ORIGINAL ARTICLES

Shariah Lawyership system and its applications in Malaysia

Abnor Azli Ibrahim, Ahmed Muhammad Husni, Hayatullah Laluddin, Anwar Fakhri Omar, Muhammad Nazir Alias

Fellow of Institute of West Asian Studies (IKRAB) & Lecturer at Department of Syariah, Faculty of Islamic Studies, UKM. Malaysia.

ABSTRACT

This study tackles an important aspect of lawyership in its application in the present era. The problem of the study lies in knowing the extent of the impact of customs and traditions in their role in society and evaluated in the light of the contemporary reality. The study also aims to shed light on the status of lawyership and its practice. The study used the historical and inductive methods to collect material, and doctrinal and analytical approach to analyse the reported opinions and applied them to reach to convincing results. The study was able to know the status of lawyership and its system in Islamic and Malaysian society and its role in the Islamic civilization. Masculinity is not a requirement in lawyership as women proved their capabilities in this field. Selection of shariah lawyers is done by a competent committee in this field.

Key words: Lawyership, women, judiciary, Malaysia

Introduction

The Arab and Muslim countries knew lawyership with its modern term after mixing with the Western countries, and not after its occupation, but this borrowed system was not unknown in Islamic countries before; this profession began in the era of Abbasids as people used to appear before the judge on behalf of the litigants who were not knowledgeable on shariah or cannot attend the court due to their other businesses (Essam, Muhammad, 1983, 51). Working in the judiciary and the administrative bodies was associated with something similar known as system of representation in lawsuits, disputes and debates, and this system corresponds with what is called in the contemporary ordinances as 'lawyer' (Mashhur Hassan Mahmud Salman, 1987, 46).

In the earlier eras of Islam, it was not a practice for someone to represent another in judicial matters, every person used to attend the court for suit or responding to a lawsuit by himself not appointing anyone to defend him. But after decades, Muslim transactions evolved and new problems emerged, which make people busy with their private and public affairs and a person may not be able to attend court or he is unwilling to engage in judicial problems and debates, in addition to the fact that judiciary in these days became more complex as it is difficult to understand the legislation, and only expert in law can understand; an ordinary person cannot engage in the legal debate by himself relying on his intelligence to defend himself or to collect his right if he is ‘plaintiff’. But he must consult expert or hire someone to defend him; hence this shows the need for people to use expert to do this difficult and complex job, and law expert today are judges and lawyers, and since judges are prevented from expressing opinion and advice in justice matters, then only the lawyers are left do that (Abdul Nasir Musa Abul Basal, 1986, 124).

Literal Definition of Lawyership:

Literally, lawyership: origin is protects him. The verb ‘hama’ has many meanings in Arabic (IbnManzur, 1978, 14/198-200): He protects a man if he prevented something from affecting him.

Technical meaning of Lawyership:

Lawyership can be defined as: a career where experts practice shariah and legal procedures before any court or side on behalf of others in any action or transaction. Lawyership is a fine art that requires creative abilities and talents. Only experts in many arts are qualified and are capable of practicing it, such as: art of literature, art of rhetoric, the art of the pen, and lawyership after that is a great message that shows the nature of the soul, revealing what is inside it, and finding motives, and
understanding its goals and objectives, with a view to explain the view of the lawyer’s client and justifying his behavior in front of the court (Taha, Abu Al-Khair, 1971, 593).

Lawyer or lawyers: is the one knowledgeable on the law and can prove rights to its owners and push back the false claim of the aggressor, relying on his knowledge of the law of rights and responsibilities, and preserved freedoms for protecting groups and confirmation of interests (Muhammad, Abu Zahra, 175).

Or they are: a group of experienced and expert in law who work in matters of law and justice and take them as profession; they carry out their job by expressing opinions and advice to their clients and defending them before the competent authorities and conveying their point of view in the best way and facilitating the job of the judge of terminating the disputes (Abdul Nasir Musa Abul Basal, 1986, 124). This definition is more comprehensive.

The rule of Lawyership in Islamic Law:

Lawyership is a new word that came as a result of mixing with West with Ottoman Empire, in late days of this empire this term was known, but despite that it was not famous between the scholars and jurists (MashhurHasan Mahmud Sulaiman, 1987, 50). Contemporary researchers included rule of lawyership under the issue of ‘Agency on disputes’, and the Majelle defined agency as ((when a person mandates someone to carry out his affairs on his behalf, and the person who gave the mandate is known as “Muwakkil’ and the mandated is known as “Wakil” and the pillars of the agency is offer and acceptance)) (Ali Haidar, Majelle: Article 1449).

