

## A BRIEF OVERVIEW ON THE INQUISITORIAL METHOD IN MALAYSIAN SHARIAH COURTS

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### ABSTRACT

*For decades, the Shariah Courts in Malaysia have adopted the adversarial system as a formal procedural legal system to solve family cases in court trials. Malaysian Shariah Courts have gone through developments and changes to improve the courts' external and internal legal structures. In December 2019, the Shariah Judicial Department of Malaysia had introduced a new practice direction where Shariah judges may execute the inquisitorial approach in trials if deemed necessary. Based on qualitative research of interviews and library research, this article aims to identify the benefits of applying the inquisitorial approach in Shariah courts. This study reported that not only does the inquisitorial system provide a broader jurisdiction for the Shariah judges, but it also allows the judges to practice judge-led mediation in trials. While the formal legal system remains adversarial, this study also confirmed that the Malaysian Shariah legal system practices an adquisitorial approach which is a hybrid of both the adversarial and inquisitorial approaches. Some judges may use the inquisitorial approach while most apply the adversarial method.*

**Keywords:** *inquisitorial method, Shariah Courts, Shariah Judicial Department of Malaysia*

## **INTRODUCTION**

Malaysia is a unique country with a distinct legal structure based on English common law, known as the Common Law of Malaysia (Shabanaj, D., 2017: 42-68). It is a hybrid of different legislations such as the Federal Constitution, States Constitution, and Islamic law. Subject to Article 121(1A) of the Malaysia Federal Constitution, the reassertion of Malaysian Shariah Courts' (MSC) jurisdiction as state courts under this regulation enables the courts to have exclusive jurisdiction in matters concerning Muslims and specific areas of the Islamic Law.<sup>1</sup> Since its establishment during the British colonisation, the Shariah Courts have undergone various changes in terms of administration, management and structural systems. These changes do not merely aim at improving the Shariah courts' external and internal structures, but also dealing with various challenges that arise over the past decades.

Among the challenges faced by the MSC are backlog of cases (Abdullah, R., 2009: 1-30), inconsistency between Malaysian Shariah states' law and limited jurisdiction (Che Pa, H., et al., 2016: 1-13). Other challenges include failures to comply with court orders (Nasohah, Z., 2009: 115-128) and so-called discrimination against women (Farah Safura & Aminuddin Ruskam, 2015). To improve and preserve the Islamic judicial system, the MSC has taken various actions to deal with these challenges. For instance, the MSC has implemented mandatory mediation to reduce the backlog of cases, provide 'night court' sessions<sup>2</sup> and upgraded its technology initiatives via E-Syariah Online Portal (Mohd Shariff, R.N., 2018: 291-299). Most importantly, a centralised federal department known as the Department of Syariah Judiciary Malaysia (JKSM) was established in 1998 as a coordinated effort to standardise the administration and management of all Shariah courts throughout Malaysia (Wan Muhammad, R., 2020: 54). One of JKSM's main roles is the issuing of practice directions.

On December 2019, JKSM introduced a new practice direction known as Practice Direction Number 7 Year 2019. The practice direction functions as a way to allow Shariah judges apply an inquisitorial approach for civil, or *mal*, cases. However, past literature shows that the inquisitorial system is often practised and associated with criminal procedural system rather than *mal* cases

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<sup>1</sup> See Article 74 of the Malaysian Federal Constitution, read together with Article 121 (1A) of the same Act.

<sup>2</sup> Astro Awani Online (2020). "Syariah 'night court' sessions to reduce backlog - Selangor Chief Syarie Judge," <http://english.astroawani.com/malaysia-news/syariah-night-court-sessions-reduce-backlog-selangor-chief-syarie-judge-111788>, accessed on 4 July 2020.

(Abdul Rani Kamarudin, 2003; Madhav Prasad Acharya, 2003; Thomas Ogg, 2013; John R. Spencer, 2016; Janet Ainsworth, 2017). This situation raises a question as to how formalising the inquisitorial approach to solve *mal* cases can be useful and beneficial for the Shariah jurisdiction system.

With that said, this article aims to distinguish how the inquisitorial system would be advantageous for Shariah courts to resolve *mal* cases. Using qualitative research through library research and interviews, the study aims to understand the concept of the inquisitorial approach by comparing it to the current adversarial process used in Malaysian Shariah courts. This article also aims to identify possible benefits or influence of resorting to the inquisitorial approach to solve *mal* cases. The study will focus more on the inquisitorial approach as it is a 'new' concept that has recently been added in the practice directions under JKSM.

