. It is even possible that the Islamic community itself will not support the existence of shariah courts in Malaysia.

Some parties believe that this constitutional amendment does not necessarily dignify Islamic law. Hooker who referred to the decision of the case involving the amendment of the constitution stated that the decision of the case shows that the Constitution and not sharia that interprets the law and the Malaysian Constitution is based on secular concepts, English and Malaysian law and not based on shariah (Hooker, 1993).

In the meantime, the weaknesses found in the sharia court can give a negative image to the Islamic community. For example, Maznah Mohamad in her study of women dealing with sharia courts in Johor Bahru, Pinang Island and the Federal Territory made a statement that there is discrimination in the implementation of Islamic law in Malaysia. Among the evidence to support this statement is that it is very difficult for the poor and women to get a defence in the sharia court because the legal system of the shariah court is difficult to access. He also said that the experience of women in his study said that they were uncomfortable with the atmosphere of religious offices and shariah courts (Abdul Monir, 1999).

Not only that, on 22 May 2022 there was an issue that challenged shariah law when 21 Shariah Enactments were challenged by two lawyers Nik Elin Zurina Nik Abdul Rashid and her son, Tengku Yasmin Natasha Tengku Abdul Rahman challenged 21 provisions in the Criminal Code Enactment Shariah (I) 2019 Kelantan. It is even more serious when on 30 September 2022, Federal Court Judge, Datuk Vernon Ong Lam Kiat has given permission to challenge approximately 21 provisions in the Kelantan Criminal Code Enactment (I) 2019 to the 2 lawyers. Examples of challenged enactments include section 5 (false allegations), section 11 (destroying a place of worship), section 31 (sexual harassment) and others.

Apart from that, since shariah court have their own system, it is pertinent to note that their own rules and evidence are different from those of the civil court, to some extent. the conflict that occurs when the civil court is interfering with what goes on in the shariah courts. The issue is whether the opinion of a Sharia law expert is binding on the civil court? Zainur Zakaria examines the acceptance of the opinions of shariah experts such as the Mufti in the Evidence Act 1950. He concludes that in matters that touch

on shariah law in civil courts, expert opinions on Islamic law should be consulted and used (Zainur, 1995). There is an assumption that the expansion of the jurisdiction of shariah courts in the criminal framework, certainly, the hudud law, is more religious politics than a serious effort to implement Islamic law. Similarly, the implementation aspect of this law is said to not understand the current reality and the general objective of sharia law. Mahmood Zuhdi (2001) stated that the Islamic criminal jurisdiction in Malaysia has not been able to achieve the objectives of shariah law and considers the shariah court to be nothing more than another secular court.

In addition, as we know, the Constitution divides the legislative powers between the Federation and the States. This division of powers makes Islam, including Islamic criminal law, a matter for the states, while matters related to the administration of justice in general, including the creation of criminal offenses and their procedures, fall under the federal legislative authority (Khaleefah & Wan Ismail, 2023). So far, due to the division of powers, there have been four hudud offenses committed by the State Legislature. The offenses are, adultery, accusing adultery, drinking alcohol and apostasy. These four offenses are considered offenses against Islamic religious orders and only apply to Muslims. The other three hudud offences, namely theft, robbery and fighting the legitimate government, have been mentioned in the Penal Code, which is a law at the Federal level that is adopted on all parties. The same goes for the offense of killing and causing injury. Both of these are found in Federal law. If we can accept those offenses as general offenses for all Malaysians, the changes that need to be made to impose hudud punishment and further make the offenses under this Federal law a general crime.

If hudud is classified as a general crime and removes hudud from legal restrictions associated with Islamic religious principle, then hudud can be enacted by Parliament. From a constitutional perspective, there are no legal barriers for Parliament to enact hudud laws. Provided that it is related to any matter mentioned in the Federal List. This point is quite clear as mentioned in Item 4(h) of the Federal List, in the Ninth Schedule. No restrictions are placed on the Powers of Parliament for the purpose of "Creation of offenses in respect of any matter included in the Federal List or referred to by federal law".

Due to the issue discussed above, therefore this topic has been decided to do research regarding this topic. The purpose of this research is to ensure the shariah law are suitable and relevant towards people based on issue nowadays. Also, to understand how shariah court in Malaysia gives a solution regarding the challenges towards the shariah law and study how shariah court can give the right towards people.

Research Questions

- i. What is the concept of Islamic criminal law according to shariah perspective?
- ii. What are the jurisdiction and position of shariah court in Malaysia?
- iii. What are the challenges and achievement of shariah court in Malaysia nowadays on amend suitable and relevant Islamic criminal law?
- iv. Is Islamic law in the Shariah Court effective and does it need for improvement of the States Shariah legal provision.

Research Objectives

- i. To identify the concept of Islamic criminal law according to shariah perspective.
- ii. To analyse the jurisdiction and position of shariah court in Malaysia.
- iii. To examine the challenges and achievement of shariah court in Malaysia nowadays on amend suitable and relevant Islamic criminal law.
- iv. To propose whether Islamic law in the Shariah Court effective and does it need for improvement of the States Shariah legal provision.

Literature Review

According to Raihanah Abdullah (2009) stated the weakness of shariah court in Malaysia have made the negative perception towards its especially for women. Also, the statement of the media gives an impact towards the shariah court. It is because women are the majority attend to the court to fight for their right and have the protection by the law. This writing also shows the adjournment of a case in the Shariah Court. Other than that, writer also gives solutions to the challenges that happened therefore the issue has been settled.

