



الجامعة الإسلامية العالمية ماليزيا  
INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA  
بِوَسِيْلَتِي اِسْلَامُهُ اَنْبَارًا يَجْنِبًا مُلْدِيْنَا

THE ADMINISTRATION OF ISLAMIC JUDICIAL  
SYSTEM IN ASEAN COUNTRIES WITH  
PARTICULAR REFERENCE TO MALAYSIA

BY

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for the degree of Doctor of Philosophy

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## ABSTRACT

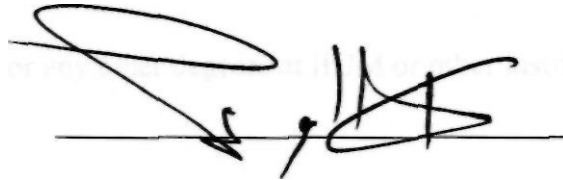
The purpose of this study is to find out similarities and differences in the administration of Islamic judicial system among selected ASEAN countries and Malaysia. It analyses the structure of *Shari'ah* Court, appointment and dismissal of judges, and problems militating a smooth and systematic administration of *Shari'ah* Court. This study adopts a historical-comparative approach necessary to answer questions about macro level changes or for understanding social and judicial processes that operate across time or are universal across several societies. It draws data from four sources: primary sources, secondary sources, running records and recollections. Using these sources, the study analyses the judicial structure as it prevailed during the period of the Prophet (SAS) and the Rightly Guided Caliphs (*khulafa' al-rashidun*) and the periods of the Ummayyads and the 'Abbasids. Subsequent chapters compare the judicial system prevalent in Indonesia, Philippines, Thailand, Singapore and Malaysia. The comparison was made in pairs using "similar system" and "different system" designs. The study found that all the countries with the exception of Thailand try, with varying degrees of success, to accommodate the legitimate rights of their respective Muslim population by instituting court systems based upon Islam. Interestingly, the study found that the *Shari'ah* Court in Singapore is well administered with systematic organisation as well as manpower. Thailand stands at the opposite side of the spectrum with a truncated *Shari'ah* confined to only four provinces to the exclusion of others. In the Philippines, the *Shari'ah* Court has become somewhat static while in Muslim majority Indonesia, the *Shari'ah* Courts have evolved over time but most of the development relates to procedural matters and does not affect the substantive element of *Shari'ah*. Malaysia, the self-declared Islamic state, has a three-tier system consisting of subordinate courts, high courts, and appellate courts, thus fulfilling natural justice in a modern world. However, there is ample room for improvement in terms particularly of an independent organisation to look after the needs and interests of the administration of *Shari'ah* Court.

## ملخص البحث

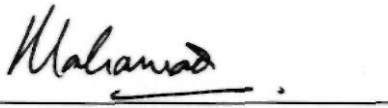
الغرض من هذه الدراسة هو الوقوف على السمات والفوارق بين نظام الإدارة القضائي الإسلامي بين دول آسيان وبين ماليزيا. وقد قامت الدراسة بتحليل بنية المحاكم الشرعية، تعيين وإعفاء القضاة، والمشاكل التي تعوق سير المحاكم الشرعية. قامت الدراسة باتباع المنهج التاريخي المقارن وهو المنهج المناسب للإجابة على الأسئلة الشاملة لفهم العمليات القضائية والاجتماعية المتصلة بالتحويلات على المستوى المحلي أو على مستوى المجتمعات المتعددة. تأخذ الدراسة بيانها من مصادر أولية وثانوية، ووثائق متواجدة ومن مذكرات وباستعمال هذه المصادر تقوم الدراسة بتحليل البنية القضائية منذ وقت الرسول ﷺ والخلفاء الراشدين وخلال فترتي الأمويين والعباسيين. ويتم في الفصول المتتالية من الدراسة مقارنة النظام القضائي السائد في كل من إندونيسيا، الفلبين، تايلاند، سنغافورة وماليزيا. وقد قامت المقارنة باتباع أسلوب "الأنظمة الشبيهة" و"الأنظمة المختلفة"، فوجدت أن كل البلدان ما عدا تايلاند، حاولت بدرجات متفاوتة من النجاح استيعاب الحقوق المشروعة لمواطنيها المسلمين وذلك بإقامة نظام محاكم إسلامية. ومن الملفت للنظر أن الدراسة قد وجدت أن المحكمة الشرعية في سنغافورة تقوم على أساس متين من التنظيم ومزودة بالمقتدرين من الأفراد. أما تايلاند فإنها تقف على النقيض من ذلك بنظام شريعة محدود في أربعة أقاليم فقط من دون بقية الأقاليم. في الفلبين أصبحت محكمة الشريعة إلى حد ما جامدة، بينما تطورت المحاكم في أندونيسيا ولكن ظل ذلك التطور وقفاً على الجوانب الإجرائية فقط. أما في ماليزيا، الدولة التي تعلن أنها دولة مسلمة، فهناك ثلاثة مستويات من المحاكم، محاكم دنيا، محاكم عليا، ومحاكم استئناف، مرسية بذلك قواعد العدالة الأساسية كما يراها العالم الحديث. و لا زال هناك الحاجة للمزيد من التطوير في هذا المجال خاصة فيما يتعلق بقيام نظام مستقل للنظر في حاجات تنظيم محاكم الشريعة في البلاد.

