

Conflict of Jurisdiction Between Malaysian Civil and Syariah Courts in the Issuance of Declaration of Death: A Way Forward

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ABSTRACT

When someone is missing for some time, his next of kin has a legal right to request for a court order to determine, among others, his or her marital status, maintenance issues of the spouse and children, and the legal status of his assets. This can be done through a decree from the court on the person's death. Once this decree is obtained, the marital and property status of the missing person could be ascertained accordingly. Malaysia is a commonwealth country that apply a dual system of law, i.e. common law and Islamic law that are respectively implemented in the civil and syariah courts. Both legal systems have provisions in the issuance of the decree for presumption of death. Section 108 of the Evidence Act 1950 empowers the civil court to issue the decree after 7 years of one's missing. This provision is a statute of general application and applicable to both Muslim a non-Muslim as regards to the property status of the missing person. Section 80 of Syariah Court Evidence (Federal Territories) Act 1997, on the other hand, gives a jurisdiction to the syariah court to issue the decree as regards to a Muslim who is missing for 4 years for the determination of the status of his marriage. These two laws provide different time frames of waiting period and totally different types of procedures. So far Section 80 is only used for the determination of the missing's marriage. However, of late, there are many calls especially from the syariah fraternity for the syariah court to issue the decree as regards to the missing's inheritance. By referring to the existing legal provisions, this research aims to study the possibility of the syariah court to exercise this jurisdiction from constitutional point of view. This research also looks at the extent of the civil courts' principles and procedures to be adopted by the syariah courts. To accomplish this, the paper adopts a qualitative and comparative research paradigm and employs a library-based methodology. This paper also highlights the common law and syariah perspectives on the substantive and procedural aspects of the practice with harmonization approach between the laws. Ultimately, it will propose to the relevant authorities on the most practical steps for the syariah court to exercise this jurisdiction.

Introduction

Malaysia is a unique country, known for its duality of laws and courts system. As a part of the Commonwealth Countries, Malaysia, applies the English Common Law that is applicable in civil courts at the Federal level. The Islamic law, as the personal law of Muslims, on the hand, is applied in the syariah courts at State level (Ahmad Bustami, 2018).

The jurisdictions of both courts are provided in the Malaysian Federal Constitution, specifically in the Federal Lists

(for the civil courts) and the State Lists (for the syariah courts).

Despite having these Lists, there were so many conflicts of jurisdiction between these two courts that were reflected in the Malaysian legal history. This happened when the civil courts assumed its jurisdiction in the personal matters of Muslims while, legally speaking, the matters should be addressed by the syariah courts (Shuaib, 2010). The personal matters

basically refer to matters relating to belief, family, trust and estate of Muslims.

Realizing this, the government made a serious effort to approve an amendment in the Federal Constitution by inserting clause (1A) to Article 121 to prevent future conflict of jurisdiction between these courts in 1988. Article 121 provides:

121. (1) There shall be two High Courts of co-ordinate jurisdiction and status,

namely

(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) (Repealed), and such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts. (emphasis added).

The effect of the amendment was illustrated in the words of Mohamed Azmi SCJ in the case of Mohamed Habibullah b Mahmood v Faridah bte Dato Talib [1992] 2 MLJ 793, SC as follows:

With effect from 10 June 1988, the new exclusion cl (1A) was introduced by the Constitution (Amendment) Act 1988 which expressly excludes the jurisdiction of the

High Court in Malaya and the High Court in Borneo in respect of any matter within the jurisdiction of the Syariah Court. By such exclusion, the intention of the new cl (1A) is clearly to confer exclusive jurisdiction to the Syariah Courts to adjudicate on any matter which has been lawfully vested by law within the jurisdiction of the Syariah Court. In short, any jurisdiction lawfully vested in the Syariah Court is now exclusively within the jurisdiction of that court." [emphasis added.

The judgment of this highest court resolved, to certain extent, the issue of the conflict of jurisdiction that has been haunted the Malaysian legal system for so many years. Afterwards, there are many other cases followed suit granting the exclusive jurisdiction to the syariah courts to avoid further conflict of jurisdiction. During this period, the highest court of the land was the Supreme Court until it was renamed to the Federal Court in 1994.

