

CHAPTER II

THE SHARIAH COURT

The judicial structure expressly provided for by the Federal Constitution comprises of the High Courts of coordinate jurisdiction and status with both appellate and unlimited original jurisdiction in civil and criminal matters in the whole of the Federation, and a Federal Court which ranks above the High Courts with an exclusive jurisdiction- appellate, original and advisory. Apart from these, there are the subordinate courts - the Session's Court, Magistrate Court, and at the lowest end, the Penghulu Court as established by Federal law. In each states of Malaya including the state of Johore, there is the Shariah law court with jurisdiction relating to Islamic law as defined and provided for in the states' Enactments concerning the administration of Islamic law. The Shariah Courts are neither created by virtue of provisions in the Federal Constitution, as in the case of the Federal and High Courts, nor established by Federal law, as in the case of the lower courts; "the constitution, organization and procedure of Muslim Courts"¹ fall within the exclusive competence of the various state legislatures and under the authority vested in the Rulers.

In Johore, Shariah Court is established with reference to the Courts Enactment No. 54. The jurisdiction of a court of Chief Kathi extends throughout the state. However, the Courts Enactment No. 54 and the Kathis Court Rules 1973 which are found in Johore do not expressly define the spheres of jurisdiction of

1. See Appendix 1 State list.

Shariah Court or the Kathi Court. This is found by contrast in the Perak Administration of Muslim Law Enactment 1965 in section 45, where provision is made for the court's criminal and civil jurisdiction.²

The Courts Enactment No. 54 in Johore, only provides that every Kathi and Naib Kathi shall have powers in all matters concerning the religion of Islam, marriage and divorce, and in all other matters regulated by law of the religion of Islam, as may be defined in his tauliah.³ By implication, therefore, the jurisdiction of the Shariah Court includes the matters which are defined in the Kathi's tauliah. This would then include offences concerning non-payment of zakat and fitrah, marriage, divorce, maintenance and failure to fast during the month of Ramadhan. However, in practice, the cases which come to the Shariah Court are those which concern matters like marriage, divorce and maintenance. Other cases like non-payment of zakat rarely appears in the Shariah Court.

It is found that the Shariah Court has limited jurisdiction which only covers matters, "defined in the Kathi's tauliah".⁴ The Kathi's tauliah covers civil matters like marriage, divorce and maintenance but criminal offences are not defined at all. In Johore, there is the Muslim Offences Enactment No.47 (25 of 1919) which prescribe certain offences. The Enactment provides for offences like adultery,⁵ incest, unlawful marriage,⁶ and unlawful religious teachings.⁷ But these offences

2. See Appendix 2 Perak Enactment.

3. Courts Enactment No.54, s.65.

4. Courts Enactment No.54, s.65.

5. Muslim Offences Enactment No. 47, s.6

6. Muslim Offences Enactment No. 47, s.7.

7. Muslim Offences Enactment No.47, s.3.

do not come within the jurisdiction of the Shariah Court. In Johore, the offence of incest (by reason of consanguinity or of fosterage) is triable by the High Court; while the other offences under the Muslim Offences Enactment are triable by the Court of a Magistrate of the First or Second Class. In such trials the Court shall be assisted by two Muslim assessors.⁸ Therefore it is found that the Shariah Court has no power to try offences which concerns the Muslim religion because these offences do not come within the sphere of the Kathi's tauliah.

The reasons for this are also clear. This is because the Shariah Court is more competent to deal with civil and personal matters which are more related to the Muslim religion like marriage and divorce, rather than having to deal with cases of adultery or propagation of the religion which may require a better system of ascertaining evidence and examining witnesses. Those cases are criminal matters which are better dealt with in a Magistrate Court where the rules for adducing evidence are stricter. In this respect I would add that it is not the Muslim system of adducing evidence which is inadequate but rather the administration or the application of it by the Kathi in criminal matters.

In Johore, only persons professing the Muslim religion are subject to the provisions relating to Muslim offences.⁹ The jurisdiction of the court to try cases which only involves Muslim persons as provided under this Enactment could lead to unsatisfactory situations. For example, section 6 of the Muslim Offences

8. Muslim Offences Enactment No.47, s.8.

9. Muslim Offences Enactment No.47, s.2.

Enactment provide for the offence of adultery. If the two persons involved in the offence happen to be Muslim persons, then there would not be any problem in applying the provisions of the Enactment. But what if the offence of adultery is committed by a Muslim woman and a non-Muslim man. Would the court then have the jurisdiction to punish the non-Muslim man as provided in this Enactment? It is clearly stated that the Enactment does not apply to non-Muslims. Therefore it could lead to a very absurd situation where the court could convict the Muslim woman while it has no power to do so with regard to the non-Muslim man. There has not been any decided cases on this matter.