## APPROVAL PAGE

The thesis of Ramizah Wan Muhammad has been examined and is approved by the following:

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## DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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This thesis is dedicated to my teachers, *Almarhum* Professor Tan Sri Datuk Ahmad Ibrhhim and *Almarhum* Professor Datuk Dr. Mahmud Saedon Awang Othman, whose scholarly works have inspired me to work on this topic. May Allah (SWT) bless their souls and place them among the *Shuhada* '.

*Amin.*

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The Judicial Official Act 2000, Thailand  
The Thai Constitution 1997

## **LIST OF ABBREVIATIONS**

AMLA- Administration of Muslim Law Singapore

DPR- Dewan Perwakilan Rakyat

EIC - East India Company

ILIM - Islamic Training Institute of Malaysia

ILKAP - Institute of Judicial and Legal Training

JAKIM - Jabatan Kemajuan Islam Malaysia

JKSM - Federal Syariah Judicial Department

JKSN - State Syariah Judicial Department

MNLF - Moro National and Liberation Front

MPR - Majelis Permusyawaratan Rakyat

MUIS - Majelis Ugama Islam Singapura

OMA - Office on Muslim Affairs

S. A.W. - Peace be Upon Him

UUD - Undang-Undang Dasar

## CHAPTER ONE

### THE ISLAMIC JUDICIAL SYSTEM: A FRAMEWORK

#### INTRODUCTION

Islam is a complete way of life and a comprehensive civilisation. It includes among its most important objectives the realisation of justice and the eradication of injustice. Justice, in Islam, is a goal to be achieved and an ideal to be sought. Surely, Allah (SWT) “commands justice and the doing of good.”<sup>1</sup> He warns the believers not to allow “your rancour for a people to cause you to deal unjustly. Be just, for that is closer to piety.”<sup>2</sup>

Judicial institution is an important institution to dispense justice. While the Qur’ān does not specify the judicial procedures and structures of courts, it nevertheless laid down prescriptive injunctions that may be considered as guidelines for structuring judicial system in a Muslim society. There are many verses in the Holy Qur’ān relating to justice. The word “*‘adl*”<sup>3</sup> meaning justice, occurs in 28 places; the equivalent word “*qist*” meaning balance, occurs 25 times.<sup>4</sup> A word referring directly to carrying out justice that is “*qadā*” and its derivatives occur in 52 places. On the other hand, the word “*ḥukm*”<sup>5</sup> and its derivatives, meaning ordinances, commandments, judgements and decisions occur 89 times.<sup>6</sup>

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<sup>1</sup> Al-Qur’ān, *al-Nahl* 16:90.

<sup>2</sup> Al-Qur’ān *al-Māidah* 5:8.

<sup>3</sup> See al-Qur’ān, *al-An‘ām* 6:70, *al-Nisā’* 4:58, *al-Mā’idah* 5:95, *al-Nahl* 16:90, *al-Ṭalāq* 65:2, *al-Nisā’* 4: 129, *al-Ḥujurāt* 49: 9 and others.

