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Judicial Creativity in the Malaysian Shari’ah (Syariah) Courts: the Need for Paradigm Shift

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ABSTRACT

Judicial creativity helps develop law by way of ijtihad. This fact has been proven in various fields of the Shari’ah. The paper discusses some of these areas and concludes that with the added contribution of qadhis, the Shari’ah is equally relevant in all spheres of human relations (muamalat) and can solve any socio-legal problem in times to come.

Key word: Sharia”ah, Creativity, Judicial Activism.

Introduction

The role of judiciary in every jurisdiction is undeniably important in the development of law despite having statutory provisions to serve as guidance. It is among the scope of the work of judges to interpret the law and to administer and decide on the rights and responsibilities of the parties in legal proceedings. The availability of statutory provisions to a large extent hinders this function to be exercised extensively, particularly in cases where the jurisdiction of the Shari’ah Courts is subject to the availability of statutory provisions (Mohamad Habibullah v Faridah Dato Talib). Therefore, this study is undertaken to examine the power of the Shari’ah courts’ judges and the possibility of developing the law through judicial reform, particularly in cases where strict compliance to statutory provisions may prejudice the interest of the public. This paper is based on the premise that the Shari’ah allows further interpretation and expansion of the texts so that the legislation could meet the needs of the particular time and place. Thus, the need for the judiciary to take an active part in the legal reform process, especially on matters that relate to family, seems inevitable.

Ibn Qayyim pointed out in his celebrated work Turuk al Hukiyyah that the judge must possess a high degree of knowledge and understanding ‘to differentiate the trustworthy from the liar, the truthful from the falsifier, he is going to compare between this and that, then he can issue correct decision’. This observation is relevant to describe the role of judges. Above all, fair administration of the Shari’ah is part of the law and assumes eminent position in its legislation.

Historical overview of Judicial Activism:

Judicial function in the Shari’ah involves both spiritual and intellectual journey as exercising the duty is considered as a trust (amanah) from Allah (Quran, al Nisa’: 4). The Qur’an states:

‘O you, who believe, stand out firmly for justice as witnesses to Allah, even as against yourselves or your parents or your kin and whether it be against the rich and poor. For Allah can best protect both. Follow not the lusts of your hearts, lets you swerve and if you distort justice or decline to do justice, verily Allah is well acquainted with all that you do’.

The above quoted verse clearly illustrates the sole objective of decision-making process that is to accord justice to both litigating parties. This is not an easy process as parties’ emotions, in most occasions, may be full of anger and revenge. On this premise, the Qur’an reminds the judge of not to take side by giving a wrong judgment and purposely depart from justice (Quran, al Maidah: 9). Thus, the Prophet (s.a.w.) made a strong reminder when exercising his duty as a judge and is reported to have said:

You bring to me for judgment your disputes and some of you perhaps being more eloquent than others, so I give judgment on their behalf according to what I hear from them. Bear in mind in my judgment if slice off anything for him from the right of his brother he should not accept it, for I sliced off for him a portion of Hell (Sunan Abu Dawud, Kitab al Aqdiyyah, Vol. III, p. 1016).

The above hadith gives a reminder not only to the judge, who is presiding the case before him, it extends to the litigating parties to be equally just and reasonable in their claims as not to encroach the right of the other party. As the parties could not be expected to be exceptionally reasonable when the dispute arises, Shari’ah

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imposes the burden heavily on the judge to exercise justice. For this reason, Shari'ah regards judicial duty deserves worldly rewards and the rewards in the Hereafter. The Prophet (s.a.w.) said:

When a judge gives a decision having tried his best to decide correctly, and is right, there are two rewards for him; and if gives judgment after having tried his best to arrive at a correct decision but erred, there is one reward for him.

The hadith explains the need for the judge to be well equipped in both substantive as well as procedural law, taking into account that the background of the case are not necessarily identical though the subject matter of the claim is similar. In most occasions, it requires more than just knowledge on the fact in question, but deeper understanding can be obtained through various means including experience and knowledge in other related fields. Lesson from history proves that common sense may work and practical in approach. Example can be seen in a judgment of Prophet Sulaiman (Solomon) when two women appeared before him on appeal claiming to be the mother of a child that was classified in Turuk al Hukmiyyah as ‘the oldest and the youngest’. The case was previously heard before Prophet Dawood (David) where the oldest was decided to be the mother of the child. Prophet Sulaiman asked for a knife to cleave the child and both will equally get their portion. Ironically, the oldest agreed to the idea while the youngest strongly objected and willing to sacrifice her shares for the oldest so that the child will survive. The mother instinct has helped Prophet Sulaiman to decide that the child belongs to the youngest (Ibn Qayyim, Turuk al Hukmiyyah, translated, pp. 3-4).

