

Analyzing the Position of Urf under the Islamic Legal System in Malaysia

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Abstract: Malaysia has been recognized as an Islamic country all over the years whereby it has robust Islamic legal system in order to cater with the challenging of contemporary issues. All in all, this research discusses the background of Islamic legal systems in Malaysia and the position of urf as one of the tools to address the contemporary issues. This is to show that Islamic legal system in Malaysia is progressive wherein it accepts and adopts any changes of legal rulings in line with the changing of time and places via. accommodating it with urf as an instrument to deduce legal rulings on related issues. Thus, this study involves a qualitative research methodology where the document analysis is used to collect the data and then, the data is analyzed by using content analysis and constant comparative techniques. In relation to this, the study found that urf plays important roles in the process of deducing legal rulings where the Islamic legal system framework can accommodate the rulings in line with the reality of the society. It is hope that, this study will benefit the policy makers and practitioners as well in dealing with a lot of Shariah issues.

Key words: Fatwa islamic legal system, legal rulings and urf, contemporary, instrument, techniques, rulings

INTRODUCTION

Before delving further into the discussion on the position of urf in the Malaysian legal system, it is important to initially elaborate on the background of Islamic legal system in Malaysia. This is to identify the recognition of Islamic law as a legal guidance for Muslims in Malaysia. In fact, the Islamic legal system in Malaysia is purposely created for upholding the spirit of Islamic law as well as preserving the right of the Muslims.

Historically, the Islamic legal system in Malaysia can be viewed in two stages, namely before and after Malaysia achieved independence. According to Mahamad Naser (n.d.) Islam has spread and accepted in Malaysia in the thirteenth century. However, some believed it was on the might say fifteenth century because there is no accurate data to signify the exact date of the coming of Islam. It is also, believed that there are two theories with regards to the introduction of Islam in the Malay land and this includes either through trading or Sufism (Aziz and Shamsul, 2004). However, Al-Attas as cited have emphasized that the theory of Sufism is more rational than the theory of trading because Sufism is from

the Arabs compared to the theory of trading that is from Indian traders. In view of this, it was identified that there were a lot of things in the life of the Malay society which were influenced by the Arabs such as the Malay old religious books (yellow books) are similar with the method used in Arabic books, some of Malay words originated from the Arabic language as well as the Malay custom practices which were influenced by the Arab people.

Admittedly, the Sufism theory became the major acceptance of Islam in the Malay world because it was intimately close to the psychological reason where the strategy of da'wah (preaching) was suitable with Malay thinking at that time. The inhabitants of the Malay world perceived Islam as the best religion to follow instead of previous religions such as Hinduism and Buddhism because these religions were not, so, suitable to their life. This is due to Islam being viewed as a lenient religion where it could compromise with the elements of locality and be understood by all people compared to the previous religions which was only be understood clearly by certain groups of people such as priests and monks. Moreover, Islam also, treats fairness in every aspects of

life where the other religions regarded public society as a slave and further divided them into castes in society. In view of this, Islam was more adaptable and accepted widely, since, the teaching of Islam suited the life of the Malay society. Subsequent to this Islam could change the existing belief as well as influence the worldview of the Malay world while maintaining the social culture of the society which was in line with Islamic principles.

MATERIALS AND METHODS

This study aims to identify the position of *urf* under the Malaysian legal system. In order to achieve this objective, qualitative research methodology is adopted in which the data consists of available laws and regulations which include the federal constitution, state religious enactments as well as documents are sought by using in-text technique. Thereafter, the data is analyzed by using content analysis technique and constant comparative technique in ensuring that the data gathered is matched with the objective of the study.

RESULTS AND DISCUSSION

The findings of this study could be highlighted based on two points namely Malaysian constitution and states religious statutes.

Malaysian constitution: As far as the acceptance of Islam in the Malay world is concerned, this clearly signifies that Islam has been regarded as a basis of law in the Malay world. Zaini Nasohah; Wan Mohammad (n.d.), for example, emphasized that Islam became the foundation of law in the state administration in other words, it was perceived as a local law (*lex loci*) before the colonial era. In fact, Malay custom is the only *urf* that has been regarded as part of Islamic law in Malaysia before the Independence day (Abdul Rahman, n.d.). In terms of formality, Mahamad Naser (n.d.) has asserted that there is no need to acknowledge Islam as the highest religion in the formal provision like the assertion of Islam in the federal constitution at that time, since, the population of non-Muslims is very limited. Therefore, it is enough to stress the recognition of Islam through the adoption of Islamic law in the *adat-istiadat* or Malay custom (Penang Shariah Judiciary Department, n.d.).

