POWERS AND JURISDICTION OF SYARIAH COURTS IN MALAYSIA

2nd Edition

Farid Sufian Shuaib
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SECOND EDITION

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PREFACE TO THE SECOND EDITION

It has been five years since the publication of the first edition of this book. Ten years have passed since the insertion of article 121(1A) of the Federal Constitution. The three past Chief Justices during the intervening years, Tun Eusoff Chin, Tun Dzaiddin Abdullah and Tun Fairuz have delivered important decisions in separate cases touching on Syariah courts. The current Chief Justice – at the time of writing of this book – Dato’ Abdul Hamid Mohamad, has always delivered significant judgments regarding this issue since his days as a High Court judge.

Syariah court reports have also managed to capture front page headlines of newspapers. The cases of Lina Azlani, M Moorthy, Nyonya Tahir and Kamariah Ali are some of the cases that have pitted different groups not only on Syariah courts per se but on the issue of freedom of religion. A controversial national roadshow involving the Minister in the Prime Minister’s Department in the post 2008 General Elections Cabinet line up, Datuk Zaid Ibrahim (before he became a Minister), was conducted by NGOs as a response in particular to the Lina Azlani judgment.

Lest we forget after being drowned in all these controversies, almost all of the cases decided by Syariah courts are on the determination of Islamic law matters among Muslims. The reassertion of Syariah courts’ jurisdiction and powers is to enable Syariah courts to decide issues of marriage, custody, property transactions, Syariah offences and administration of Islamic law in accordance with Islamic law and deliberated by experts of the law. Without this assertion, matters of Islamic law will continue to be decided by civil courts, resulting most of the time with denial of the application of Islamic law or with the creation of Anglo-Mohammedan law. However, cases on the custody of children from Muslim marriages being governed by Islamic law rather than by civil law in civil courts decided by non-Muslim judges do not make to the front page of newspapers. Such cases are heard exclusively by Syariah courts because of the reassertion of Syariah courts’ jurisdiction.
Rector of International Islamic University Malaysia (IIUM) and Prof Datuk Dr Mohd Azmi Omar, the Deputy Rector (Academic & Research) (IIUM) for their support in research and publication in IIUM; the Research Management Centre, in particular the Dean, Prof Dr Mohamad Sahari Nordin and the Deputy Dean, Assoc Prof Dr Faridah Yusof for supporting me with grants; the Dean of Ahmad Ibrahim Kulliyyah of Laws, Prof Datuk Dr Zaleha Kamaruddin, for encouraging me to write to write; Dr Khairil Azmin Mokhtar, the Head of the Department of Public Law for his support and understanding. As always my colleagues at the Library of the International Islamic University Malaysia are ever helpful. I hope they will not take offence if I mention only a few names because of the limited space. Thanks to the Chief Librarian Pn Nooraini bt Ismail, Pn NurAini Abu Bakar, Cik Yusrina Abu Bakar and Cik Norazila Ahmad Palal of the IIUM Library. Their assistance is indispensable for me to complete my research. My colleagues at the Faculty have never let me down either to be my spring board to test my hypothesis or to lead me for further research. In particular I would like to thank Prof Dr Abdul Aziz Bari, Dr Shamrahayu A Aziz, Dr Mohd Hisham Mohd Kamal, Dr Ramizah Wan Muhammad, Mr Tajul Aris Ahmad Bustami and Mr Baharuddeen Abu Bakar. From LexisNexis, my thanks to the product development and editorial team – Paramjeet Kaur, Ida Nurbayatuty Jamil Nordin and Sharon Goh for their untiring effort in working with me to complete the manuscript. I thank my wife and children for countless hours away from them to complete this book.

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Ahmad Ibrahim Kulliyyah of Laws
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Islam and Islamic law have a unique place in Malaysia. Looking at the history, constitutional provisions and applicable law, Islamic law has a place in the administration of justice in Malaysia. Islamic law has been applied by civil courts and Syariah courts in the past and at present. Judges of Syariah courts in particular have the opportunity to propound Islamic law as provided by the Federal Constitution and State law. Within the limited jurisdiction and powers, Syariah court judges have the opportunity to apply Islamic law. Alas, sometimes they could not. Civil courts would say that Syariah courts have no exclusive jurisdiction over a subject matter and therefore the Federal Constitution does not preclude civil courts from hearing the case. Voluminous case law examined this question. I thought this is the appropriate time to analyse the written law and case law so that a coherent outcome could be produced from the Federal Constitution and cases. This is what I set out to do. Whether I would succeed in this endeavour could perhaps best be judged by the reader.