Some researchers believe that this text does not sufficiently address the debates about the challenges of Shariah courts or the relevant facts and laws. The document discusses the jurisdiction and position of Shariah Courts in Malaysia, with a focus on recent cases involving interference from Civil Courts. It highlights the historical background of Islamic law in Malaysia and the structure of the Shariah Courts. It also examines the jurisdiction of the Shariah Courts, and the amendment made to Article 121 of the Federal Constitution. The document concludes that there is still a lack of clarity on the jurisdiction of Shariah Courts and the need for further clarification. Researchers opined that this discussion is does not focusing on the amendment whether the Islamic law nowadays are suitable or need to improvise.

The document discusses the implementation of alternative sentences in Shariah courts as a means to rehabilitate offenders. It highlights the need for improvement in the legal provisions of Shariah law in the states to avoid legal problems. The document also explains the different forms of alternative sentences, such as good behaviour bonds and rehabilitation centres, and suggests improvements to the existing laws.

Researchers think about the writing above is that the author focuses more on the alternative sentences however to make sure the alternative has been set up, the existing law need to improvise so that the law can give the actual right for the actual people that are in needs.

Discussion and Finding

The concept of Islamic Criminal Law according to Shariah Perspective

Islamic law or known as Shariah Law is based on revelation from Allah SWT which cover all aspect of human life, "ibadah", "muamalat". "jinayat", "fara'id". It appears to emphasize the importance of individualized sentencing, equal application of the law, consistency with the legal framework, and protection of offenders' rights even during punishment (Al-Alfi, 1982). The root word of jarimah literally means "to cut off" (Anwarullah). This word also means a sin, a crime, a fault, an offence or an act of disobedience, a transgression whether done intentionally or committed through inadvertence (Lane Edward). In the religious context, the word jarimah means an act of committing what has been prohibited by the Syariah or not doing what has been ordered by the Syariah, of which, consequently the punishment of Hudud or Ta'zir has been prescribed (Abu Zahrah). In other words, jarimah means the commission of a prohibited act or omission of an obligatory act for which punishment is prescribed. The commission and omission are violations of the legal order and prohibitions imposed by law. An example of the commission of a prohibited act is adultery (al-zina) for which the punishment as prescribed in the primary sources of Islamic law punishment is one hundred lashes whipping for unmarried persons and stoning to death for married persons.

However, word al-Jinayah defined as all forms of prohibited and destructive actions, whether the Action is on the body, property or so on. Crime is any form of offense according to Shariah that can be punished based on God's law whether it is qisas, hudud or takzir (Hassan al- Mawardi, 1966). This definition tries to distinguish between crimes that can be punished and crimes that cannot be punished by the government. This makes the scope of crime large because all offenses that can be punished by the government according to Sharia are considered crimes (Fathi Yusof, 2014). In the classical textbooks of fiqh, criminal law is not regarded as a single, unified branch of the law. Provisions regarding offences mentioned in the Quran and Hadith constitute violations of the claims of God (the right of Allah) with mandatory fixed punishments; these offences are: apostasy (riddah), robbery (hirabah), unlawful sexual intercourse (zina), theft (sariqah), the unfounded accusation of unlawful sexual intercourse (qazaf) and drinking alcohol (syurb khamr). Provisions for offences against another person, i.e., homicide and wounding, are subdivided into:

- i. Those regarding retaliation (qisas) and;
- ii. Those regarding financial compensation (diyat).

And they are provisions concerning discretionary punishment of sinful or forbidden behaviour or of acts endangering public order or state security (ta'zir).

Some scholars said that it encompasses all kinds of prohibited acts that relate to injury whether in relation to the human body or property or other violations (Al-Zailaie). According to other scholars, the word refers to or means offences liable to punishment under Hudud or Qisas (Ibn Al-Farhun). Generally, jurists do not differentiate between jarimah and jinayah, as both words have the same meaning or are synonymous to each other (Audah). Among other words that also associated with crime are disobedience (ma siyyah) and sin (ithm). Actually, the word disobedience (ma siyyah) is a general term, encompassing both punishable and non-punishable offences.

Islam has, in fact, adopted two courses for the preservation of the five indispensables in human life: religion (Islam), life, intellect, offspring and property. The first is through cultivating religious consciousness (al wazi' al dini) in the human soul and the awakening of human awareness through moral education. The second is by inflicting deterrent punishment (al qanun), which is the basis of the Islamic criminal system. The Islamic Criminal Law, which is part of the Shariah Law, provides a worldly punishment in addition to that in the hereafter (Zulkifli Muda, 2010). Indeed, the original source of Islamic Law is Allah. Syariah is the main part of the religion of Islam that is introduced and revealed by Allah, who is actually the Lawgiver. Although there are differences on standards of punishments, such as offences liable to punishment under Hudud, offences liable to punishment under Qisas, and other offences liable to Ta'zir, all of them are subjected to the main source, that is punishment under Allah (by virtue of al-Quran).

Allah says:

Translation: “And this (He commands): Judge thou between them by what Allah hath revealed, and follow not their vain desires, but beware of them lest they beguile thee from any of that (teaching) which Allah hath sent down to thee. And if they turn away, be assured that for some of their crime it is Allah’s purpose to punish them. And truly most men are rebellious”.