Though this practice may no longer be relevant today in the presence of technological advancement such as DNA testing or other forms of genetic engineering, however, in certain occasion, it might prove to be useful in the absence of other cogent evidence. A ‘Hong Kong’s case’ is one example of ‘unusual case’ described by the judge where two unrelated families claiming to be the rightful heirs of the deceased which appeared to have two different identities, but all parties in the dispute are Pakistani’s origin and assumed a close relation. The deceased who was working in a company in Hong Kong died in an accident due to a fatal injury as a result of the explosion in the sewage tunnel that was under construction in his workplace. The dispute practically concerned about the sum of compensation due to the deceased in which the two families were claiming for. In resolving the dispute, the court has to solely rely on evidence tendered by both parties which were based on facts and the credibility of witnesses is the most crucial. On most occasions, the court has to use common sense in its finding by looking into consistency of evidence, sacrifices of natural family with regard to all expenses including the cost of bringing the body back to Pakistan for burial, the absence of family photos and the most interesting thing is the customary practice where it would be unusual for the parents not to coming back to Pakistan with the dead body of the son for burial is an indication that the deceased is not their son. The fact that the other party is willing to go for DNA test and the other one is not willing is also a good indication even though the test has never been carried out due to the degraded position of the tissue. As history is an open book and repeats itself, the finding illustrates the scholarship quality of court’s finding by using common sense in the absence of direct evidence.

This practice is in line with the spirit of the hadith that has been aptly quoted in many classical works and compilation of ahadith.

When the Prophet sent Muadh ibn Jabal as a governor and a judge in Yaman, the Prophet asked him “according to what will you judge?”. He replied “according to the Book of Allah”. “And if you find nought therein?” “According to the Sunnah of the Prophet of Allah”. “And if you find nought therein?”. Then I will exert myself to form my own judgment”. And thereupon the Prophet said “Praise be to Allah Who has guided the messenger of His Prophet to that which pleases His Prophet” (Sunan Abu Dawud, Kitab al Aqdiyah).

The last portion of the hadith gives a clear message as to the important of judicial interpretation which must be exercised diligently through ijtihad. In elaborating the understanding on the hadith in the present context, Ahmad Ibrahim commented that ‘the principles of justice in Islam are contained in the Quran and Sunnah, whose teaching is absolutely binding on Muslims, and cannot be amended or modified by any human being whether they are the executive, the legislature or the judiciary. It is the duty of the executive to enforce the Islamic law and for this purpose if any administrative measures are needed to implement the law, these can be enacted by the legislature in the form of human laws. The judiciary has the function of deciding and applying the law as contained in the Quran and Sunnah or where necessary using the ijtihad of the jurist in the past and in the present’. This observation indicates a strong urge to exercise ijtihad whenever necessary to suit the demand of the society. Both ijtihad and judicial creativity are methodologically essential for a just decision.

Umar has left a detailed procedure for a just decision in his historic letter to his judge Abu Musa al Ash’ari in Basrah. The content of the letter reads:

Jurisdiction is to be administered on the basis of the Qur’an and Sunnah. First understand what is presented to you before passing any judgment. Full equality for all litigants: in the way they take places in your presence and in the way they look at them, and in your jurisdiction. In that way no highly placed person would look forward to your being unjust nor would a weak one despair of you fairness. The burden of proof is the responsibility of he plaintiff and the oath is upon the denying party. Compromise is always the right of litigants except if it allows what Islam has allowed. Clear understanding of every case that is brought to you for which
there is no applicable text of the Quran and Sunnah. Yours then is the rule of comparison and analogy, so as to
distinguished similarities and dissimilarities and thereupon seeking your way to the judgment that seems nearest
to justice and apt in the eyes of Allah. Never succumb to anger or anxiety and never get impatient or tired of
your litigants.