## **BACKGROUND OF THE MALAYSIAN LEGAL SYSTEMS**

Generally, the Malaysian legal system can be divided into two types of sources; the written and unwritten laws (Manring, T., 1968: 34; Shabanaj, D., 2017: 51). These sources are based on Malaysia's historical legal systems left by Muslim traders, the Europeans and British colonisers before Malaysia became an independent country in 1957. Since the early centuries of Islamic history, Muslim traders and sailors have been present in trading ports across the Southeast Asia region, including Malaysia (Farid S. Shuaib, 2012: 87). They came from various countries such as the Middle and Near East, the Indian sub-continent and Muslim Chinese traders from China not only to trade but also to spread the teachings of Islam in Malaysia, which was then known as the Malay Peninsula (Wan Muhammad, R., 2020: 44). Thus, the original law in the Malaya lands was customary law (*adat*), including those aspects of the incorporated Hindu and Islamic law, as well as Islamic law that served as a separate and alternate substantive body of law (Farid S. Shuaib, 2012: 85-86).

By the end of the thirteenth century, the first Islamic sultanate was established in the region. Over time, different forms of Islamic law were applied to settle conflicts within the sultanates as more sultanates were formed. This fact was mentioned in the historical reports of the Europeans and the British (*Ibid*, 87). However, the arrival of the Europeans, and later on the British, had influenced not only the dynamics of Islamic legislation among the indigenous people living in the Malay Peninsula but also the Malaysian legal system as a whole. The influence of the Europeans began by the early sixteenth while the British expanded hers by the nineteenth century (*Ibid*). Although the Europeans first

came before the British, it is the English common law brought by the British that remains an integral part of the current Malaysian legal system (*Ibid*).

During the era of British colonisation, the British expanded their control over the sultanates in two major ways. The first one was by acquiring land through purchase or conquest and putting it under the British's direct control. In courts, most civil matters would be applying British law. The British agreed to allow specific issues, including Muslim family issues, to be governed by Islamic law. Hence, British-trained judges were instructed to apply Islamic law as much as they could. The reason was that all of these issues resided under the jurisdiction of the same court, whether Muslim-related or not (Farid S. Shuaib, 2012: 85-88). For areas where the British failed to gain control, the British used a second approach by signing treaties with the sultans. Under these treaties, British Residents were in charge of state policies while the sultans remain as head of state. Muslim family laws and Malay customs remained under the sultan's jurisdiction. Still, the British insisted on establishing civil courts to impose their common law practice (*Ibid*).

In his article, Farid S. Shuaib (2012) continued to point out that during the period of British colonisation, cases concerning Muslim family law may have been decided by a local Islamic court in the first instance. Still, all cases were typically subjected to appellate review by the British civil court. The action was to ensure that any judgement made by the local Islamic judges did not offend the British notices of justice (*Ibid*, 99). Even after Malaysia gained her independence in 1957 and established her dual-legal systems of civil courts and Shariah courts, the practice continued and became a controversial issue. To limit the practice, an amendment was made in 1988 with regards to Article 121 (1A) of the Federal Constitution. It stated that the government's civil courts "shall have no jurisdiction in respect of any matter within the Shariah court's jurisdiction".<sup>3</sup>

In terms of legal modes and procedures, there are two types of legal systems used in court trials known as the adversarial system and the inquisitorial system (Kamarudin, A.R., 2007: 65). Based on past cases handled by the civil courts, it can be noted that the standard mode of procedure used by the British is mainly in the form of the adversarial system rather than the inquisitorial system. Hence, the adversarial system is not only practised in civil courts but also the Islamic Shariah courts in Malaysia. The following points will now elaborate on the similarities and differences between these two systems.

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<sup>3</sup> See Federal Constitution (Amendment) Act, Act A704, 1998.

According to Western literature, the adversarial system is inherited from the British's common law (Massenot, B., 2011: 602), whereas the inquisitorial system came from Roman Law (Slobogin, C., 2013: 710). In his article, John R. Spencer (2016) briefly mentioned that the ingredients for the term 'inquisitorial' and 'accusatorial', a name which is used interchangeably with 'adversarial' (SC Thaman, 2013: 471), has various meanings to different people. It subsequently led to confusion as to what the essence of the distinction between these two terms is. Therefore, it is essential to understand the concepts and approaches of adversarial and inquisitorial legal systems.