(Surah Al-Maidah, 5:49)

Last but not least, the principles of Islamic criminal law in regard to accusations. It is an important principle that a person is not allowed to make an accusation without producing proof or evidence. Without sufficient evidence, such accusations do not hold any legal standing. In fact, the accuser may be regarded as sinful and, in some cases, may even face punishment themselves. Furthermore, it is emphasized that the accused person is presumed innocent in the eyes of the law and the public until there is substantial evidence to prove otherwise. It is worth mentioning that these principles are also adopted in Malaysian Law.

The jurisdiction and position of shariah court in Malaysia

Muslim judge (Qadi) appointed by “Raja” and “Sultan” of their respective states except in the Federal Territories, Penang, Malacca, Sabah and Sarawak where the appointment is made by the Yang di-Pertuan Agong. The Prosecutor and the Islamic Affairs Officer are among the Court's staff. The role of the Islamic Affairs Officer is to receive complaints, investigate and assist the Qadi. Prosecution is usually made by the Religious Prosecutor. The Islamic Law of Evidence is applied in the Syariah Court where in the Law on the Administration of Islamic Law through the Enactment provides that the Syariah Court must follow the law of evidence as found in Islam such as in the aspects of the number, status and quality of witnesses or evidence need proof.

In the early 90s the structure of the Syariah Court was updated. Steps have been taken by the Islamic Religious Affairs Department to reorganize the structure of the Syariah Court into a three-tier hierarchy. Through the Islamic Law Administration Act (Federal Territory) 1993 and the Islamic Law Administration Act (Selangor) 1989, a new structure with the concept of a three-tier hierarchy was created:

- i. Syariah Subordinate Court
- ii. Syariah High Court
- iii. Syariah Court of Appeal

Looking at the problems of non-uniformity in the decisions of the Syariah Court because there are differences in the Islamic Religious Administration Enactment and the procedures for appointing judges of the Syariah Subordinate Court, Syariah High Court and the Syariah Court of Appeal which are different and the lack of Syariah Court judges throughout the country resulting in many Mal cases and Syariah crimes were delayed, so the government agreed to establish a new department known as the “Jabatan Kehakiman Syariah Malaysia” (JKSM) which began operating on 1 December 1998 (Dato’ Ghazali, 1999). Except for Syariah Courts in the Federal Territory of Kuala Lumpur and Labuan, the existence of Syariah Courts is under the jurisdiction of the states. The Ninth Schedule, List II - List of States, of the Federal Constitution provides:

"Hukum Syarak dan undang-undang diri dan keluarga bagi orang-orang yang menganut agama Islam, termasuk Hukum Syarak berhubung dengan mewarisi harta berwasiat dan tak berwasiat, pertunangan, perkahwinan, perceraian, maskahwin, nafkah, pengambilan anak angkat, taraf anak, penjagaan anak, pemberian, pembahagian harta dan amanah bukan khairat, wakaf dan ta'rif serta mengenai amanah dan khairat agama, perlantikan pemegang-pemegang amanah".

Therefore, the power of the State Legislature is to enact matters regarding Islamic law as provided in the Ninth Schedule, List II - State List. This includes the power to establish courts that have jurisdiction over Muslims only. Although this provision clearly deals with state jurisdiction, there are many other Federal laws that limit state jurisdiction.

For example, in the field of succession, testate and intestate, account has to be taken of the Probate and Administration Act and the Small Estates (Distribution) Act with the result that the Qadi are in effect only given the function of certifying the shares to be allotted to the beneficiaries under Islamic law. In the field of criminal law in particular, the jurisdiction of the Syariah Courts is very limited. It has jurisdiction only over persons professing the religion of Islam and it has only such jurisdiction in respect of offences as is conferred by Federal law. Until 1984, the Muslim Courts (Criminal Jurisdiction) Act, 1965 had provided that such jurisdiction should not be exercised in respect of any offence punishable with imprisonment for a term not exceeding six months or any fine exceeding \$1,000.00 or with both. The Act was amended in 1984 and the jurisdiction of the Syariah Court has been extended by giving them jurisdiction to deal with cases punishable with imprisonment up to three years, or fine up to \$5,000.00 or whipping up to six strokes or the combination of all these. The Criminal jurisdiction of the Syariah Courts is therefore less than that of the First-Class Magistrate which can generally try offences for which the maximum term of imprisonment does not exceed ten years imprisonment.

The Selangor Syariah Criminal Offences Enactment has established several specific categories of crimes, namely:

- i. Faith-related offenses such as spreading false doctrines and takfir.
- ii. In relation to the sanctity of Islam and its institutions such as insulting matters related to religion, religious authorities, fatwas, disobeying court orders, gambling, drinking alcohol and intoxicating beverages, disrespecting the month of Ramadan, not performing Friday prayers and not paying Zakat or fitrah.
- iii. In relation to immorality such as incest, prostitution, sexual relations, celibacy, men acting like “pondans” and indecent behavior in public.

4) Misdemeanours such as running away married women, preventing married couples from living as husband and wife, inciting husband and wife to divorce or leave their obligations, selling or giving children to non-Muslims, qazaf (accusing adultery), collecting zakat without truth and misusing the halal mark.