Additionally, the implementation of Islamic legal rulings was based on the Malay old religious books which comprised various legal rulings where it was originally sought from the legal rulings based on the Shafi'i School. The examples of rules which adopted the elements of Shariah are the Malacca Digest (*Hukum Kanun Melaka*),

Maritime Laws of Malacca (*Undang-undang Laut Melaka*), matrilineal-based *Adat Perpatih* and the patrilineal-based *Adat Temenggong*.

At this point, the acceptance of Islamic law in customary law in majority parts of the Malay land shows that there is an integration of Islamic law with the preservation of existing *urf* in the early times of Islam came to Malay lands, though albeit not all provisions in the law complies with Shariah requirements. The reason of the preservation of the existing Malay custom is due to the Islamization process which took a long time to change, as it happened in subtle and gradual shifts. Thus, it was able to provide a space for the Malay people to adjust and leave Malay customs which contravened Islamic law without force. To sum up, Islamic law is regarded as a main law in the Malay land based on the historic evidence of the adoption of Islamic law in certain customary laws.

Thereafter when Malaysia achieved its independence, it was recognized as an official Islamic country when initially stated in the Federal Constitution. Since, Article 4 (1) of the constitution recognized the Federal Constitution as the highest law in Malaysia, henceforth, all laws including Islamic law must not contravene the provisions of the federal constitution (Hasan, 2005).

According to Anonymous (2010) that was introduced on 31 August 1957, the same day the Malaysia achieved its independence Islam is regarded as the official religion (dln) (Federal Constitution, 3 (1)) whereby the sultan is the ruler and head of religion who enjoyed full capacities via prerogative power towards Islamic religious matters and Malay custom. Furthermore, for the federal states that do not have sultan, the Yang diPertuan Agung was appointed as the ruler and head of religion for them (federal constitution, 3. In fact, it indicates that the sultan has absolute power to control and safeguard the functions and implementation of Islamic law in Malaysia whereby Malay custom is included as most important preservation in the Malaysian legal system. Apart from that anything related to Islamic religious matter must be in tandem with the articles. Subsequence to this, it placed Islam to the special status where Muslims can practice the Islamic rulings freely while preserving the Malay custom.

Besides this, Islam encourages things which can provide benefit and goodness to mankind. As Allah mentioned in the Quran, "If Allah had so willed, He would have made you a single people but (His Plan is) to test you in what He has given you: So, strive as in a race in all virtues. The goal of you is to Allah, it is He that will show you the truth of the matters in which you dispute"

(Al-Ma'idah (5): 48). Henceforth with the spirit of the establishment of Islam through, Federal Constitution, the function of *Siyasah Al-Shara'iyah* (policies of Islamic government) via. systematic administration was introduced in ensuring the implementation of Islamic law is really feasible. Indeed, the entailment of related authorities and institutions in Malaysia towards implementing legal rulings is very important as to ensure the *Maqasid Al-Shariah* (objectives of Shariah) is achievable.

Overall, this denotes that 'urf could be an important element to deal with the Islamic religious matters explicitly or impliedly before and after independence through the recognition of Malay custom. Although, Islam prior to independence did not receive official recognition officially until after independence, several customary laws in several states have shown, however, that there was a combination of established Malay customs with Islamic law in the state legislation. At this point, the insertion of Islam and Malay custom in the Federal Constitution has strengthened the authoritativeness of 'urf in deducing legal rulings in Malaysia.

States religious statutes: Islamic law could be more progressive to respond with the current reality by the implementation of *Siyasah Al-Shara'iyah* through the authority emanated from in the State List (List II) under the Ninth Schedule of the Federal Constitution. This can be shown by good efforts undertaken in every state of Malaysia in the administration of Islamic law where they try to benefit the authoritativeness derived from the provision of constitution in preserving Malay custom as well as legal rulings. Certainly, the administration has been divided into three departments, namely Islamic Religious Council, Shariah Judiciary Court and Mufti Department in which every department comprises specific job's functions. As a consequence, this segregation could ensure the implementation of Islamic law run smoothly. Of course, this can benefit the society as a whole, since, it can ease the handling Islamic matters that are believed to be more complicated than before.

With regards to the process of Islamic legal deduction's scope, the last category, namely the scope of Mufti Department is very much related to this present study. This is because this department is authorized to cater to Islamic legal rulings matters. In view of this, the activities of the Islamic legal deduction in Malaysia shall follow the statutes which emanated from within the state. Nevertheless, the statutes in every state could be in different versions. This is due to the administration of Islamic law being based on the prerogative power of the Sultan that shall lead to different laws enshrined in the

state. However, the contents of the enactments are not far apart from one another because the modifications of the enactment in each state mostly follow the enactments of Selangor (Ibrahim *et al.*, 1990). In relation to this, the position of 'urf in certain provision stated in the administration of Islamic law enactments, acts or ordinance related to the Mufti and Fatwa in each state could also be viewed in order to identify the position of 'urf.