The majority of scholars (Sidi Muhammad Al-Marir, 1901, 1/159) are of the opinion that it is permissible to be an agent in litigation dispute because there is satisfying the needs of people as they cannot do that by themselves, as Allah (swt) created the universe with different motives, natures, capacity and talents, and what one can do another may not be able to do (Zuhaily, 1982, 76-77), and the reason for the permissibility of general agency and its merit and wisdom is available in agency in disputes, and this is strengthened with what was reported in a hadith with shows variation in the ability and argument which says ((Some of you may be more capable in argument than others)).

Ali ibnAbiTalib has appointed AqeelibnAbiTalib as agent because he was intelligent and when Aqeel became older, he appointed Ja’afar as agent and others to represent him in disputes, and the reason for that as Ali (kw) says: “Verily, disputes has plunge and the devil attends it and I hate to attend it” (Muhammad, Rawas, 1983, 642). He also said: “What has been judged to my agent is for me, and what has been decided against my agent is against me (IbnQudamah, 1994, 5/65).

Conditions of Lawyership in Islam:

The jurists did not mention conditions for the exercise of agency in litigation (lawyership), because they did not discuss it as a profession with special system and rules, but they only discussed it as agency on dispute with its general system, or during litigation as a special case, and not a general matter. Some contemporaries mentioned some necessary conditions that must be available on the lawyer in agency in dispute extracting from the conditions of agency which are as follows:

1- To have capacity to do what he has been hired for.
2- It is necessary for the lawyer to look for the truth and evidence in his agency.
3- The lawyer must be one (According to Malikis).
4- The lawyer must not be an enemy to the litigant party.
5- The lawyer must not violate the order of his client.
6- It is right for the lawyer to contract with those that their testimony and defense is not accepted for him and against him.
7- The lawyership must not be on something that is against the shariah, and expression on its greatness, and not to agree with what is against it.

In the Malaysian shariah legal system, shariahlawyership has been regulated in all states and is known as rules of shariahlawyership for the state. Some laws in many Malaysian states such as Negri Sembilan (EnakmenPentadbiranHukumSyarakNegeriSembilan, 1991, N01, Section 54/1), Selangor (EnakmenPerundangan Islam Selangor, 1989, No 8, Section 55), and Pahang stipulated on the need of shariahlawyership service in shariah courts for the purpose of facilitating judicial proceedings and ensuring justice among the people, and provided several requirements for anyone who wants to practice lawyership, which includes:

First: He must be a Malaysian citizen and lives in Malaysia.
Second: He must have a degree in Shariah.

It is required for the applicant to have a degree in shariah from a recognized university by the Malaysian government, and a verbal interview is conducted to the applicant and obtained a certificate to practice.
**Third:** To get a lawyership certificate from a competent authority.

It is required from a shariah lawyer to get a lawyership certificate issued by religious or judicial councils in the states, signed by the president of the Council and after payment of fees is done, and the certificate is valid for one year only, and the council may terminate the certificate at any time it wishes.

**Fourth:** experience in the judiciary, law and shariah.

It is allowed for someone who has experience in the judiciary and law and has familiarity with a broad Islamic law to apply to practice as shariah lawyer, so the State of Kelantan allows those with experience in judiciary such as judge in one of the Malaysian shariah courts to apply for shariahlawyership, and shariah courts may appoint who has capacity and deserves to be a shariah lawyer to defend one of the litigant parties if he is poor with the consent of the Sultan, and the poor person is exempted from paying the prescribed fees.

**Fifth:** Knowledge of the Malay language.

It is also required from the applicant to be shariah lawyer to be expert in Malay language, in both writing and speaking, because trials in the Malaysian courts are conducted in Malay which is the official and prevailing language in the state.

**Sixth:** To pass the competency exam.

The council established a special committee for the purpose of holding special exams for the applicants of shariahlawyership and the committee works to verify the applicant’s knowledge qualifications, and conducting examination for the applicant that has no shariah degree, and if examination becomes necessary for him, he must pass to qualify as shariah lawyer.

**Seventh:** The requirement of Islam.

The Federal Government did not mention Islam as a requirement for the applicant to shariahlawyership, but some states mentioned and I see the requirement of Islam is necessary and the fact that it is not mentioned is unnecessary because requirement of Islam in shariahlawyership is known among Malaysian Muslims and they will not consent for non-Muslims to be lawyers in Muslims’ disputes, and thus, till now no non-Muslim name has ever been mentioned among the shariah lawyers, in addition to the previous conditions that cannot be available in a non-Muslim normally. I suggest that the Malaysian legislature should unite the requirements of lawyership among the states, and to stipulate Islam as a requirement for the applicant.