The term 'adversarial' linguistically refers to a system, especially of political or legal, that involves people who are in opposition and argue against each other.<sup>4</sup> SC Thaman (2013) defines adversarial procedure in court as a court procedure where evidence is produced by the parties (prosecution and defence), and the judge plays a neutral and passive role (SC Thaman, 2013: 471). During the process, lawyers play an active role where they act as proxies, or representatives, for the litigants (Ainsworth, J., 2017: 81). They are already involved in the pre-trial investigation and factual assessments of the case. Such is not the case for the judge who is only exposed to the case once it is ready to be tried (Ainsworth, J., 2015: 2).

As it is, lawyers hold the decision to determine what type of evidence or witness to be brought before the court. Cross-examinations will take place where lawyers from both sides of the litigants will then take turns in presenting evidence, questioning witnesses for testimonies and supporting their side of the case (*Ibid*). On the other hand, a judge seldom intervenes to ask questions and interact with the witnesses during an adversarial setting. Throughout the whole trial, judges will decide whether questions or answers provided by others in the court are legally proper or not (*Ibid*) aside from having the responsibility to come up with the verdict at the end of the case after evaluating the evidence<sup>5</sup> presented by both sides of the parties (Robert Thomas, 2013; Janet Ainsworth, 2017; Ron Shaham, 2011). One advantage of the adversarial system provided by Ainsworth (2015) is that it gives litigants and witnesses with a more direct experience to share and shape their own legal narratives while having their stories heard and respected. Consequently, the adversarial approach has the

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<sup>4</sup> Definition of the term "Adversarial". See Oxford Online Learner's Dictionaries, "Adversarial" <https://www.oxfordlearnersdictionaries.com/definition/english/adversarial?q=adversarial>, accessed on 4 April 2020.

<sup>5</sup> Thomas, R. (2013). "From Adversarial v Inquisitorial to Active, Enabling, and Investigate: Developments in UK Administrative Tribunals", <https://ssrn.com/abstract=2144457>, accessed on 12 November 2020.

potential for positive perceptions in the public of the procedural fairness of the justice system (Ainsworth, J., 2015: 11).

As for the inquisitorial system, Abdul Rani Kamarudin (2007) explains it as a system where the courts play a dominant role in investigating the facts and the law and make decisions according to its view of the justice of the case (Kamarudin, A.R., 2007: 67). SC Thaman (2013) defines it as a court procedure where the judge plays an active role in investigating the issues and ascertain the truth, and the parties play a more passive role. During the trial, the judge is in charge of conducting investigations rather than the lawyers. He is primarily responsible for supervising and gathering facts and evidence required to resolve a case. The judge ultimately provides a decision or court order for the issue as well.

On the other hand, lawyers play a marginal role in an inquisitorial setting. As a judge, to carry out any form of approach requires meticulous calculations and care. It is a heavy responsibility as it involves public interest in an effort to uphold justice and prevent injustice in society (Ahmad, M.N., 2001: 90). With that being the case, the judge needs to be cautious to establish proper procedures for both sides of the parties in a trial during an inquisitorial approach. To determine their cases, he needs to ensure that both sides are given equal opportunities to raise matters of substance. Apart from the role of the judges and lawyers, another difference noted is the development of trial evidence.

According to Janet Ainsworth (2015), the adversarial trial evidence is mainly developed from oral question-and-answer sequences between lawyers and witnesses while judges in inquisitorial trials generally construct legal trial narratives through written statements. Overall, the adversarial system is opposite to the inquisitorial system. While both judge and lawyers participate in the collection of evidence, the critical difference lies mainly in the judge's role during the trial. For an adversarial setting, a judge plays a passive role as he judges both sides of the litigants. In contrast, a judge plays a proactive role should the trial is executed by inquisitorial means.

Overall, Malaysia remains a unique Commonwealth country with a distinct legal structure based on common law (Shabanaj, D., 2017: 42-68). The common law system is implemented interconnected or in conjunction with other Malaysian legal structures such as the Federal constitution, state constitution, and the Shariah law. The primary mode of court procedure to execute these laws in Malaysia is mainly adversarial, but there are cases where the inquisitorial approach is also applicable. This point will further be explained in the following content.