The procedures of following opinions: Undoubtedly, Malaysian perceives Shafi'i School of thought as a main reference in determining Islamic legal ruling (Fatwa). As a result, it has influenced the lifestyle of the Muslim society broadly as well as the Islamic legal system. This can be found in enactments in every state excluding the state of Perlis. In the enactment of Kedah for instance, it is stated that the Fatwa Committee must follow the *qawl mu'tamad* (prevailing views) of the Shafi'i first where if the *qawl* will be contravened to the *maslahah*, the Fatwa Committee shall choose the *qawl* that less orthodox of the Shafi'i School, however, in the event that there is no any *qawl* from the school can be used, thus, the Fatwa Committee shall follow another opinion from the remaining three main schools of thought namely Hanafi, Hanbali and Maliki as to be considered as suitable (Anonymous, 1962).

Undoubtedly, the above provisions have shown that the procedures of deducing legal rulings rigidly follow the opinion from Shafi'i School where the weak opinion of the school was still acceptable, if the opinion was more suited to the public interest compared to the strong Shafi'i opinions as well other opinions from the remaining schools.

However with recent developments of Islamic legislation, there were several amendments made on provisions pertaining to authorities to be followed by the Mufti and his legal committee who shall follow another *qawl mu'tamad* in other schools such as the Maliki, Hanafi and Hanbali instead of the weak opinions of the Shafi'i School in the event of the *qawl mu'tamad* of the Shafi'i School as opposed to the public interest. Subsequent to this, part III of the appointment of the Mufti, authority in religious matters and the Fatwa Committee of Terengganu, for example has emphasized that the Fatwa Committee shall follow the *qawl mu'tamad* from the Hanbali, Hanafi and Maliki Schools, if the *qawl mu'tamad* of the Shafi'i School lead to the repugnant to the *maslahah* of the public and if there is no appropriate opinions in any of four schools, the Fatwa Committee shall conduct *ijtihad* without being any bound with the school's opinions.

From the provisions of the enactment, it apparently elucidates that the process of dispensing rules in

Malaysia is in the madhabic form where the priority is given to the Shafi'i School's opinion, so, long as the opinion does not contravene the maslahah of the people. This indirectly depicts that the Islamic legal system in Malaysia preserves the right of the Muslims where it is factually well known that the majority of the Muslim in Malaysia is from this school.

There is no doubt that the preservation of Shafi'i School's opinion is actually related to the consideration of 'urf of the Muslim society as the Malay's life is generally guided by the school. According to Anisah and Saadan Rahimin, Paizah and Nor Hayati Islamic teaching and learning processes based on the Shafii School a long time ago in the Malay Archipelago (nusantara) have influenced the way of life of the people including 'urf that has been established before the coming of Islam. This is owing to the school's opinions which has influenced and formed an established believe system as well as 'urf in Muslim society. As a result, some of the practices include the food practices (urf) which are in accordance with the opinions of this school. Accordingly, the recognition of Shafi'i School as the main reference in deducing Islamic legal rulings is actually in line with the maqasid Al-Shariah that is to preserve the public interest as well as to consider the established 'urf in the society.

Moreover, the permission of referring to another qawl mu'tamad in other schools such as Hanafi, Maliki and Hanbali and also, without referring to any qawl mu'tamad from any school by conducting ijthad in the event of the legal rulings from Shafi'i School opposed to the maslahah of the society are actually given a massive space for the fuqaha to exercise ijthad in the best way. In fact, the space given for conducting ijthad does not rigidly follow the Shafi'i School opinion which is actually due to consideration of the public interest as well as changes in the way of life.

Thus, in Section 38 of the Kelantan Enactment for instance has explicitly stated the preservation of 'urf of the society in the process of deducing legal rulings as it provides that, "any Malay custom or law based on Malay custom which is followed in the state and does not conflict with the teachings of Islam shall be considered in issuing any Fatwa under the preceding sections." Furthermore, the state of Perlis Enactment also contains such provision, "In issuing a Fatwa under this Part, the Majlis and Fatwa Committee shall have due regard to the Adat Istiadat Melayu or Malay Customary Law applicable in the State of Perlis" (Anonymous, 2006).