The message put across does not depart from the rule that has been set earlier by the Prophet. However, the
institution of judiciary became more eminent in Umar’s time where he himself has to exercise ijtihad upon new
emerging issues. In some cases, he departed from the judgment of the Prophet himself to the extent of legalizing
the status of triple divorce pronounced in one word as three divorces, even though he knew it was one divorce as
practiced during Prophet and Abu Bakar (the first Caliph) (Ibn Qayyim, Tauruk al Hukmiyyah, translated, p. 17).
This ruling served as a judicial measure to decrease number of divorces in his time for the maslaha (benefit) of
the people and it should serve a punitive measure in a special situation but become so universally accepted that
it defeated its original purpose as many Muslim countries subscribe to the literal ruling. Much of these exercises
and Umar’s scholarship quality were followed by his predecessors in various disciplines. Thus, the evidence for
the flexibility of the Shari‘ah can be seen from hundreds of judgment reached by the Muslim scholars to meet
new situations, judgments that have indeed give rise to the wealth of Islamic legal literatures. (Muhammad

Among factors that contributed to the success of judicial exercises as observed by the study that the mufti
and the court choose the interpretation that led away from confrontation and conflicts and towards harmony in
the community as well as protection of its weaker members by looking into their position in the society where a
class and social position mattered very much. In case of family law, there were mediating a sets of social
relations that shaped the distribution of wealth and the power in the society at large. There were accommodative
to social practices and sensitive to local custom and such practice indicate a great deal of balance between male
prerogative and female rights. On this note, it has been highlighted that women had unlimited access to justice
and for that matter women resorted frequently to the courts for support assignments (Judith E. Tucker, 1998)
which are not a common exercise in many Muslim countries nowadays.

Flexibility and independence of judgment, creativity and even compassion to concrete legal problems in
their communities remain a hallmark of their approach to the practice of law. In another occasion, the Qadi
could be the initiator for su‘lih settlement. It has already a practice where concluded orally and outside the court
were considered binding by the qadis and will be registered for certification. This mutual recognition and
interaction between the court and other socio-legal arenas indicates that neither views operated in isolation by
adopting various pattern of interaction between Shari‘ah, karan (law) and ‘urf (custom). (Tamdagon , 2008)

The fact that the Muslims are governed by religious law in regulating family relationship, this observation
is highly significant to be emulated in the modern Islamic judicial system as human inter-personal relations are
basically the same though the facts may slightly differ. This judicial activism is also reflected in other collection
of fatwas although they may not be as comprehensive as that of Khair al Din al Ramli as famously applied in
Syria and Palestine during the Ottoman period. However, systematic research on the extensive available fatwa
literatures will provide many insights into Muslim daily and family life during different periods of Islamic
history.

The study on the Muslim Egyptian family law during Ottoman period posted the same trend. Though the
basic rules of the Shari‘ah was followed but there were great diversity of transaction depending on the time
place and social conditions of the parties. There were evidence of incorporation of marriage contracts liberally
to protect the interest of women including the pledge not to take another wife and to provide financial support
for step children which indicate that there was a general acceptance of children from previous marriage and the
mother remarriage does not prevent her from having custody of the child. In case of breach, the wife is at liberty
to seek divorce with forfeiting her dower unless otherwise specified in the marriage contract. In another study,
the Qadi will not deny the wife’s application for khulu‘ divorce even when the husband is not willing to go
through with it. The court granted guardianship of the child to the mother after the death of the father.

Some of these practices have been translated through legislative reform in many Muslim countries in
contemplation of societal change. For example, on divorce matter, the Muslim countries treat triple divorce as
one divorce to encourage conjugal resumption. Egypt for example in 1979’s reform introduced the law that if
the husband divorced the wife arbitrarily, she entitled to maintenance of up to two (2) years above the normal
duration of three months. The divorce accorded the right to accommodation to prevent great hardship in finding
housing in great cities like Egypt.