Jurisdiction Mal

The term *mal* traditionally refers to property; however, in a legal context, it pertains to non-criminal cases. The *mal* jurisdiction of the Syariah Court applies to all Muslims who are residents of the respective states. The Syariah Court has extensive jurisdiction, covering various aspects of Islamic family law, including the following:

1. Pre-marriage matters – This includes cases such as the dissolution of an engagement, applications for marriage permission, and applications for polygamy.
2. Issues arising during marriage – This encompasses applications for marriage validation, annulment of an invalid marriage, maintenance (*nafkah*) for spouses and children, determination of a wife's *nusyuz* status, and applications for cohabitation orders.
3. Dissolution of marriage – This includes applications for divorce through *khuluk*, *lian*, *fasakh*, *talaq*, *ta'liq*, judicial divorce, divorce due to apostasy, and divorce based on the presumption of death.
4. Interlocutory orders in ongoing cases – This refers to temporary applications such as maintenance for a spouse and children, gifts, injunctions against property transactions, and restraining orders against harassment. For instance, a woman may seek an injunction to prevent her ex-husband from harassing her or apply for a restraining order to protect jointly owned property from being used in business dealings.
5. Post-divorce matters – This includes applications for *muta'ah* (consolation payment) following divorce, division of matrimonial property, *iddah* maintenance, child maintenance, arrears of maintenance, and *hadanah* (custody of children).
6. Matters related to wills, waqf, and inheritance – This includes applications concerning the execution and enforcement of wills, waqf declarations, and inheritance distribution.
7. Enforcement of court orders – This includes applications related to ensuring compliance with Syariah Court rulings.

This comprehensive jurisdiction ensures the proper application of Islamic law in family and personal matters, reinforcing the role of the Syariah Court in upholding justice for the Muslim community.

In 1988 an amendment was made in Parliament to Article 121 by adding clause (1A). Article 121 (1) "Then there shall be two High Courts which have the same jurisdiction and level, that is:

(a) one in the States of Malaya which is named the High Court in Malaya and which has its registered office in Kuala Lumpur; and one in the States of Sabah and Sarawak which is named the High Court in Borneo and which has its registered office at any place in the States of Sabah and Sarawak as determined by the Yang di-Pertuan Agong; and any subordinate court as provided by Federal Law; and the High Courts and subordinate courts shall have such jurisdiction and powers as may be conferred by or under Federal law. (1A) The courts mentioned in Clause (1) shall not have jurisdiction in respect of any matter within the jurisdiction of the Syariah Court.

According to Professor Ahmad Ibrahim, a major effect of this amendment is to reduce the discrepancy between the decisions of the Syariah Court and the High Court. Among them in the case of *Myriam v. Ariff* where the divorce was made before the Qadi and it was agreed by both parties that the custody of the two children, an 8-year-old daughter and a 3-year-old boy, was handed over to their father. Then the plaintiff made an application in the High Court requesting that he be entitled to custody of the child even though he was married to another man who was not the mother of the children.

With reference to section 45(6) of the Selangor Islamic Law Administration Enactment 1952, the Civil High Court held that when there is a conflict of decision between the Syariah Court and the Civil Court, the decision of the Civil Court prevails. Furthermore, with the Guardianship of Infants Act 1961, the Civil Court held that this act does not conflict with the jurisdiction of the Civil Court in this case. In the end, Hakim Abdul Hamid decided that the son was handed over to his mother and the girl to her father.

However, after the 1988 amendment there were some High Court Judges who still ignored the amendment of Article 121 (1A) 1988. This can be seen in the case of *Ng Wan Chen v Majlis Agama Islam* and another where a dispute has arisen as to whether the deceased Lee Siew Buddhist or Muslim. The deceased's widow claimed that her husband was a Buddhist while the Islamic Religious Council held that he was a Muslim, declaring that the deceased was a Buddhist during his lifetime and until his death. He requested that the High Court issue an interlocutory injunction so that his body would not be handed over to the Islamic Religious Council. Next, the Islamic Religious Council disputes the jurisdiction of the High Court hearing this case because they think it falls under the jurisdiction of the Kuala Lumpur Syariah Court. The High Court held that section 45(2) and (3) of the Selangor State Shariah Law Administration Enactment 1952 gives jurisdiction to the Syariah Court in the matters listed there in and the list does not include jurisdiction to determine whether a person adheres to or practices Islam. Since there is no provision that gives this jurisdiction to the Syariah Court in deciding whether a person is a Muslim or not at the time of his death, this does not prevent the Civil Court from making a decision. Therefore, the High Court ruled that the evidence in the case was not enough to prove that the deceased was a Muslim at the time of his death. There is no evidence to show that the deceased's conversion to Islam was made in accordance with the Selangor State Islamic Law Administration Enactment 1952 and the rules made under it. The Honourable Hakim opined that the deeds done by the deceased during his lifetime clearly show that he did not follow the teachings of Islam. With that, the Court ruled that the deceased was not a Muslim at the time of his death.

However, there are also Judges who tend to make decisions in favour of the Syariah Court. In one case *Md. Hakim Lee v. Federal Territories Islamic Religious Council*, Kuala Lumpur, 33 plaintiff (original name Lee Leong Kim) a Buddhist embraced Islam on March 30, 1978 and adopted the name Md. Judge Lee bin Abdullah. On 10 October 1995 through deed poll and legal declaration, the plaintiff has declared that he has left Islam and has shown his intention to use the name Lee Leong Kim. Lee claimed that his act of leaving Islam was guaranteed under article 11 of the Federal Constitution and that no one had the power to restrict his freedom from doing so. The defendant did not file any affidavit in opposition to the plaintiff's application, but the defendant filed a suit in chambers for the plaintiff's application to be rejected under Order 18 Rule 19 of the High Court Rules 1980 on the grounds that the High Court did not have jurisdiction to hear the plaintiff's application as contained in article 121(1A) of the Federal Constitution. With reference to paragraph 1 of list II of the Ninth Schedule of the Federal Constitution, the Honourable Judge Dato' Abdul Kadir Sulaiman ruled that the court that has jurisdiction in relation to the matters raised is the Syariah Court. therefore, the plaintiff's application is rejected with costs because the Civil Court does not have jurisdiction to hear the matter requested in this application based on article 121(1A) of the Federal Constitution.