Appeal

An appeal from the decision of the Shariah Court lies to the Ruler in Council and is heard and determined by a committee appointed from the members of the Muslim community in Malaya.¹⁰ Any court before which any question of Muslim law arises may refer such questions to the Mufti, and the Mufti shall transmit to such court his opinion with the reasons given and references to the authorities on which it is based. An appeal may be brought from the opinion of the Mufti to the Ruler in Council, and such appeal may be heard and determined by a committee appointed by the Ruler in Council from among the members of the Muslim community in Malaya.¹¹

10. Courts Enactment No. 54, s. 65 to s. 67.

11. Muhamadan Law Determination Enactment 1949

2. Muslim Offences.

The Muslim jurists divide the laws regarding Muslim offences into three classes:

1. Those which concern men in their social and individual existence and their dealings with one another.

2. Laws which solely concern the spiritual aspect of the individual life, though some may relate to worldly transactions.

3. Laws which mainly concern the spiritual aspect of individual life, but also affect the Muslim communal life in its religious aspect.

The first class includes laws relating to contracts, transfer of property, succession, domestic relations, and crimes. The second class includes laws enjoining commendable acts such as alms, fasting and superogatory prayers. The third class includes laws enjoining the duties of performing the five daily prayers and the Jumah prayer, paying the Zakat and fasting during Ramadhan.¹²

Muslims in Malaysia are subject to the ordinary criminal law of the land, the main part of which is contained in the Penal Code. The offences which concern the Muslims may be divided into six groups:

a. matrimonial offences

12. Professor Ahmad Ibrahim, Islamic Law in Malaya, P.315

- b) laws dealing with unlawful sexual intercourse
- c) laws concerning the consumption of liquor
- d) laws concerning the spiritual aspect of individual life which also affect the Muslim communal life,
- e. laws relating to adoption and
- f. miscellaneous laws relating to the teaching of Muslim doctrines and conversions.

Matrimonial Offences.

In Johore it is provided that any person whose duty is to effect the registration of a marriage, divorce or revocation of divorce and who omits to effect such registration shall be liable to a fine not exceeding \$50;¹³ And any person who fails to comply with the summons of a Kathi making an enquiry to a marriage, divorce or revocation of a divorce shall be liable to a fine not exceeding \$10. Where the marriage of the two Muslims has been irrevocably dissolved by the pronouncement of three divorces by the man against the woman, it shall be unlawful for such persons to cohabit as man and wife unless the woman shall first have been lawfully married to some person other than her divorced husband and such marriage has been dissolved and the period of 'idah' has elapsed;¹⁴ any person who acts in contravention of this provision shall be guilty of an offence and for each offence shall be liable on conviction to a fine not exceeding \$150, and for each subsequent offence to a fine not exceeding \$500 or to

13. Muhammadan Marriage Enactment, No.17 (15 of 1914) s.7.

14. Muhammadan Marriage Enactment, No.17 (15 of 1914) s.8(ii)

imprisonment not exceeding six months.¹⁵

Unlawful Sexual Intercourse.

The Penal Code punishes the offences of rape, incest, unnatural offences, gross indecency, kidnapping from lawful guardianship and enticing a married woman; and such provisions apply to Muslims.

In Johore it is provided that any Muslim who has sexual intercourse with a person whom he is and whom he knows or has reason to believe that he is forbidden by the Muslim law to marry by reason of consanguinity or fosterage or affinity is guilty of an offence of incest. If the offence is incest by reason of consanguinity or fosterage the person shall be liable on conviction to imprisonment for a term not exceeding five years and any woman convicted of being a participator in such act shall be liable to imprisonment for a term not exceeding one year. If the act is incest by reason of affinity, the person shall be liable on conviction to imprisonment for a term not exceeding six month or to a fine not exceeding \$250, and any woman convicted of being a participator in such act shall be liable to similar penalty.¹⁶

Any Muslim who has sexual intercourse with a Muslim woman who is or whom he knows or has reason to believe to be the wife of another man, has sexual intercourse not amounting to rape, is guilty of the offence of adultery and shall be liable on conviction

15. Muslim Offences Enactment, no. 47 s. 5. to s. 7.

16. Muslim Offences Enactment, no. 47. s. 7.

imprisonment to a term not exceeding one year and shall also be liable to a fine not exceeding \$250; any Muslim woman convicted of being a participator in such an offence shall be liable to imprisonment not exceeding six months.¹⁷

Any Muslim woman who leads an immoral life by becoming a prostitute or cohabiting with a man to whom she is not married, shall be guilty of an offence and on a conviction shall be liable for a first offence to imprisonment for a term not exceeding one month and for each subsequent offence to imprisonment not exceeding three months.