As for the issuance of decree for presumption of death, the legal provisions suggest that both courts shall have the jurisdiction over this matter.

This paper seeks to discuss the issues involving the courts' jurisdiction to issue a decree for presumption of death and its related matters. To accomplish this, this paper will trace back the Malaysian legal history and its legal system, relevant legal provisions will be analysed and the jurisdictional issues and challenges surrounding this matter will also be addressed.

Malaysian Legal History: An Overview

Malaysia has a long history of civilisation with the recovery of many historical artifacts dated as early as 11,000 years ago and even research had suggested the date to be 40,000

years ago (Zabidin, 2024). However, the most complete historical evidence on the legal system can only be traced back to Malacca Sultanate that reigned between 1400 – 1511 with the enforcement of The Law of Malacca. (Shuaib, 2010).

When Malacca fell into the hand of Portuguese in 1511, the law was further developed and implemented by other States such as Law of Pahang 1595, Law of Kedah 1605, Law of Johor 1789 and 99 Laws of Perak.

The British colonisation/intervention began in Penang in 1786, Malacca and Singapore in 1824. These 3 States were combined into the colony of the Strait Settlements in 1826. The British then intervened in Perak and Selangor in 1874, Pahang in 1888 and Negeri Sembilan in 1889. In 1895, these 4 States formed a federation, namely the Federated Malay States. Perlis, Kedah, Kelantan, Terengganu accepted British Advisers after 1909 while Johor in 1914. These 5 States were collectively known as the Unfederated Malay States. Sarawak and Sabah were officially made British colonies with the formation of Federation of Malaysia in 1948 (Shuaib, 2010).

The British imposed English law through two ways namely the civil court system and legislation. English judges trained in English law presided courts of law and applied English legal principles in the dispute resolution. In addition, many laws were legislated based on English law and some were modelled after legislation in India such as the Penal Code (Act 574), the Contracts Act 1950 (Act 136) and Evidence Act 1950 (Act 56) (Shuaib, 2010).

The British, on the other hand, avoided interference in matters relating to Islam and Malay custom in which its

implementation was given to the hands of Malay Rulers who headed the State. Malay Ruler is known as Sultan in most of the States except Perlis and Negeri Sembilan where the Ruler is known as Raja and Yang di-Pertuan Besar respectively.

When the country was moving towards independence, the Reid Commission was established and responsible for drafting the Constitution for the Federation of Malaya. It was led by Lord Reid of United Kingdom and assisted by few others including Justice Abdul Hamid of Pakistan. The Federation of Malaya then achieved its independence from the British on 31 August 1957. The Reid Commission suggested the power to enact on Islamic law and establish the syariah courts should be given to the States (Shuaib, 2010). This is reflected in the Federal Constitution where matters relating to Islam, Islamic law, syariah courts and the Malay custom are provided in the Schedule 9, State List. This List that empowers the State to legislate and to implement Islamic law in the syariah courts. With the insertion of Sabah and Sarawak in 1963, the Federation of Malaya was renamed Malaysia.

Legal Provisions on the Decree for Presumption of Death

The distinctive feature of Malaysia as compared to other countries is her multiracial and multi-religious society. It is the centre of many cultures, with people of different races and religions living together. Malaysia is known for its distinctive legal systems, namely, English common law and Islamic law. The judiciary in Malaysia is basically influenced by the common law of England and Islamic law. There are two court systems in operation, namely, the civil court system and the syariah court system. Unlike the civil court system in Malaysia,

which is a federalised court system, the syariah court system is primarily established by state law (Shuaib, 2012).

The decree for presumption of death is an order issued by a court on the death of a missing person, upon application of a member of a close family. The person must have been missing for a period of time and there is no news of his livelihood and his whereabouts was not known by a person who normally communicates with him. When the decree is issued, the missing person is legally considered as dead and his property may be distributed according to the law.