According to Othman the use of any Malay custom or law based on Malay custom in any enactments of state is very general. As a consequence, the provision may be interpreted broadly and may include any types of

established urf within the states. Of course when urf was generally, interpreted in the statute, the urf consequently, regarded as an important consideration in the process of deducing Islamic legal rulings in Malaysia.

In summary, although, only the enactment of states of Kelantan (Section 38, 1994) and Perlis (Section 54 (2), 2006) mentioned clearly the position of 'urf in the procedure of deducing legal rulings, 'urf impliedly plays significant role for the fuqaha to derive the rules because the flexibilities of the legal rulings could be seen when the Islamic legal system can accommodate the current reality of what occurs in the society as well as able to preserve local practices, so, long as it does not contravene with Shariah requirements.

The authority of Mufti and legal committee: There is a specific provision in every enactment of the 14 states on the permission to make any changes, modification on a Fatwa that is already issued. The ordinance of Majlis Islam Sarawak, Section 40 (1-2), for example, states that the Fatwa Committee shall make any revision on the existing Fatwa that has already been published in the Gazette either to amend, modify or revoke the Fatwa and the new Fatwa issued after the process of revision shall be deemed also as a Fatwa.

Thus, the Mufti and his legal committee can make any changes with the existing Fatwa decisions when there is a need to do so. There is no doubt that there are many instances of changing Fatwa in the previous history of Islamic jurisprudence due to the reflection of a difference in locality, socio-economic as well as political factors in addition to 'urf (Dahlan *et al.*, 2012; Hasan, 2005). In view of this, the permission given to review the existing enactment indicates that the Islamic legal system in Malaysia meticulously takes into account the changes happened in the society and henceforth makes the 'urf to be very significant to respond to the current reality in Malaysia.

Moreover, another provision stated that the Mufti could conduct research in dealing with the Shariah issues and therefore, shows that how much more important it is to acquire absolute information before the legal ruling is concluded. What has been stated in the enactments in each state including the state of Johor is as follows, "Before a Fatwa Committee makes a Fatwa, the Mufti may cause any study or research to be carried out as directed by him and a working paper to be prepared".

At this point, it is important to conduct research because the output of the research could be a valid source of legal rulings where it could change the perception of the society. When 'urf is established from the decree of the authority, it shows that it is important to

get empirical data in field research because the reality is always exposed to changes from time to time. Therefore, when the fuqaha consider urf in doing research, it actually assists the fuqaha' to achieve the accurate legal rulings issuance to the society.

Last but not least, the provision on Fatwa related to national interest also could be highlighted in this study since it is related to the importance of 'urf in the process of determining legal rulings. There are several enactments of administration of Islamic law in several states such as Malacca (Section 39-40, 2002), Penang (Section 51-52, 2004), Kedah (Section 24, 2008), Negeri Sembilan (Section 52, 2003), Johor and Perlis (Section 51-52, 2006) which have included the provision related to the national interest in the enactments. The enactment of Penang, for example has mentioned that the Fatwa derived from the National Committee is also recognized as a Fatwa in the state and therefore, the State Fatwa Committee shall adopt any advice and decision from the Fatwa and published it in the gazette, if it is needed.

The deliberation of the issue related to the national interest to the National Fatwa Committee as well as adoption of the National Fatwa Committee's decision as a Fatwa significantly refers to the importance of 'urf of the Muslim society in Malaysia as a whole. Since, the opportunity of each state to deliver different legal rulings in one particular case could undermine the authority of the Fatwa, the inclusion of the provision, therefore, protects the credibility of the Fatwa.

In conclusion, the administration of Islamic law did not ignore the process of doing ijihad. In fact with the provisions emanated from the enactments, there is a chance for the fuqaha to do ijihad by not rigidly follows qawl mu'tamad of the Shafi'i School blindly. In fact, Shariah issues are always raised from time to time in line with the changing of times, places and circumstances. Therefore, the need for reviewing the ijihad is really related to the change of 'urf at a particular times and circumstances. With the existing administration of Islamic law enactments in every state, it shows that 'urf has its important place in legislation where it is intricately related to the public interest. Similarly, in order to identify the real need of the society, 'urf is an element for the fuqaha to consider because the objective of 'urf is taken into account and is due to 'urf part of life of the society.

CONCLUSION

Urf plays important roles in the process of deducing legal rulings in Malaysia. Although, the position of urf in

Islamic legal system is stated in the general forms, it was identified that the fuqaha actually refer to urf when there is a need to deduce legal rulings. To sum up, the method of determination of Islamic legal rulings in Malaysia does not ignore the functions of urf, hence forth, it shows that the Islamic legal system in Malaysia can accommodate the legal rulings in line with real life of the society.

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