In the case of Anchom bte Lanpong v. PP¹⁸ the Court of Appeal in Johore rejected an argument that the Muslim Offences Enactment was ultra vires the Constitution of Johore as it purported to revise or amend the Muslim law, which was declared by that Constitution to be an immutable part of the law of the state.

Consumption of Intoxicating Liquor.

The Excise Enactment provides that no person holding a licence to sell any intoxicating liquor by retail for consumption in the premises shall permit any Muslim other than a public servant in the bona fide exercise of his duty to enter upon the premises so licensed, and it is further provided that every Muslim found upon premises so licensed shall be presumed to have entered thereon with the permission of the holder of the license until the contrary

17. Muslim Offences Enactment No.47, s.6.

18. (1940) M.L.J. 22.

is proved.¹⁹ It is found that in practice, this provision is rarely, if at all enforced in the state. There has never been any cases brought to court concerning any Muslim who violates the provisions of this Enactment despite the fact that there are found many Muslim persons who enter or patronise such premises. Furthermore, there is an artificial distinction that a Muslim public servant in the exercise of his duty is not prohibited from entering such premises. In practice it would be difficult to ascertain whether such public servants who enter those premises are acting in bona fide exercise of his duty.

Offences Dealing with the Spiritual Aspect

In cases of Friday prayers and fasting in Ramadhan, there are no specific provisions in the Johore State Enactments which deal directly with them. But such matters are included in the Kathi's tauliah and can be dealt with accordingly by a Kathi in every district of the state.

Non-payment of Zakat.

All persons liable under the Muslim law to pay Zakat and Fitrah shall make such payment as and when it falls to be made according to Muslim law and any person who fails to do so shall be guilty of an offence and shall on conviction by the court of a Kathi be liable to a fine not exceeding \$10.²⁰ There is a suggestion made to increase the penalty of non-payment of Zakat to a fine of \$1,000 or an imprisonment of six months or both.

19. Johore Excise Enactment 1935 (E. No.102) s.39.

20. Johore Zakat and Fitrah Enactment 1957, s.9.

This is dealt with in the chapter on Zakat.

Miscellaneous Offences.

In Johore it is provided that no Muslim shall accept in his own house and in the presence of members of his own family teach any religious doctrine unless he has previously obtained permission to do so from the Ruler in Council; and any Muslim who teaches any religious doctrine without having obtained such permission shall be liable on conviction to a fine not exceeding \$100. Any permission granted by the Ruler may be revoked at his discretion.²¹

3. Evidence

There are various procedures of giving evidence in a Shariah Court in Johore. There is the usual taking of oath where the witness will swear upon the Holy Quran to tell the truth on giving evidence, which is similar to that of giving evidence in the ordinary court. There is also the 'Sumpah Sharyi' found only in maintenance cases where the court would not require the wife to produce any witness to support her evidence. According to 'Hukum Shara'' or the regulations as provided by the Muslim law, a witness is allowed to testify on oath that maintenance has not been complied with and this is accepted by the court without further evidence. This is an oath between the witness and God.²²

21. Muslim Offences Enactment No.47, s.3.

22. Materials obtained from the Chief Kathi Johore.

Number of Witnesses.

The testimony of a single individual is not enough to prove any fact, except the appearance of the new moon in the month of Ramadhan. In order to prove the crime of zina (fornication) four male witnesses must be produced and two witnesses are required to prove the culprit's confession. Real property claims and contracts with consequences that are purely pecuniary such as sale, cancellation by consent, transfer of debts due to a person and security, as well as rights resulted from these contracts, such as the right of option may all be proved by the testimony of two male witnesses. In other contested cases such as marriage, repudiation, return to conjugal union, death, appointment of agents of testamentary dispositions, two male witnesses are required. Cases which come under observation of women such as existence of virginity, and defects in parts of the body usually covered are proved by the evidence of four women.²³

Status of Witnesses.