Codification Of The Law and Judicial Interpretation:

It is interesting to note that the Shari‘ah develops extensively on ijtihad as the Quran does not contain a
code of law and general in approach. The Prophet (s.a.w.) himself does not favour Muslims to be bound too
much with his rulings and the decisions are based on actual happenings. However, codification of law took its
phase upon influenced by the Civil Code and largely adopted in many countries. No doubt that codification of
law has helped the judiciary to decide based upon clear provisions in the legislation and people may understand clearly their rights and duties. On the hand, as observed, codification may reduce mental activity of *ijtihad*, which is significantly important in the development of the *Shari‘ah* (Razali Nawawi and Ahmad Ibrahim, 1987).

The effort to codify the law was initiated during the Abbasid dynasty in the second/eight century as there was a proposal from Ibn Muqaffa‘ (d.139/759) a functionary in the provincial administration of Basra. He submitted a memorandum to the caliph Ja‘far al Mansur suggested a set of proposal touching on all aspects of administration of justice designed to improve the system by codifying all the laws into a coherent legal system (Majid Khadduri, 1984). What is suggested is a unified code derived from the recognized sources of law should be issued by the caliph and applied to all in addressing problems relating to discrepancies and irregularities in procedural justice. Khadduri mentioned several examples of the difficulty occur when the law is not codified. A woman seeking divorce could not initiate divorce without her husband’s consent thus she was advised to apostatize and the marriage will be dissolved on the ground of apostasy. In case of divorce by *talaq*, the effect is given to its literal meaning as it would be difficult to determine the intention in human relationship, unless it is ambiguous. Though such examples represent a portion of many other difficulties faced particularly by women due to cultural practices that induced them into disadvantaged position, codification of law is essential to reduce methodological discrepancies in applying the law into practice.

However, such proposal received less favour as the Muslim jurists incline towards developing own school of law resulting in the existence of diverse legal doctrine rather than to accept one unified code of law. The hesitant is in line with the hadith ‘divergence of opinion among the *ulama*’ is a mercy’. The claim has its basis in early period as the study by Tucker established that judges (*qadis*) from Hanafi mazhab routinely invited Shafi‘is and Hanbalis assistants to preside in cases of marriage annulments. The study concludes that the *mufti* and the court, while dealing with litigating parties are extremely careful and interpret the law that led away from confrontation and conflicts and towards harmony in the community as well as protection of its weaker members by looking into their position in the society where a class and social position mattered very much.

However such noble practices do not survive as Khadduri asserted that one of the continuing causes of the disagreement among scholar was methodological, failure to relate the theory of justice to practice- to translate Divine justice to human. Such assertion is justified in many instances where in many decided cases, the hesitant to apply appropriate rule to the given facts has led to the discriminatory outcome. Annulment of marriage by the father for the girl’s marriage without getting his consent with any legal justification has led the girl to change the *madhab*. It has been criticized by Coulson as to create school shopping which essentially deviate from the original intent that is to view that the interrelations between schools were complementary rather than competitive.

The struggle to codify the law was finally initiated in early 20th century. Earliest codification of Muslim Family in Islamic history begins with the Ottoman Family Rights 1917 in Turkey featuring the unified form of legislative code by adopting various Sunni schools of law in a codified form, though the emphasis is made on Hanafi doctrine. Among essential elements in 1917 law are prohibiting *mut‘ah* (temporary) marriage, fixing the age of marriage at 18 and 17 for boys and girls respectively, provides safeguard on equality of treatment between co wives in polygamous marriage and allows for a stipulation in the contract of marriage such as an option to divorce, judicial divorce is widely recognized and divorce by *talaq* under duress, intoxication or metaphorical is not recognized except when it is intended by the husband. Unfortunately, the Act was never enforced in Turkey due to the introduction of secular law in 1926 by Kamal Ataturk. However, the law of 1917 was the basis for substantial legal reform in Islamic Family law in Muslim countries including Malaysia, which takes the model of Egypt and Pakistan with a mixture of local customs.

Therefore, the codified law should not be regarded as the only source of reference on the basis that the *Hukum Syarak* remains the final reference. *Hukum Syarak* is defined as the law following the four major schools of laws as clearly stated in the Islamic family Law Act/Enactment in Malaysia. Based on this provision it is the legislative intent (*maqasid*) that matters in order to provide enough space for the judiciary to exercise discretionary power exclusively in matters where justice could not be served by applying the law literally. This is particularly relevant in the *Shari‘ah* context as the development of the law substantially designed to suit the objectives of *Shari‘ah* (*maqasid Shari‘ah*) that is to protect the interest of the people and to remove hardships (Yusuf Qaradawi, 1990).