The Federal Constitution provides the Federal, State and Concurrent Lists. The Federal List empowers the Federal Government to administer, Parliament to enact laws and civil court to hear cases on matters in the Federal List. The State Lists provides the matters under the administration of States, State Legislative Assembly to legislate laws and syariah courts to hear cases on items provided in the list. The Concurrent List is where both Federal and States have jurisdiction on the matters.

The Federal List

The Federal Constitution, 9th Schedule Federal List, List 4 (e) provides:

(i) succession, testate and intestate; probate and letters of administration; ... [emphasis added].

(ii) the matters mentioned in paragraph (i) do not include Islamic personal law relating to ... gifts or succession, testate and intestate.

The Federal List provides matters that are within the jurisdiction of the Federal agencies, and this includes the civil courts. The issuance of decree for presumption of

death is considered as part and parcel of probate and administration. Hence, it is the jurisdiction of the civil courts.

This Lists empower the Parliament to legislate laws relating to succession such as the Wills Act 1959 (Act 346), Distribution Act (Act 300), Presumption of Survivorship Act (Act 205), Inheritance (Family Provision) Act 1971 (Act 39) etc. It is to be noted that all the laws are applicable to non-Muslim only as Muslims are governed by State Laws.

This Lists also empower the Parliament to legislate the Evidence Act 1950 (Act 56). Section 108 provides:

When the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it. (emphasis added)

This provision indicates that if a person has not been heard of for a period of seven years, the family may apply for a declaration of presumption of death at the civil court. The decree is considered as part of probate and administration of a dead person's property. Therefore, it is the exclusive jurisdiction of the civil courts.

The State List

The syariah courts enjoy its jurisdiction in the Muslims' estate distribution based on the Federal Constitution, State Lists, List 1 that provides:

Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating

to succession, testate and intestate, ...
(emphasis added)

Unlike the Federal Lists that provide jurisdiction on succession with the support of power to civil courts to issue probate and administration, State Lists only provide the jurisdiction to hear succession matters only without the power to issue probate and administration. This has become a focus on the issue of equal status of courts in Malaysia.

State Lists empower the State Legislative Assembly to legislate Administration Law that confers the jurisdiction on Muslims' succession to the syariah courts. Administration of Islamic Law (Federal Territories) Act 1993 (Act 505), section 46 (2) provides:

(2) A Syariah High Court shall

(a) in its criminal jurisdiction

(b) in its civil jurisdiction, hear and determine all actions and proceedings in which all the parties are Muslims and which relate to--

(iv) the division of, or claims to, harta sepencarian;

(v) wills or death-bed gifts (marad-al-maut) of a deceased Muslim;

(vi) Gifts inter vivos, or settlements made without adequate consideration in money or money's worth, by a Muslim.

(vii) Wakaf or nazr.

(viii) Division and inheritance of estate or intestate property.

(ix) The determination of the persons entitled to share in the estate of a deceased Muslim or of the shares to which such persons are respectively entitled; or

Further, Muslim wills enactments were legislated to fulfil the needs of Muslims for reference and guidance. Selangor was the first State legislated Muslim Wills (Selangor) Enactment 1999, followed by Muslim Wills (Negeri Sembilan) Enactment 2004, Muslim Wills (Malacca) Enactment 2005, Muslim Wills (Kelantan) Enactment 2009, Muslim Wills (Pahang) Enactment 2017 and Muslim Wills (Sabah) Enactment 2018.

The State Lists also empower the legislation of Syariah Court Evidence (Federal Territories) Act 1997. Section 80 of the Act provides:

When the question is whether a man is alive or dead, and it is proved that he has not been heard of for four years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it. [emphasis added]

Interestingly the section provides that the waiting period of four years for the issuance of a decree of presumption of death by the syariah court as compared to seven years in civil courts.

The prevalent argument is that this section is restricted for the application to dissolve a marital relationship upon a husband's missing. The waiting period of four years is based on the approach of Mazhab Shafie that has been an official Mazhab in Malaysia as provided in section 39 of the Administration of Islamic Law (Federal Territories) Act 1993 (Ahmad Bustami, 2016).