Witnesses must be free from bias and prejudice. A person cannot depose in favour of his ancestors or descendants, though he may legally do so against them. The deposition of an enemy is inadmissible but a favourable deposition of an enemy is admissible. According to Nawawi, husband and wife may give evidence in favour of each other, and a person may even depose in favour of his brother or a friend. The testimony of persons who

23. Professor Ahmad Ibrahim, Islamic Law in Malaya.

are too eager to give evidence may be challenged.²⁴

In Johore the general Muslim law regarding evidence apply since there is no specific provisions dealing with evidence in the state. The Kathis in the court mostly rely on Hukum Shara'. Generally, the quality of witness required is usually referred to as a free, adult, sane Muslim of irreproachable character, not liable to suspiscion. In deciding cases of inheritance or wills, the judge or the Kathi will decide according to the Muslim law. It is customary that the land office will send copies of wills that concern Muslim persons to the Shariah Court before such property could be distributed. It is the duty of the Shariah Court to ascertain the amount of the property, whether there are any debts to be paid and to settle the property according to Muslim law before it is sent back to other authorities concerned. Before a fatwa or decision is given regarding such property, it cannot be dealt with or distributed in any other way.

4. Sources of Law.

In the Middle East the Muslim countries have almost adopted comprehensive codes of Islamic law in place of the uncodified Shariah law. But the Administration of Muslim Law Enactments in the Malay States and in Johore particularly, refrain from meddling with the established doctrine of the substantive law, leaving the onus of expounding the law to those qualified to do so. In Johore, the Majlis is directed to take notice of

24. Reference was made to Chief Kathi Johore.

and act upon all written laws enforced in the state, the provisions of the Shariah law and Malay Customary law.²⁵

Sources of Shariah Law.

The school of Islamic law that prevails in Malaya is the Shafii School, one of the four original schools of law recognised by the Sunnites. Beginning in tenth century the systematic exposition of its law generated a wealth of literature consisting of commentaries, glosses and interpretation by individual scholars. There appeared a variety of legal digests by the fourteenth century, which remained authoritative in the Shafii school. Among the early recognised texts on the Shafii law were those of Abu Shuja' and Nawawi, the two great Shafii jurists whose works became well known in the East. Abu Shuja is the author of the shortest compendium on Shafii law, the Al-Ghayah. Nawawi's Min haj al-Talibin has ever since remained a standard work of reference.²⁶

From the latter part of the sixteenth century, the most decisive exposition ever to be undertaken on Shafii law appeared in the works of two well known commentators on Nawawi's Min haj - they are Ibni Hajar al-Haitami (d.1565) and al-Ramli (d.1596) whose works came to be regarded as the correct statements of the doctrine of the school of Shafii law. The opinions of Ibni Hajar as expounded in his commentaries al Tuhfah

25. Abdul Majeed Mohamad Mackeen, Contemporary Islamic Legal Organisation in Malaya, P.50.

26. Ibid.

won special recognition among the Shafii adherents of Malaysia and Ceylon. These works represent some of the most important sources on which the Islamic legal experts in Malaya rely for their interpretation and exposition of the views of the Shafii school.²⁷

Malay Customary Law.

The Shariah law or 'hukum shara'' is a broad entity which also embraces those valid elements of Malay custom which could be assimilated into Islamic law through the effective instrument of the fatwa. The word for 'custom' in Islamic legal nomenclature is 'adah, generally referred to as 'urf. Although custom per se did not succeed in becoming an official course of Islamic law, it has functioned as a principle of subsidiary value within the framework of recognised sources. The role of custom in determining the application of the substantive law of the Shariah has been recognised. On this basis, custom was not only assimilated into Islamic law but its binding nature was acknowledged in the maxim "Custom ranks as stipulation". The guiding principles for resolving conflicts between customary practices and Shariah law have been laid down by the Shafii jurists - al Suyuti, 1505. The author enumerates the following rules:²⁸

1. Customs are recognised in so far as they show continuity in practice.
2. Cases of conflict between customary practice and a doctrine of Shariah law shall be resolved in favour

27. Abdul Majeed Mohamad Mackeen, Contemporary Islamic Legal Organisation in Malaya, P.51.

28. Ibid, P.53

of the former in the absence of a definite Shariah rule.

3. Cases of conflict between customary practice and a Shariah rule shall be resolved in favour of the latter in the presence of a definite Shariah rule.

4. Between a general (am) and a particular (khas) custom, the latter shall be valid only in so far as it is not limited incidence, example a custom limited to an individual as opposes to a group.

5. Custom shall prevail in certain matters in respect to which the Shariah provisions are general and on which neither the doctrine of the law nor its phrases suggests any definitions.

These rules provide the basis on which the scope for intergrating custom within the framework of Islamic law may be. Malayan Islamic jurisprudence therefore stands midway between extreme Shariah puritanism and blind veneration of customary observances. By combining the Shariah law, the Statute law, and customary practice in a harmonious balance, it sets the pace for continuous expansion of the Shariah law. The State Enactment which provide for the administration of Islamic law in the state, are not strictly the source of law but rather set out as a machinery for legal administration.