One difficulty that I faced in writing this manuscript or in other writings regarding Islamic law in Malaysia is the spelling of Arabic words that can be found in Malay or English writings, including statutes, in Malaysia. I have adopted the spelling that is widely used in statutes in Malaysia. Thus for instance, Shari‘ah courts becomes Syariah courts; waqf becomes wakaf and Shari‘ah becomes Shariah. Regarding the word Shariah, in Malaysia it is used interchangeably with Islamic law and hukum Shara‘ (or hukum Sharak).

In writing this book, I would like to thank Prof Dr Kamal Hassan, the Rector of International Islamic University Malaysia (IIUM), Assoc Prof Dr Mohd Azmi Omar, the Deputy Rector (Academic) of IIUM and Assoc Prof Datuk Dr Jamil Osman, at times the Deputy Rector (Academic) of IIUM for their support in research and publication in IIUM; the Research Centre, in particular the Dean, Prof Dato’ Dr Syed Arabi Idid, the Deputy Dean, Assoc Prof Dr A Khaliq Ahmad for supporting me with the grant; the former and present Deans of Ahmad Ibrahim Kulliyyah of Laws, Prof Tan Sri Harun Mahmud Hashim, Assoc Prof Dr Abdul Mohaimin Noordin Ayus and Nik Ahmad Kamal Nik Mahmod, for
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It would be evidenced from references made in this book that the pioneering works on Syariah courts had been done by al-Marhum Prof Tan Sri Datuk Ahmad Ibrahim. The path he paved for succeeding researchers and writers to tread eagerly and to expand judiciously is invaluable.

I had the idea of writing this book after the publication of my article entitled ‘The State List and Article 121(1A) of the Federal Constitution: The Jurisdictional Conflict Continues’ in volume seven of IIUM Law Journal. Chapter 5 is an expansion of the article. Some parts of Chapter 4 are based on materials I used for my contribution to the title ‘Syariah Law’ in 14 Halsbury’s Laws of Malaysia (Original Title Scheme) published by Malayan Law Journal in 2002.

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Table of Contents

Abbreviations ................................................................. ix
Glossary ........................................................................ xi
Preface to the Second Edition ................................. xv
Preface to the First Edition .................................. xvii
Table of Cases ............................................................... xxiii
Table of Legislation ..................................................... xxxiii
Table of Subsidiary Legislation .............................. xxxix
Table of Foreign Legislation ................................. xli

CHAPTER 1
INTRODUCTION

SECTION I
ISLAM AND THE MALAYSIAN LEGAL SYSTEM

CHAPTER 2
ISLAM IN MALAYSIA

2.1 INTRODUCTION ...................................................... 13
2.2 ARRIVAL OF ISLAM IN MALAYSIA .......................... 13
2.3 MALAYSIAN LEGAL HISTORY ................................ 14
2.4 CONCLUSION ........................................................ 19

CHAPTER 3
ISLAM AND SYARIAH COURTS UNDER THE
CONSTITUTIONAL FRAMEWORK

3.1 INTRODUCTION ...................................................... 23
3.2 THE HISTORY OF THE FEDERAL CONSTITUTION ....... 23
3.3 RELEVANCE OF CONSTITUTION ........................... 25
3.4 ISLAM AS THE RELIGION OF THE FEDERATION ...... 28
3.5 ISLAM AND FEDERALISM ...................................... 30
3.6 THE RIGHT TO PRACTISE ISLAM ............................... 32
3.7 LEGAL PLURALISM .......................................................... 39
3.8 CONCLUSION ................................................................. 41

SECTION II
SYARIAH JUDICIARY

CHAPTER 4
STRUCTURE AND ORGANISATION OF
SYARIAH COURTS

4.1 INTRODUCTION .......................................................... 49
4.2 STATE SPECIFIES ....................................................... 50
4.3 DISTINCT ENTITIES IN
THE ADMINISTRATION OF ISLAM ........................................ 53
4.4 JURISDICTION IN GENERAL ........................................ 54
4.5 THE SYARIAH BENCH .................................................. 57
4.6 PROSECUTION ............................................................ 61
4.7 INVESTIGATION .......................................................... 62
4.8 SYARIE LAWYERS ..................................................... 65
4.9 MUFTI AND FATWA ..................................................... 68
4.10 MAJLIS AGAMA ISLAM
(COUNCIL OF ISLAMIC RELIGION) ....................................... 74
4.11 CONCLUSION ............................................................. 76