In *Re Ridzwan bin Ibrahim* [2002] 4 AMR 4318; [2002] 4 CLJ 502, HC, the court held that the application for presumption of death can be made as general law where there is no inconsistency

between section 108 of Evidence Act 1950 and section 80 of the Syariah Court Evidence (Federal Territories) Act 1997. In the absence of specific provisions under the Administration of Islamic Law (Federal Territories) Act 1993 or the Syariah Court Civil Procedure (Federal Territories) Act 1998 concerning matters of probate and administration, the applicant will still have to resort to the jurisdiction of a civil court (Halim, 2021).

Death Declaration

There are three types of death declaration in the Malaysian practice (Halim, 2021):

(a) Death Certificate for Actual Death

The National Registration Department (“NRD”) is mandated by law to issue the death certificate in a normal actual death case. Normal actual death refers to an ordinary death where the body of the dead person is available as opposed to the case of missing person or an incident where the body could not be found but the likelihood of death is high. For the distribution of an estate, the beneficiary is required to produce this certificate as a proof of death (Order 71 r 3(1) and (5) of the Rules of Court 2012). The issuance of the death certificate is only allowed when the body of the dead person is available section 18 of the Births and Deaths Registration Act 1957.

(b) Issuance of Death Certificate by Court **12**

A situation where the likelihood of death is high in case where the body of the person could not be found, the court may issue an order for the issuance of death certificate. Even though the period of seven years missing is provided in section 108 of the Evidence Act 1950, the section does not prevent the court from, based on the circumstantial evidence, issuing the death of

a person before the expiry of that seven years.

In *Re Osman Bachit* [1997] 4 MLJ 445; [1997] 2 CLJ Supp 269, Augustine Paul J held that in cases where circumstantial evidence available may prove that the person is dead, the family or interested party cannot be required to wait for seven agony years just for formality in submitting the application for a decree for presumption of death. The court has the jurisdiction, based on circumstantial evidence, to shorten the waiting period of seven years.

In *Re Inquest into the Death of Lim Chin Aik, Deceased* [2014] 1 CLJ 136, a lightning arrester structure on a building fell and crushed the victim’s car. The incident had created an 8-foot-deep hole in the ground. The remains of the car were recovered but not the victim’s body. The rescue operation could not dig any deeper into the hole because of it could harm the surrounding buildings. Considering the evidence as a whole, the court held that, in all probabilities, the victim’s body might still be buried inside the hole, the body could not be extracted for fear of public safety. The court declared the death of the victim and order the NRD to issue a death certificate (section 24 of the Births and Deaths Registration Act 1957).

The disappearance of Malaysia Airline Flight MH370 on March 8, 2014 further explains the power to issue a death certificate in a special case. After 327 days of extensive search, the Malaysian government on January 29, 2015 had officially declared the loss of MH370 as an accident and all of its passengers and crew were presumed dead. The issuance of the order was later arranged by the relevant authorities.

The practice of issuing the death certificate by court order above indicates a clear power given to the civil court to determine the death of a person in a very special situation. No such power is given to syariah court.

(c) Issuance of Decree for Presumption of Death

In case of missing person, the law empowers the civil court to consider an application for a decree of a person who has been missing for a period of seven year. When the court satisfied with the application (Jalet, 1968), the decree issued becomes an official document on the death of that person. The Evidence Act 1950 (Act 56), section 108 that provides:

When the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it. (emphasis added)

In the case of Ex Parte Application of Tay Soon Pang @ Yeo Hak Seng [2008] MLJU 928, a person was born in China in 1899, came to Malaysia in 1914 and domiciled in Johor. He went to China in 1970 and decided to stay with his relatives there. Since then, he communicated with his wife by letters until 1982 when the communication stopped. From 1982 until the date of the application by his son, there was no evidence that his father was still alive. Should he be still alive, he would be 108 years old already. The court satisfied with the application and granted the order accordingly.