<sup>4</sup> See Al-Qur’ān, *al-Ḥujurāt* 49:9, *Al-Māi’dah* 5:42, *Al-Nisā’* 4:135, *Al-Māi’dah* 5:8, *Al-Ḥadīd* 57:57, *Yūnus* 10:54. The word ‘*adl*’ has been defined literally as an inclination towards the truth or right. It is “the character of oneself which prevents him from committing severe sins and permissible undesirable acts.”

<sup>5</sup> See, among others, al-Qur’ān, *al-Nisā’* 4:58, *al-Nisā’* 4:105, *al-Baqarah* 2:213, *al-Māi’dah* 5:44, *al-Mumtaḥinah* 60:10, *al-Nisā’* 4:65.

<sup>6</sup> Ḥukm, according to al-Zuḥaylī, is “the judging of a thing to stand to another thing in the relation of an attribute to its subject, affirmatively or negatively, such as the judgement that the moon is rising or not.” Wahbah al-Zuḥaylī, *Uṣūl al-Fiqh al-Islāmi*, Dār al-Fikr, Damascus, 1986, p. 21.

The reason for enumerating these verses is to show the importance the Qur'ān attaches to justice. This applies to others and oneself alike. Although these verses may not specifically refer to the court or to the judicial institutions, they do relate to the judicial system as a whole. Thus, the Qur'ān enjoins:

If you judge, judge in equity between them for Allah loves those who judge in equity.<sup>7</sup>

To those entrusted to administer justice and to uphold the trust (*amānah*), the Qur'ān says to the effect that;

Allah does command you to render back to those to whom they are due and when you judge between man and man that you judge with justice.<sup>8</sup>

Allah (SWT) also warns and cautions the judge to give judgment according to His laws and not to follow one's desire.

O Dāwūd! We indeed made you a vicegerent on earth: so judge you between man in truth and justice nor follow you the lust of your heart for it will mislead you from the path.<sup>9</sup>

In another verse, Allah (SWT) talks about the difficulty of rendering justice to those whom one hates or to whom one has an aversion. The verse reads:

O you who believe stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others make you swerve to wrong and depart from justice. Be just: That is next to piety and fear Allah. For Allah is well-acquainted with all that you do.<sup>10</sup>

The Prophets, according to Ibn Qayyim al-Jawziyyah, were sent with various books to ensure that every human being lives in justice.<sup>11</sup> Consequently, there are many *aḥādīth* emphasising justice and the role of judiciary in realising justice.

The Prophet (SAW) said,

---

<sup>7</sup> Al-Qur'ān, *al-Mā'idah* 5: 42.

<sup>8</sup> Al-Qur'ān, *al-Nisā'* 4: 58

<sup>9</sup> Al Qur'ān, *Al-Şād*, 38: 26.

<sup>10</sup> Al Qur'ān, *al-Mā'idah* 5: 8.

<sup>11</sup> Ibn al-Qayyim, *al-Ṭuruq al-Ḥukmiyyah* (Cairo: Maṭba'ah al-Madanī, n.d), 14.

Allah would be with a *qāḍī* if he had not committed any cruelty. However, *Shaitān* would be with him if he was cruel.<sup>12</sup>

Another *ḥadīth* clarifies the onerous responsibility of a judge by placing him into one of the three categories. The *ḥadīth* reads;

Judges are of three types, one of whom will go to the paradise and two to the hell. The one who will go to the paradise is a man who knows what is right and gives judgment accordingly; but a man who knows what is right and acts tyrannically in his judgment will go to hell; likewise a man who gives judgment when he is ignorant will go to hell.<sup>13</sup>

On the burden of being a judge the Prophet (SAS) said,

Who so is appointed a judge among men has indeed been slaughtered without a knife.<sup>14</sup>

In another *ḥadīth*, the Prophet (SAS) said that

When a judge wishes to pass decree, and then strives hard and decides justly, there are two rewards for him; but when he wishes to pass a decree, and he strives hard but commits mistake, there is one reward for him.<sup>15</sup>

The above *ḥadīth* shows the responsibility and the status enjoyed by a *qāḍī* who receives the guidance and protection from Allah (SWT). It is also essential to note that the Prophet (SAS) himself, on numerous occasions, assumed the position of a judge and was emulated by Rightly Guided Caliphs, the *Khulafā al-Rāshidūn*.