Challenges and Achievements of the Syariah Court in Malaysia in Amending Suitable and Relevant Islamic Criminal Law

Challenges of the Syariah Court

Islamic criminal law is designed to be suitable for all societies and applicable across all ages. It aligns with human nature and is meant to be practiced by those who believe in it. The obligation to uphold Islamic criminal law is affirmed in the Qur'an, as stated in:

Translation: "Indeed, We have revealed to you, [O Muhammad], the Book in truth so that you may judge between the people by that which Allah has shown you. And do not be for the deceitful an advocate".

(Surah An-Nisa, 4:105)

In the current legal framework, the suspension or enactment of a law falls within the jurisdiction of legislative bodies such as the State Legislative Assembly or Parliament. Although judges have discretionary power in sentencing, they are required to acquit the accused if the available evidence does not meet the standard of proof. For instance, an individual stealing during a period of famine due to hunger may not be subject to *hudud* punishment.

One of the main arguments against the implementation of the Islamic Penal Code is its potential impact on foreign investment, with concerns that financial pressures may arise. However, this argument is questionable, as Islamic law upholds fairness and justice in accordance with divine will. The implementation of Islamic law fosters societal peace and stability, leading to a reduction in crime. Consequently, a well-governed nation adhering to Islamic principles may, in fact, enhance investor confidence, as investors seek stable and secure environments for business operations. Foreign investors should not fear the enforcement of Islamic criminal law, as their primary intention is to invest, not to engage in criminal activities.

Another concern is that Islamic criminal law can only be enforced when the majority of the population fully embraces Islam and refrains from wrongdoing. However, this perspective is flawed, as the purpose of Islamic criminal law is to deter crime and promote justice, rather than waiting for societal perfection before implementation. The failure of the current legal system to eradicate crime is evident. For instance, in 2021, there were 52,974 reported crime cases (Ahmad Ismadi, 2023). The crime rate in Malaysia has consistently increased at a higher rate than the population growth, causing insecurity among citizens. If left unchecked, this trend may further threaten national stability. Therefore, rather than delaying its implementation, Islamic criminal law should be enforced as part of societal reform (*islah* and *tajdid*), complementing efforts in education, family development, social welfare, and *da'wah*. Without the enforcement of Islamic criminal law, these efforts may not yield optimal results.

Another challenge raised is the claim that the public lacks sufficient knowledge of Islamic criminal law, making its implementation impractical. However, Islam does not require all citizens to fully comprehend a law before its enforcement (Zakaria & Nasohah, 2019). In legal systems worldwide, no parliament or legislative body mandates complete public understanding before passing a law. Malaysia alone has over 760 Acts and thousands of regulations, yet most citizens are unfamiliar with them. Nonetheless, Parliament continues to pass laws regardless of public comprehension. In contrast, Islamic criminal law—including *hudud*, *qisas*, and *ta'zir*—is well-documented in the Qur'an and Hadith, widely studied in mosques and academic institutions, and available in various books and languages. Therefore, ignorance of Islamic criminal law is not a valid reason to reject its implementation.

A common argument against Islamic criminal law is that it is unsuitable for a multi-racial society like Malaysia. However, this claim is unfounded, as history demonstrates that the Islamic government led by the Prophet Muhammad (PBUH) in Medina governed a diverse society, including Jews and non-Muslims. Scholars such as Imam Malik and Imam Al-Shafi'i hold that non-Muslims may be given the option to be judged under Islamic criminal law or the existing civil legal system. If this view is adopted, concerns about multi-racial and multi-religious contexts hindering the enforcement of Islamic criminal law become irrelevant. Non-Muslims who do not wish to be subject to Islamic criminal law may instead be judged under Malaysia's Penal Code.

Fundamentally, Islamic criminal law is a divine legal system granted as a blessing for humanity. It aligns with the complexities of human nature and is designed to establish justice. Its enforcement will not only lead to societal success in this world but also ensure ultimate success in the hereafter.

Innovations and Achievements of the Syariah Court

The Syariah Court in Malaysia has introduced several innovations, particularly in online service improvements, to address contemporary challenges in case resolution. One of the significant innovations contributing to the resolution of Syariah cases is the implementation of *sulh* (amicable settlement), which was first introduced in 2002 through the establishment of *Majlis Sulh* (Tuan Mohammad Shakir, 2016).

The practice of *ṣulḥ* in the Malaysian Syariah Court was inspired by Singapore's case resolution approach, which was subsequently modified to suit the Malaysian legal and judicial context. Notably, the concept of dispute resolution through *ṣulḥ* has also been adopted by the *Biro Bantuan Guaman* (BBG), where it is known as mediation.

With the rapid advancement of communication technologies, the *Jabatan Kehakiman Syariah Malaysia* (JKSM) has developed several digital systems to enhance administrative efficiency and professionalism in the Syariah Court. Among these innovations is the E-Faraid System, designed to facilitate the management and resolution of *faraid* (Islamic inheritance) cases. This system streamlines the registration process by directly linking and verifying essential information—such as the deceased's personal identification number, date of death, death certificate number, and next-of-kin details—with the *Jabatan Pendaftaran Negara* (JPN). The system's ability to calculate and distribute *faraid* property up to a hundred layers of heirs enables judges to resolve *faraid* cases efficiently and accurately.