SECTION III
ISSUES IN JURISDICTION AND POWERS

CHAPTER 5
CONFERMENT OF JURISDICTION

5.1 INTRODUCTION .......................................................... 81
5.2 EXPRESS CONFERMENT BY ITEM 1
OF THE STATE LIST .......................................................... 82
  5.2.1 Construction of Schedules ......................................... 84
  5.2.2 Imperative Language ................................................ 85
  5.2.3 The Purpose ........................................................... 88
  5.2.4 Constitutional Right ............................................... 90
  5.2.5 Jurisdiction by Implication ....................................... 91
  5.2.6 General Saving Clause ............................................ 93
5.3 IMPLIED CONFERMENT FROM STATUTES .................. 95
5.4 INTERTWINED SUBJECT MATTERS ..................... 99
5.5 INHERENT JURISDICTION ............................... 105
5.6 CONCLUSION ........................................... 109

CHAPTER 6
POWERS OF SYARIAH COURTS
6.1 INTRODUCTION ........................................ 113
6.2 THE CASES ........................................... 113
6.3 DISTINCTION BETWEEN JURISDICTION AND POWERS .......................... 115
6.4 POWERS OF SYARIAH COURTS ....................... 118
6.5 IMPLIED POWER ..................................... 120
6.6 CONCLUSION ........................................... 123

CHAPTER 7
JURISDICTION OVER NON-MUSLIMS AND ARTIFICIAL PERSONS
7.1 INTRODUCTION ........................................ 127
7.2 GENERAL POSITION ................................... 127
7.3 EFFICACY ............................................. 130
7.4 JURISDICTION OVER SUBJECT MATTER AND PARTIES ..................... 131
7.5 CONVERSION OF ONE SPOUSE TO ISLAM ................ 135
  7.5.1 Status of Non-Muslim Marriage ..................... 136
  7.5.2 Option for Remaining Non-Muslim Spouse ............ 137
  7.5.3 Option for the Converted Spouse ................... 141
7.6 RIGHTS OF NON-MUSLIMS ................................ 142
7.7 CONCLUSION ........................................... 147

CHAPTER 8
INTERPRETATION OF ISLAMIC LAW
8.1 INTRODUCTION ........................................ 151
8.2 THE PROBLEM ........................................ 154
8.3 THE RAMIFICATION ................................... 155
TABLE OF CONTENTS

8.4 SOLUTIONS .................................................. 158
8.5 CONCLUSION .................................................. 165

CHAPTER 9
JURISDICTION OVER SYARIAH OFFENCES
9.1 INTRODUCTION .............................................. 169
9.2 SYARIAH OFFENCES ......................................... 169
9.3 LAWS AND MORALS ......................................... 171
9.4 LEGISLATIVE COMPETENCY IN CRIMINAL MATTERS .............................................. 172
9.5 CONFERMENT OF JURISDICTION ....................... 177
9.6 JURISDICTION OVER OTHER STATE LAW ............ 179
9.7 SUKMA TRILOGY ............................................. 180
9.8 PRECEDENT ................................................. 182
9.9 LEGISLATIVE HISTORY ....................................... 183
9.10 IMPLICATION, ADDING WORDS AND HARMONIOUS CONSTRUCTION .................... 188
9.11 HARMONIOUS CONSTRUCTION AND THE PUBLIC PROSECUTOR'S POWERS ............... 191
9.12 NON-LITERALIST AND ABSURD RESULT .................. 192
9.13 CRIMINAL ACTS, OFFENCES AND BASIC STRUCTURES .............................................. 194
9.14 SENTENCING POWERS OF SYARIAH COURTS ......... 199
9.15 CONCLUSION ................................................. 200

CHAPTER 10
CONCLUDING REMARKS
10.1 INTRODUCTION ............................................... 205
10.2 AMALGAMATION OF COURTS ............................... 205
10.3 FEDERALISATION OF COURTS AND LAWS .............. 207

APPENDIX ......................................................... 211

BIBLIOGRAPHY ..................................................... 219

INDEX ........................................................... 227