The Prophet (SAS) always based his judgement on evidence presented and not on the basis of eloquence of the claimant. Nobody can claim his or her right without presenting evidence as is evident from the following *ḥadīth*.

Ummu Salamah reported the Prophet (SAS) as saying: I am only a human being and you bring your dispute to me, some perhaps are more eloquent in their plea than others, so that I give judgment on their behalf according to what I hear from them. Therefore whatever I decide for

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<sup>12</sup> Al-Shawkānī, *Nail al-Awṭār*, Vol. 8 (Cairo: al-Bāb al-Ḥalabī, n.d.), 293.

<sup>13</sup> Al-Shawkānī, *Nail al-Awṭār*, p.263.

<sup>14</sup> Ibn Farḥūn, *Tabṣīrah al-Ḥukkām*, Vol.1 (Beirut: Dār al-Shuūn al-ʿIlmiyyah, 1995), 12.

<sup>15</sup> *Ibid*, p.116.

anyone who by right belongs to his brother, he must not take anything, for I am granting him only a portion of hell.<sup>16</sup>

The companions of the Prophet (SAS) also played a very important role in establishing a standard system and procedures of judicial administration. A very distinguished companion is ‘Umar ibn al Khaṭṭāb who wrote the famous letter to his *qāḍī*, Abū Mūsā al-Ash‘arī in Kūfah. This letter is considered as the cornerstone of Islamic judicial system.<sup>17</sup> It contains ten judicial principles as follows:

1. Judiciary is a matter that has been established by the *Sunnah* and therefore must be followed.
2. Matters must be fully understood before any judgement is passed. Judges must understand the facts of the case, procedures and substantive laws.
3. Justice must not only be done but also seen to be done. The purpose of the judiciary is to return the rights to the rightful owners.
4. Judges must implement justice in every conceivable aspect. The prosecutor and accused must get equal treatment before the court of justice.
5. The burden of proof is on the party that asserts the claim; oath is on the denying party. The decision must be based on evidence.
6. Judges must give opportunities to the parties in conflict to settle the case by mutual consent. However, it must not be on matters that turn *ḥalāl* into *ḥarām* or vice versa.
7. Justice must prevail at all times. If a judge identifies a mistake in his judgment, he must correct it.
8. A witness must be just and free from any doubts. Generally, a witness is assumed to be just unless proven otherwise.

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<sup>16</sup> *Sunan Abū Dāwūd*, vol.3 (Lahore: Sheikh Muhammad Ashraf, 1984),1016.

<sup>17</sup> Wahbah Zuḥaylī, *Tārikh al- Qaḍā’ fī al-Islām* (Damsyiq: Dār ul-Fikr, 1995), 109.

9. Every case must be fully understood. Evidence and facts must be equally understood before passing a judgment. Decisions must follow al-Qur’ān and the *Sunnah* of the Prophet Muhammad S.A.W. as well as *ijtihād*.

10. Every judge must follow the etiquette inside as well as outside the court. No one should decide a case when he is angry, distressed, bored or biased.<sup>18</sup>

*Qādī* should observe these principles in their professional lives.

It should be evident from the cited references from the Holy Qur’ān and *aḥādīth*, that it is obligatory upon every Muslim to uphold justice in every walk of life. The *fuqahā’* and *‘ulamā’* are unanimous that administration of justice, i.e., enforcing good and suppressing evil, is one of the fundamental functions of an Islamic state. Thus, the Qur’ān categorically states:

Those who, if we give them power in the land, observe the prayer and pay the *Zakāh* and enjoin what is good and forbid what is evil.<sup>19</sup>

Administration of justice is a devotional act. According to Sarakhsī, “it is one of the best acts of devotion” and “one of the most important after belief in Allah.”<sup>20</sup> The second Caliph ‘Umar ibn al-Khaṭṭāb considered *qadā’* as a “firm obligation,” and al-Ghazālī considered it prior to *jihād*.<sup>21</sup> The *fuqahā’* are of the opinion that *qadā’* is a collective obligation, a *wājib* or *fard al-kifāyah*.<sup>22</sup> *Fard* or *wājib* means an obligation and *kifāyah* means that if a few competent persons fulfill the obligation, it is

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<sup>18</sup> Ahmad Ibrahim and Mahmud Saedon Awang Othman, “Judges and Lawyers under the Shariah”, Aidit Haji Ghazali (ed), *Islam and Justice* (Kuala Lumpur: IKIM, 1993), 134-135.