## **RULES AND REGULATIONS SUPPORTING THE INQUISITORIAL APPROACH IN SHARIAH COURTS**

As mentioned, among the judicial bureaucratic developments occurring in Malaysia is the establishment of the Shariah Judicial Department of Malaysia (JKSM). It was built to standardise administrative and judicial inconsistencies amongst Shariah Courts in Malaysia. One of JKSM's leading roles is the issuing of procedural practice directions for Shariah Courts, which began in the year 2000.<sup>6</sup> A practice direction can be defined as a written document issued by the Head of Director of JKSM or the Shariah Chief Judge concerning the procedures or policies of Shariah Courts (Wahab, M.A., 2016: 175).

Although a practice direction is not considered a legal status, it must be followed and adhered to by Shariah legal practitioners (*Ibid*). A practice direction is only enforceable in a state if it is endorsed by the state's Head Judge. The endorsement of the practice direction by a state's Head Chief becomes the source of authority to ensure that it is adopted in the Shariah Court of the said Malaysian state. If not endorsed, the practice direction is considered void. The functions of practice directions are very much in line with the principle of preserving religion (*al-dīn*). A practice direction helps to maintain Islamic law and preserve property through cost-effective and speedy-resolving cases. Other than a standardising tool, JKSM's practice directions also aim to speed up case settlements and facilitate judges when making references, including procedures and approaches of a judge in a court trial (*Ibid*).

One of the recent practice directions issued is Practice Direction No.7 Year 2019. The practice direction contains the guidelines for civil court trials through inquisitorial means in Shariah Court and is also known as *Garis Panduan Perbicaraan Kes Mal Secara Inquisitorial Mahkamah Syariah*. In the practice direction, guidelines are provided for the judges on how to conduct a trial through inquisitorial means for civil cases, should the judge deem it necessary. Although the Shariah jurisdiction is divided into criminal and civil cases, the Practice Direction enacted by JKSM regarding the inquisitorial approach specifically mentions *mal* cases, that is, civil cases. The *mal* cases under the Shariah court's jurisdiction generally refers to premarital issues, issues throughout a marriage, issues after the dissolution of marriage, post-

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<sup>6</sup> Shariah Judicial Department of Malaysia (2020). "Background of JKSM," <http://www.jksm.gov.my/index.php/ms/profil-jabatan/pengenalan/latarbelakang-jksm>, accessed on 27 March 2020.



divorce issues, interlocutory applications, applications to enforce court orders and last but not least, applications on wills, inheritance and waqf.<sup>7</sup>

Based on the guidelines mentioned in Practice Direction No. 7(2019), a Shariah judge may determine which party will begin first as well as the order of speech. He is allowed to ask questions to anyone at any appropriate time without following the order in an adversarial setting. He may also question and call upon anyone at any time, be it the witness or a person who was not brought forward as a witness. He would also be allowed to re-examine witnesses who have been questioned at any stage of the proceeding. Furthermore, the judge may allow parties to present supplementary affidavit and other documents. An oral hearing for interlocutory applications during the proceeding would also be permitted if deemed necessary by the judge.<sup>8</sup>

Investigations in an inquisitorial setting are not necessarily limited solely on the Shariah judge. At the discretion of the judge, should Shariah lawyers represent either litigant, the judge may allow the Shariah lawyer to conduct the examination-in-chief and obtain information from his client or/and witness(es). Once it is done, the judge may proceed to ask questions that he deems fit towards the parties and witnesses. After that, parties or the Shariah lawyer may continue with the cross-examination. At the end of the process, the judge may continue to investigate these people by asking questions. However, at this stage, cross-examining the parties would not be allowed unless permitted by the judge. Once the information has been gathered, the judge may come up with the case's verdict even in the absence of written submissions.<sup>9</sup>

Practice Direction No.7 (2019) is not necessarily mandatory in all Malaysian states, but it does provide a more solid opportunity for Shariah judges to partake more actively in a trial. More importantly, this particular practice direction acts as an 'expansion' to a number of existing laws and regulations under the Shariah Court, which indirectly imply, and support, the idea of an inquisitorial approach. For example, section 129 of the Shariah Court Evidence (Federal Territories) Act 1997 (Act 561) portrays the judge's role, or participation, in court trials where a witness is required to take an oath. The section is written as follow:

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<sup>7</sup> Shariah Judicial Department of Malaysia (2020). "Penerangan Kes Mal", <http://www.jksm.gov.my/index.php/ms/prosedur-mahkamah/135-penerangan-kes-mal>, accessed on 1 July 2020.