In addition, JKSM has launched the K-Faraid Portal, which provides comprehensive knowledge on *faraid* principles, including juristic opinions on inheritance law. This portal is accessible not only to JKSM staff but also to Syariah Courts nationwide and the general public. Another significant development is the Nas Portal, which serves as a database containing Quranic texts, Hadith, juristic opinions, and references to Syariah law and criminal case codes applicable in all Malaysian Syariah Courts. This portal functions as an essential resource for Syariah legal practitioners, academics, researchers, students, and the general public, facilitating easy access to authoritative Islamic legal references (Tuan Mohammad Shakir, 2016).

At the state level, several Syariah Court innovations have gained national and international recognition. For example, the E-FOS Project (*E-Fast.Order.Sulh*), implemented by the Federal Territories Syariah Court, received the Gold Award and Best Young ICC Award at the Central Region Team Excellence Mini Convention, organized by the Malaysian Productivity Corporation (MPC) on 26 April 2016. This project optimizes the *ṣulḥ* process by enabling the issuance of a *ṣulḥ* order within an hour after endorsement, thereby reducing case backlogs and expediting case resolutions (Hashim et al., 2024a; Hashim et al., 2024b).

Similarly, the EZNafkah Innovation Project, introduced by the Terengganu Syariah Court, was developed to expedite child support applications in enforcement proceedings handled by the Terengganu Family Support Section. This initiative gained international recognition, winning the Gold Award at the *International Conference on Quality 2014* in Shinjuku, Tokyo, Japan.

These innovations reflect the Syariah Court's continuous efforts to enhance judicial efficiency, improve service delivery, and ensure timely justice in accordance with Islamic principles.

Is Islamic Law in the Shariah Court Effective, and Does It Require Improvements to the State Shariah Legal Provisions?

The importance of proposing a new form of punishment as an alternative to the existing penalties imposed on Shariah offenders in Malaysia today is crucial for transforming and further empowering the National Islamic Judicial Institution (*Institusi Kehakiman Islam Negara*). This transformation ensures that the institution remains relevant to contemporary circumstances (Hasnizam & Jasri, 2014). Alternative punishment refers to an alternative to the original punishment prescribed under Act 355. For instance, an alternative to imprisonment may be a fine, while failure to pay the fine could result in imprisonment (Hashim et al., 2024; Siti Zubaidah, 2011). Alternative punishments incorporate elements of rehabilitation, such as counseling, community service, *fardu ain* classes, faith-strengthening programs, and mosque-based activities (Noor Huda, 2013).

However, alternative punishments must not be implemented arbitrarily. Several factors must be considered, including the seriousness of the offense, age, character, mental health, and other relevant criteria (Dato' Yusof, 2014). The court may impose these punishments only if it deems them beneficial for the offender (Siti Zubaidah, 2015). Among the proposed forms of alternative punishment are:

(a) Good Behavior Bond (*Bon Berkelakuan Baik*) The rehabilitation of offenders through alternative punishments in the Syariah Court includes issuing good behavior bonds to maintain peace. A bond serves as a temporary release of the accused upon providing sufficient surety, ensuring their attendance at trial. The guarantor must sign a surety bond as an undertaking. Conditions imposed on accused individuals and bail conditions are subject to the court's discretion. A Good Behavior Bond order may require the offender to attend counseling sessions, mosque programs, or perform community service.

(b) Rehabilitation at an Approved Rehabilitation Center or Home Beyond bonds, the Syariah Court may order offenders to be sent to rehabilitation homes. The authority to establish these facilities falls under the Islamic Religious Council of the respective states. Based on the Islamic Religious Administration Enactment (Selangor State) 2003 and the Riqab Registration, Rehabilitation, and Control Regulations (Selangor State) 2013 (effective August 1, 2013), a 'House of Rehabilitation' refers to any officially established facility providing rehabilitation, treatment, and protection for *Riqab*. Rehabilitation involves structured training and activities, counseling, and advisory services to reform negative behavior and enhance personal development. It incorporates clinical and spiritual healing processes under the jurisdiction of a relevant agency.

Islamic criminal law aims to instill fear of committing crimes out of reverence for Allah, the ultimate lawgiver. Unlike human-made laws, which are subject to change due to external influences such as environment, family background, education, desires, and societal norms, Islamic law remains just, impartial, and divinely guided (Abdul Ghani, 1997). For example, past societies criminalized homosexuality, whereas some jurisdictions today recognize it as a legal practice. Such inconsistencies highlight the human element in secular legal systems, contrasting with the stability of Islamic law.

Islamic criminal law exercises great caution when convicting individuals. In *hudud* cases, the evidentiary requirements are stringent. For instance, theft must involve stolen property secured in a proper place, with no extenuating circumstances such as war, famine, or disaster. Similarly, adultery convictions require four male witnesses who clearly observed the act, akin to seeing a bucket enter a well. If an accuser fails to provide four witnesses, they face a *qazaf* charge. Islamic law also enforces strict witness qualifications. Witnesses must be just and free from major sins. A screening process (*tazkiyah al-syuhud*) evaluates witnesses' moral integrity, disqualifying those with questionable conduct (Mahmod, 1998). In contrast, civil criminal law does not typically assess a witness's character when determining testimony validity.