In the local context, the judgment given in *Syed Abdullah Shateri v. Shariffa Salmah* (1959) reflects a scholarship quality of judicial activism where there was a legal battle between the daughter and her own father who had married her to her cousin without her consent after the father objected to the daughter’s plan to marry her boyfriend. The daughter refused cohabitation which led the father to bring this matter to the *Shari‘ah* court seeking for an order that the marriage is valid as well as an order for the marriage to be consummated. The *Shari‘ah* court in Singapore declared the marriage to be void. There was a technical flaw as the husband who was an interested party was not heard before the court. The father went on appeal to the Appeal Board. The Appeal Board, chaired by Ahmad Ibrahim as the President, construed extensively as to which law should be applied. As the parties were Shafi‘is, the law as formulated by Shafi‘is *madhab* should be followed. The Board
concluded that the marriage is valid. However, the Board was fully aware that such marriage could not survive as the daughter strongly opposed to the marriage and the husband did not appear to have taken an active interest in the matter. Therefore, for the interest of the girl, a fakakhwas arranged at the request of the girl and the husband which eventually ended with a khulu divorce. An interesting remark by the Board reads:

We sympathized with and understood his feelings as a father but we felt that in this case the interests of the community as a whole should take precedence over the personal feelings of the father. We felt that it was unreal to insist on the continuance of a marriage which could not consummate and to make it impossible for the girl in this case to marry the man she loved.

In the above case, should the father’s interest alone be considered following the strict application of the legislation, there were more people will be affected by the ruling; those are the daughter, the boyfriend and the husband who was not interested with the marriage. This judgment is in line with the spirit of Shar’ah that gives priority on the maslahah and even the great Imam Shafi’i himself is flexible in his approach to the extent of giving different opinions in different situations. Al Muzani the disciple of al Shafi’i states that the Imam ‘forbade his disciples to follow him blindly, for it is always necessary to look into matters of religion for one self, to exercise earnestly the spirit of inquiry and then arrive at a sound conclusion’. Al Muzani himself being the disciple of al Shafi’i sometimes differs from his teacher. Obviously, the above judgment in Syed Abdullah Shateri has all these observations. Though this case does not involve a conflict of opinions between mazhabs, the conclusion that is adopted by the court reflects its judicial creativity in resolving the dispute.

**Lacuna In The Law and The Adoption Of Juristic Opinion:**

In some cases, codification of law is not comprehensive as to include every single detail. There are matters which are left to the judge to resort to the best available resources before the decision is made. For example in Islamic family law, the status of triple talaq pronounced in a single occasion has not been statutorily provided. The common approach is to apply Shafi’i’s view, predominant madhab in Malaysia. The Shafi’i’s view on this issue inclines towards Umar’s approach that is to regard such talaq as effective of three talaqs. The purpose is to prohibit a person from pronouncing talaq unjustifiably by looking into its consequences that such divorce is irrevocable unless and after the wife married another man, get the marriage consummated and divorced. This requirement served as a penalty to the husband who has exceeded the limit of talaq. Thus, literal application of the law may cause serious difficulty to the parties whose emotion outweighs rationality. For example, in case Re Muhammad Hussin and Hazimah (1990), where the husband claimed to be out of anger, pronounced three talaqs in a single word. The wife was expecting their first child and her behavior during pregnancy was one that caused the anger. The subordinate court decided to apply the law literally and resulted in three talaqs to be declared effective. Both appeal against the decision of the subordinate court, praying for the Appeal Board to declare the divorce as one talaq. Though the issue of madhab has not been listed as the grounds for appeal, the Appeal Board decided to consider the madhab (Hanafi madhab) that the party’s belong to as significant in allowing the appeal. The decision to remove the hardship based solely upon the opinion of madhab may not be the best solution as the party who belongs to Shafi’i’s will be at the disadvantage. Therefore, an inquiry into the facts in question is material to decide on the award and the judgment of the court should go beyond the boundaries of madhab.