**Eight:** He must be of good behavior.

The principles of shariah lawyers of the Federal Territory and Malacca added this requirement. That is he must be of good behavior, good reputation, and not convicted for crime or offenses related to honour, whether under the law of administration of Islamic affairs or other laws recognized by the Constitution, and also not convicted for bankruptcy.

As for the requirement of masculinity, the jurists did not mention that, and it has never been mentioned in the best centuries that a woman has been an agent in dispute, but I am personally of the opinion that it is permissible, provided her duty does not contradict the shariah and dignity of Muslim women, and this is what is supported by common sense, and a lot of religious women practiced this profession, and this work does not demolish moral values of women, such as mixing with men without limit and no neglecting of family obligations etc. But the woman’s personality remains respectable with the sanctity of lawyership message, and a lot of women graduated from this specialization, and requirement of masculinity will not allow them to work and to practice their knowledge and expertise in this area.

Perhaps, not hiring women to represent litigant parties in the past was due to the status of the society at that time, where women used only to stay at home and rarely go out, but in our time women go out to work to support men something that became familiar, but there must be certain controls for the permissibility of her work to avoid committing sin, and this is part of changing of ruling with changing of time.

Generally, there are special laws in all states related to shariahlawyership known as the principles of shariahlawyership, and those states take noble steps to coordinate these rules to avoid difference among them to facilitate the process of lawyerships the purpose of its establishment is to help judges and parties in cases in establishing truth and justice.

**Methods of selection of shariah lawyers and its structure:**

The Islamic Religious Council has formed a competent organ entrusted with choosing shariah lawyers in Malaysia. But its composition is different from state to state. I will bring examples of different states as follows:

Committee Membership in Kuala Lumpur is as follows:
1. Head of Shariah judges (Chairman).
2. Registrar in shariah court in Kuala Lumpur (Secretary-General).
3. Three other members appointed by the Council.

The committee membership in the state of Malacca is as follows:
1. The shariah judge of the Supreme Court (Chairman).
2. Chief prosecutor.
3. Shariah lawyers’ representative appointed by the Council.
4. Registrar in the shariah court in Malacca (Secretary-General).
5. Two other members appointed by the Council.

In the state of Kedah, the committee membership is as follows:
1. The chief judge (Chairman).
2. Legal Counsel for the state.
4. And three other members appointed by the Council.

Among the duties of the Committee is supervising the examinations from preparing syllabus, questions, marking, and issuing certificates to those who passed. It also plays a supervisory role on the shariah lawyers’ activities and punishing them if they commit offenses in the rules of the shariah lawiership.

Procedure for application to practice as a shariah lawyer:

1. A person submits application by filling in a special form to practice as a shariah lawyer.
2. Attached his personal information and his necessary credentials with the form.
3. Send the request to the President of committee that appoints the shariah lawyers.
4. Submits a copy of the request to shariah court within its jurisdiction in a maximum period of one month after sending the request to the Commission for appointment.
5. The Commission sends the result of the applicants and the concerned courts within seven days after the release of the results of the request.
6. The Council may reconsider all its decisions relating to the results at the request of the applicants, and the decision of the Council after definitive study on the subject and cannot be challenged.
7. With the issuance of this decision, the appointment of the shariah lawyer would be completed and he has rights as shariah lawyer and he has obligations of a shariah lawyer in the center which he was appointed.

Conclusion: Results and Recommendations:

The most important results we found are:
1. There is no explicit shariah text that prevents women assuming the post of lawyer, it is only a discretionary jurisprudential rule, and that is why the opinions of the jurists differed on it, and based on the differences on the rule they made an analogy on her assuming lawiership.
2. Masculinity is not a requirement in the lawyership profession because Malaysian women proved their capabilities in this area.
3. Women not practicing lawyership throughout Islamic history is not evidence that it is not permissible (as abstinence is not an evidence), it was explained that the reason for that was due to the nature of social life at the time based on custom and tradition, and this is something that enters under the saying ‘fatwa changes based on time, place and situation’.
4. If a woman is not suitable to lead prayer that does not mean that she is not suitable to be a lawyer, because prayer is an act of worship, and analogy cannot be made with it.

There are valuable suggestions and recommendations that I would like to mention as follows:

- It is the Government’s duty to provide appropriate conditions for women while doing their job. Example of the duties of the Muslim government regarding working women is to take into account the characteristics of both women and men in the selection of personnel for various jobs in government institutions. This should be based on scientific, psychological, and social studies because the purpose is to achieve the interest of both men and women in the field of employment.

References

The Holy Qur’an
Al-Marir, Sidi Muhammad, 1901. Great Researches on Islamic courts, publications of Institute General Franco for Arabic and Spanish Researches in Tetouan, Cardimasin Library.