Since Shariah Courts operate at the state level, their jurisdiction is confined to their respective states. To facilitate the service and enforcement of summonses, warrants, and judgments across states, reciprocal arrangements among states are necessary. However, it is recommended that a federal law be enacted to ensure uniform service and enforcement of Shariah Court decisions throughout Malaysia and, if feasible, in neighboring countries such as Singapore, Indonesia, and Brunei.

For efficient Islamic legal administration, it is crucial to have qualified judges, judicial officers, and *syarie* lawyers. Thus, provisions should be made for the admission, control, and professional development of *syarie* lawyers. The education and training of judicial and legal officers and *syarie* lawyers should also be enhanced. The International Islamic University plays a key role in this regard. To improve the qualifications of existing judicial and legal officers, the university offers a one-year in-service diploma course covering the legal system, constitutional law, evidence, procedure, and professional skills. The LL.B. program at the university integrates both Shariah and civil law, taught in Arabic and English. For those aspiring to join the Shariah judicial and legal service, an additional fifth-year LL.B. Shariah course provides in-depth Shariah studies in Arabic. Additionally, a diploma course is available for civil law-trained lawyers seeking to qualify as *peguam syarie*.

Proposals have also been made to expand the jurisdiction of Shariah Courts, particularly in probate and the administration of Muslim estates. These proposals necessitate amendments to the Federal Constitution. Draft laws on wills and estate administration for Muslims have already been prepared. Further legislative developments are needed to govern *zakat*, *fitrah*, *Baitulmal*, and *wakaf* matters.

Regarding criminal offenses, the Shariah Court's jurisdiction should be extended. Currently, it handles only minor *ta'zir* offenses. However, provisions should be made for arrest powers and criminal investigations, enabling the court to adjudicate cases involving *qisas*, *diyat*, and *hudud*. Such an expansion of jurisdiction requires constitutional amendments.

To elevate the status and position of Shariah Courts, amendments to both the Federal and State Constitutions should include Islamic law within the definition of "law" and formally recognize the Shariah Courts, their judges, and the Shariah Judicial and Legal Service. Additionally, state enforcement officers should be empowered with arrest and investigative authority. The jurisdiction of Shariah Courts should be broadened to cover probate, estate administration, and criminal cases involving *qisas*, *diyat*, and *hudud*. All these changes necessitate constitutional amendments at both the federal and state levels.

Conclusion

In conclusion, the Shariah Courts in Malaysia have improved significantly; however, further enhancements are still necessary. As stated by *Yang di-Pertuan Agong Al-Sultan Abdullah Ri'ayatuddin Al-Mustafa Billah Shah* (2023), the administration of Shariah Courts, including the status of Shariah judges and lawyers, must be strengthened to elevate the prestige of the Islamic legal system in Malaysia. The courts must exercise their discretion wisely and ensure fairness in all decisions, particularly in family matters and Shariah criminal cases.

Additionally, continuous monitoring and evaluation should be implemented to enhance the efficiency and effectiveness of Shariah Courts. Involving stakeholders, including academics, in assessing court performance and providing recommendations for improvement is essential. Public awareness should also be improved by offering better information services regarding court procedures, legal rights, and available recourse in specific cases.

Challenges and criticisms faced by Shariah Courts should be viewed as opportunities for improvement rather than as negative influences from media portrayals that undermine their necessity. Strengthening human capital and promoting innovation within the Shariah judiciary are crucial factors in achieving governance excellence. These two aspects must coexist to establish the Shariah Court as a distinguished Islamic legal and judicial institution, particularly in Malaysia's pluralistic society.

References

- al-Mawardi, A. H. (1966). *Ahkam al-Sultaniyyah wa al-Wilayah al-Diniyyah*. Mesir.
- Bernama. (2023). Pengurusan Mahkamah Syariah hendaklah terus diperkasa, ditambah baik. *Astro Awani*. Retrieved from <https://www.ikim.gov.my/index.php/2003/03/19/bidang-kuasa-mahkamah-syariah-di-malaysia-satu-pengenalan-ringkas/>
- Hashim, H., Wan Ismail, W. A. F., Baharuddin, A. S., Alias, M. A. A., Mamat, Z., Abdul Mutalib, L., Chow Jen-T'Chiang, N. Z., & Jusof, N. (2024). Pelaksanaan sulh dalam Islam: Kajian terhadap sistem perundangan Syariah di Malaysia: Implementation of sulh in Islam: A study on the Syariah legal system in Malaysia. (2024). *LexForensica: Journal of Forensic Justice and Socio-Legal Research*, 1(2), 86-95. <https://doi.org/10.33102/zxq3zs86>
- Hashim, H., Wan Ismail, W. A. F., Baharuddin, A. S., Mamat, Z., Abdul Mutalib, L., Alias, M. A. A., Mohammed Hassan, B. M., & Jusof, N. (2024b). Hukuman alternatif berorientasikan pemulihan ke atas pesalah jenayah: Analisis terhadap kesesuaian serta mekanisme pelaksanaannya di Mahkamah Syariah: Alternative punishment oriented to restoration on criminal offenders: Analysis of suitability and its implementation mechanism in Syariah courts. (2024). *LexForensica: Journal of Forensic Justice and Socio-Legal Research*, 1(1), 13-23. <https://doi.org/10.33102/n202z962>
- Hasnizam Hashim & Jasri Jamal. (2014). Transformasi Mahkamah Syariah di Malaysia: Keperluan kajian semula terhadap bentuk hukuman bagi kes-kes jenayah syariah. *'Ulum Islamiyyah*, 12, 99-100.
- Hasnizam, Wan Abdul Fattah, Ahmad Syukran, Lukman, Zulfaqar, Mohamad Aniq Aiman, Norman, & Norma. (2024a). Konsep sulh dalam Islam dan pelaksanaannya dalam sistem perundangan