**Interpretation Of Statute:**

In another development, the codification of law is meant to serve as guideline in resolving the dispute. The details are left in the hand of judges to interpret the law and address its meaning in line with the intention of the legislation. For example with regards to the position of nafkah for the divorced wife, the law does not specifically address whether the entitlement should depend on whether the party is the Shafi’i’s or the Hanafis. The law mainly imposes on the husband to pay maintenance to the wife or the divorced wife. However, the application of the law reflects the influence of madhab in determining whether the divorced wife is entitled to such claim. This due to the fact that under the Shafi’i’s view the wife who is divorced by irrevocable divorce, i.e. judicial divorce as well as divorce by three talaqs is not entitled to claim for maintenance during iddah as there is no possibility for the parties to resume conjugal relation. On the other hand, the Hanafi allows the divorced wife to claim maintenance during iddah in any form of divorce which is viewed as a form of protection in terms of financial support after divorce. Both opinions have valid justification as far as the theory is concerned. However, in actual cases, the adoption of Shafi’i’s view in its literal sense may cause the difficulty to the divorced wife whose husband is the sole financial provider. The situation could be even worst if she has no family members to lend support after divorce which is supposed to be the case in the Shari’ah family system. Thus, it is reasonable to say that the judge should adopt purposive approach in interpreting and applying the law rather than to insist on the literal understanding. Thus, removing hardship should be one of the important
considerations in interpreting the law and this approach undoubtedly consistent with the spirit of *Shari'ah* (maqasid Shari'ah).

Another aspect of the legal provision that requires serious consideration is the method of *ruju*’ (resumption of conjugal relation) during the iddah period. The Shafiis request for an express *ijab* and *qabul* (offer and acceptance) to constitute a valid *ruju*’ whereas the Hanafis allows other form of *ruju* by way of having sexual relation. The method as expounded by the Shafiis is to give protection for the divorced wife to agree on the resumption of conjugal relation though the consent of the husband is not a condition for valid *ruju*’. Many complaints were received that the husband had sexual relation with the wife during iddah without pronouncing the *ruju*’ and the wife agreed to it thinking that it will constitute a *ruju*. This has caused uncertainty among the wives as to whether the *ruju*’ has taken place as the law does not address specifically on its permissibility. Obviously if the view of the Shafiis is to be literally applied, there is no *ruju*’, but such an action is an offence for which the Malaysian law has addressed that as punishable with imprisonment or fine or both.

In case of *mu’ah*, the essence of the law is to help women who had been divorced without just cause with some financial assistance to continue with their lives after divorce. This is based on the general rule that women generally are not income earners. Therefore, necessary assistance is greatly needed through state intervention and effective judicial decision where the law has already in place in statutory form. However, much of the problems faced by women in claiming *mu’ah* as the delay in judicial process due to the difficulty in assessing the amount. Therefore, a specific formula is much needed in case of *mu’ah* as well as assessment of *nafkah* for wife and children to serve as guidelines for judges in reaching at a just and equitable amount and to reduce unnecessary delay in delivering the judgment.

**Conclusion:**

The above discussion explains both the importance of having codification of law as well as the practice of judicial activism especially in family related disputes. The role of judges is significant in exploring into the factual situation and applies the law appropriately into the context. The practice of the past proves significant co-relation between judicial activism and administration of justice in which women that have been perceived as vulnerable member of the society, had received the utmost benefits. Thus, the interpretation of the law in its context by using *maqasidi* approach should be the practice in any given situations.

To borrow the words of Ibn Qayyim that the foundation of the *Shari’ah* is wisdom and the safeguard of people’s interest in this world and the next. In its entirety it is justice, mercy and wisdom that matter. Therefore, every rule which scarifies justice to tyranny, mercy to its oppression, and good to the evil and wisdom to triviality does not belong to the *Shari’ah* although it might have been introduced there in by implication. With the above contention, the challenge is in the hand of administrators, judicial and legal officers of the *Shari’ah* courts to show that Islamic law is not only the best in theory but is also the best in practice.

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The Quran, al Nisa’: 4.
This letter has been quoted in the book of al Kharaj by Abu Yusuf, a well-known disciple of Abu Hanifah. Though there was an argument challenging the validity of this letter merely of its noticeable absent in the early fiqh of Maliki and Shafi’i, the letter would serve useful information about the administration of justice in Islamic period. For further reading see Sami Zubaidah, Law and Power in Islamic World (London, New York: I.B. Tauris and Co. Ltd. 2003) pp: 41.