<sup>19</sup> Al-Qur’ān, *al-Ḥajj* 22:41.

<sup>20</sup> Al-Sarakhsī, *al-Mabsūt*, Maṭba‘ah al-Sa‘ādah, Cairo, n.d. Vol.XV, p. 59.

<sup>21</sup> Shamsuddīn Muḥammad al-Ramlī, *Nihāyat al-Muḥtaj ilā al-Sharḥ al-Minhaj*, Vol.20, (Beirut: Dār al-Fikr, 1984), 236.

<sup>22</sup> *Wājib ‘alā al-kifāyah* has been defined as: “one whose fulfilment in itself is demanded of the *mukallifūn* collectively disregarding the agent, such as response to greeting, performance of *jihād* and funeral prayer.” This should be distinguished from *wājib al-‘ain* (individual obligation) which is defined as “one whose fulfilment is demanded of each and every *mukallaf* individually, such as prayer and fasting, doing good to parents and joining ties with relatives.” Muḥammad al-Khuḍārī, *Uṣūl al-Fiqh* (Cairo: Maṭba‘at al-Istiḳāmah, 1938), 39.

considered to be sufficient for its fulfillment. The rest of the Muslims who do not discharge it are exonerated from it. They will not be sinners. However, it is *wājib al-‘ain* on the ruler to appoint a *qāḍī* since he is overly loaded with other state functions and since he is unable to settle all suits himself.<sup>23</sup>

Administration of justice, however, is not one man’s job. It is a teamwork that includes the judge, the lawyer, the registrar, the prosecutor, mediator as well as the administrative staff. These people need to be placed in their right position in the judicial structure and be equipped with proper knowledge and skill to perform their best to uphold justice by following correct procedures.

## **STATEMENT OF THE PROBLEM**

The purpose of this study is to examine the structure of judicial system and Islamic legal principles governing the *Sharī‘ah* Court in ASEAN countries with particular reference to Malaysia. This study analyses the existence or otherwise of trial and appeal proceedings in Islamic courts. Specifically this study analyses the structure of the *Sharī‘ah* Courts in selected ASEAN countries i.e., Indonesia, Singapore, the Philippines and Thailand. It examines the strengths and the weaknesses of the *Sharī‘ah* Courts in these countries respectively; describes the role and the functions of the judges and evaluates the reforms undertaken to improve the functioning of their respective judicial systems.

However, as stated above, this study gives special attention to the judicial system in Malaysia. In this regard it examines:

1. The structure of the judicial system both at the federal and state levels.

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<sup>23</sup> Shamsuddīn Muḥammad Al-Ramlī, *Nihāyat al-Muḥtaj*, 236.

2. The roles and functions of *Shari'ah* judge and *Peguam Syarie* (Muslim Counsel) in implementing and observing Islamic law in their legal practice.
3. The reasons for and the necessity of two kinds of federal judicial system: Federal *Shari'ah* Court and Federal Court of Malaysia, and,
4. Adversarial and inquisitorial approaches of trial

## **JUSTIFICATION OF THE STUDY**

This study is of significance in the sense that it analyses the judicial structure of ASEAN countries on a comparative basis. To date, no single study has covered the Islamic judicial structure of the countries as is attempted in this study. In the case of Thailand, amazingly, not much has been written on the application of Islamic law as well as the Muslim judge in Thailand. This study thus fills the much-needed void in existing literature of *Shari'ah* Courts. Additionally, the present study is justifiable on the following grounds:

1. Malaysia and Indonesia have Muslim majorities while the remaining ASEAN countries have Muslim minorities. Their love for Islam and the desire to live according to the *Shari'ah* are very much pronounced. Their efforts at national development in all facets of their life include the development of the Islamic *Shari'ah* Courts which form part of their respective national judicial systems. This study should probably assist them in their endeavour to develop a sound Islamic Judicial system.
2. It is very essential to have a proper structure of the *Shari'ah* Court because it will ensure that the fundamental rights of the aggrieved parties are treated justly. Moreover the structure of court is part and parcel of the procedural matters in Islamic judicial system. Classical Islamic law does provide for a