- Syariah di Malaysia. *International Conference on Syariah, Law and Science (CFORSJ I-CONF)*, 2(1), 1-12. <https://alnadwah.usim.edu.my/cforsjiconf/paper/view/62>
- Jabatan Kehakiman Syariah Negeri Pulau Pinang. (n.d.). Recent development in Syariah law in Malaysia. Retrieved from <https://jksnpp.penang.gov.my/index.php/en/media-menu/court-publication?view=article&id=91:recent-developments-in-shariah-law-in-malaysia&catid=18:penerbitan-mahkamah>
- Kali, R. (2021, December 17). Understanding Sharia: The intersection of Islam and the law. *Council on Foreign Relations*. Retrieved from <https://www.cfr.org/backgrounder/understanding-sharia-intersection-islam-and-law>
- Khaleefah, R. S., & Wan Ismail, W. A. F. (2023). القيود القانونية لنطاق الصلح اجلنائي في إطار التشرع العراقي: The legal restrictions to the scope of criminal reconciliation in the framework of Iraqi legislation. *Malaysian Journal of Syariah and Law*, 5(2), 309–339. <https://doi.org/10.33102/mjsl.vol5no2.73>
- List II, Ninth Schedule of the Federal Constitution.
- M. Kamal Hassan. (2001). Sharia and its meaning in Islam. Retrieved from https://www.worldscientific.com/doi/pdf/10.1142/9789813238916_0001#:~:text=In%20the%20Quran%20the%20term
- M.B Hooker. (2003). Submission to Allah? The Kelantan Syariah Criminal Code (II), 1993. Dalam V. Hooker & N. Othman (Eds.), *Malaysia: Islam, society and politics* (hlm. 83). Singapura: ISEAS.
- Mahmud Saedon A. Othman. (1998). *Institusi pentadbiran undang-undang & kehakiman Islam*. Kuala Lumpur: Dewan Bahasa dan Pustaka.
- Malaysia. (1952). *Selangor State Shariah Law Administration Enactment*. Act 45(2) and (3).
- Malaysia. (n.d.). *Federal Constitution*. Article 3.
- Md. Hakim Lee v Federal Territories Islamic Religious Council [1997] 4 CLJ 419.
- Mohamed Azam. (2000). Bidang kuasa dan kedudukan Mahkamah Syariah di Malaysia pasca alaf 20: Ke arah mana. *Jurnal Syariah*, 103-122. Retrieved from <http://mjs.um.edu.my/index.php/JS/article/download/22931/11447>
- Myriam v Ariff [1971] 1 MLJ 265.
- Ng Wan Chen v Majlis Agama Islam and Anor [1991] 3 MLJ 174.
- Noor Huda Roslan. (2013, March 6). Hukuman alternatif dari perspektif Syara' dan undang-undang jenayah Syariah di Malaysia [Slide PowerPoint]. *Konvensyen Perundangan Syariah*, Bahagian Pendakwaan Jabatan Hal Ehwal Agama Islam Negeri Sembilan, Bangunan SUK Seremban.
- Raihanah Abdullah. (2009). Penangguhan kes di Mahkamah Syariah: Cabaran dan penyelesaian. *Jurnal Syariah*, 1-30. Retrieved from <http://jummecc.um.edu.my/index.php/JS/article/download/22742/11287>
- Ramizah Muhammad & Khairunnasriah Salam. (2019). Achievement of human capital and innovation in the administration of Syariah Court: Aiming for an international model. *Jurnal Syariah*, 27(1), 27-44.
- Siti Shamsiah. (2003, March 19). Bidang kuasa Mahkamah Syariah di Malaysia. *Institut Kefahaman Islam Malaysia*. Retrieved from <https://www.ikim.gov.my/index.php/2003/03/19/bidang-kuasa-mahkamah-syariah-di-malaysia-satu-pengenalan-ringkas/>
- Siti Zubaidah Ismail. (2011). Hukuman alternatif dari perspektif undang-undang Syariah. *Shariah Law Reports*, 4 ShLR, hlm. xxiv.
- Tuan Mohamad Shakir Abdul Hamid. (2016, May 30). [Temu bual dengan penulis].
- YAA Dato' Yusof Musa. (2014, December 23). *Isu dan cabaran hukuman alternatif dalam undang-undang jenayah Islam di Malaysia*. Seminar Undang-Undang Jenayah Islam Peringkat Kebangsaan 2014, Fakulti Undang-Undang UKM.
- Zainur Zakaria. (1995). The determination of Islamic law or Hukum Syarak by the civil court and the admissibility of expert opinion. *INSAF*, 27(3), 98-111.
- Zakaria, Z. I., & Nasohah, zaini. (2019). Cabaran pelaksanaan penguatkuasaan undang-undang jenayah Syariah di negeri Melaka: The challenges of implementing the enforcement of Syariah criminal law in Malacca. *Malaysian Journal of Syariah and Law*, 7(2), 13–26. <https://doi.org/10.33102/mjsl.v7i2.188>
- Zulkifly Muda. (2010). *The concept of crime and criminal law in Malaysia*. Semasa Press Sdn. Bhd.