In syariah practice, there is no data on the application of this decree for the purpose of distributing one's estate. This is

because of the general understanding that this decree is exclusively civil courts. Nevertheless, Syariah Court Evidence (Federal Territories) Act 1997 provides this power to the syariah courts. Section 80 of the Act provides:

When the question is whether a man is alive or dead, and it is proved that he has not been heard of for four years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it. (emphasis added)

It is undeniably practised that upon disappearance of a husband for four years, the wife may apply this order for the dissolution of marriage (fasakh) according to section 52 of Islamic Family Law (Federal Territories) Act 1984, but can it be used for the purpose of distributing his property to the entitled legal heirs?

Recently, there are many calls, particularly from the syariah circles, urging for the syariah court to have clear power to issue a death declaration. According to them, if the government is really serious in advocating the 'equal status' of the courts, further actions should be taken to expressly mandate this jurisdiction to the syariah courts. To make it possible, the followings actions can be considered:

Firstly, in order to avoid any future confusion, a slight amendment should be made to the 9th Schedule, Federal Constitution. Federal Lists provide a jurisdiction to civil courts matters relating to succession together with power to issue grant of probate and administration. Unfortunately, State List only provides to syariah courts matters relating to succession without power of probate and administration. To provide equal status, probate and administration should also be

given to the syariah courts in dealing with Muslims' estate.

Secondly, the law and procedure relating to probate and administration should be legislated for the syariah courts' disposal. The civil courts have years of experience in probate and administration that could be harmoniously adopted by the syariah courts. Systematic exposure and trainings should be provided by the relevant institutions for this purpose.

Issues and Challenges

Whilst the call to expand the jurisdiction of syariah courts in matters relating to probate and administration should be appreciated, the following challenges should be addressed:

(a) Amendment to 9th Schedule of the Federal Constitution

The smartest way to grant the jurisdiction is by way of slight amendment to the 9th Schedule, Federal Constitution to give an express jurisdiction to the syariah courts to deal with probate and administration. Nevertheless, amending the constitution might take time, effort and political will. Convincing the law makers as to capability of syariah courts in dealing with probate and administration matters might be a challenge.

(b) Providing Adequate Procedural Law

Civil courts have a vast experience in dealing with probate and administration. Even the Evidence Act is dated back before the Malaysia's independence in 1957. Similar law and procedure such as the Probate and Administration Act 1959 (Act 97) and Rules of Courts 2012 should be provided to the syariah courts.

(c) Providing Adequate Knowledge and Exposure

The long experience and exposure of the civil court judges in this procedure could be shared to the syariah court judges. Admittedly it is a long process that requires effort, dedication and cooperation of all. The same training and exposure to the syarie lawyers should also be considered.

Legislation

Civil laws

- Federal constitution
- births and deaths registration act 1957
- probate and administration act 1959 (act 97)
- rules of courts 2012

Syariah laws

- Administration of islamic law (federal territories) act 1993
- islamic family law (federal territories) act 1984
- Muslim wills (Selangor) enactment 1999
- Muslim wills (negeri Sembilan) enactment 2004
- Muslim wills (Malacca) enactment 2005
- Muslim wills (Kelantan) enactment 2009
- Muslim wills (Pahang) enactment 2017
- Muslim wills (Sabah) enactment 2018

Cases

- *ex parte application of tay soon pang @ yeo hak seng* [2008] mlju 928
- *mohamed habibullah b mahmood v faridah bte dato talib* [1992] 2 mlj 793, sc
- *re inquest into the death of lim chin aik, deceased* [2014] 1 clj 136
- *re osman bachit* [1997] 4 mlj 445; [1997] 2 clj supp 269
- *re ridzwan bin ibrahim* [2002] 4 amr 4318; [2002] 4 clj 502, hc

Conclusion

It is a common practice that laws are developed from time to time to suit the needs of the people. Procedural laws are legislated for the effective implementation of the substantive laws. The syariah courts in Malaysia are equipped with the substantive laws to deal with matters relating to succession. To have more effective effects, the court need also be

equipped with the procedural law relating to the probate and administration of estate.

At the same time, it is acknowledged that the process is a long journey. Success could only be achieved with the support, assistance and cooperation of all. The political will of the government in providing legal provisions and guidelines are truly required. Systematic trainings and exposures in the administration of estate should be in place.

Title: *Conflict of Jurisdiction Between Malaysian Civil and Syariah Courts.....*

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