<sup>8</sup> Number 4(1) Practice Direction Number 7 Year 2019.

<sup>9</sup> Number 4(3) Practice Direction Number 7 Year 2019.



*“If the circumstances so require an examination of a witness under this Part cannot be carried out and a party to the proceeding makes an application to the judge for the witness to take the oath as a witness of truth so as to strengthen his evidence, the judge shall order such witness to take such oath and shall remind the witness that if he fails to do so, his evidence shall not be admitted.”<sup>10</sup>*

The ‘expansion’ can also be seen under several sections of the Shariah Court Civil Procedure (Federal Territories) Act 1998 (Act 585). Section 127 of the Act states that in the interest of justice, the court may call any party to adduce evidence and inspect any place or thing at any stage of the proceedings.<sup>11</sup> Section 244 of the same Act touches on the inherent power of the court as mentioned below;

*“Nothing in this Act shall be deemed to limit or affect the inherent power of the Court to make any order as may be necessary to prevent injustice or to prevent abuse of the process of the Court.”<sup>12</sup>*

In addition, Section 245 of the same Act coincides with the last part of the guidelines in the above practice direction, emphasising on the importance of Islamic Law whereby any provisions or interpretation of the provisions under the Act 1998 and guidelines of the practice direction which is inconsistent with Islamic Law shall, to the extent of the inconsistency, be void. Also, in the event of a lacuna or where any matter is not expressly provided for these two rules, the court shall apply the Islamic Law.<sup>13</sup>

## **THE INQUISITORIAL APPROACH FROM THE ISLAMIC PERSPECTIVE**

Justice must not only be seen to be done but must manifestly be seen to be done (Kamarudin, A.R., 2007: 72). In Islam, Shariah jurisdiction is not limited to any particular legal system as long as justice is preserved and any action

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<sup>10</sup> Section 129 Act 561, Shariah Court Evidence (Federal Territories) Act 1997, Part III – Production and Effect of Evidence

<sup>11</sup> Section 127 Act 585, Shariah Court Civil Procedure (Federal Territories) Act 1998, Part XV – Hearing

<sup>12</sup> Section 244 Act 585, Shariah Court Civil Procedure (Federal Territories) Act 1998, Part XXV – Miscellaneous

<sup>13</sup> Section 245 Act 585, Shariah Court Civil Procedure (Federal Territories) Act 1998, Part XXV – Miscellaneous

towards ensuring justice does not go against the teachings of Islam. There are many verses in the Quran that reflect Allah SWT's command on justice. For example, Allah SWT has decreed in the Quran:

وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ إِنَّ اللَّهَ نِعِمَّا يَعِظُكُمْ بِهِ إِنَّ اللَّهَ كَانَ سَمِيعًا بَصِيرًا

“... and when you judge between people to judge with justice. Excellent is that which Allah instructs you. Indeed, Allah is ever Hearing and Seeing.”

(Surah al-Nisā', 4: 58)

In the same surah, He also decreed as follow:

“O you who believe! Stand out firmly for justice, as witnesses to Allah, even though it be against yourselves, or your parents, or your kin, be he rich or poor; Allah is a Better Protector to both (than you). So follow not the lusts (of your hearts), lest you avoid justice; and if you distort your witness or refuse to give it, verily, Allah is Ever Well-Acquainted with what you do.”

(Surah al-Nisā', 4: 135)

In certain circumstances, Prophet Muhammad PBUH had also used the inquisitorial approach to solve conflicts, as shown in the following *ḥadīth*:

أَخْبَرَنَا إِسْحَاقُ بْنُ إِبْرَاهِيمَ، قَالَ أَنْبَأَنَا سُفْيَانُ، عَنِ الزُّهْرِيِّ، عَنِ سَعِيدِ بْنِ الْمُسَيْبِ، عَنْ أَبِي هُرَيْرَةَ، أَنَّ رَجُلًا، مِنْ بَنِي فِزَارَةَ أَتَى رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فَقَالَ إِنَّ امْرَأَتِي وَلَدَتْ غُلَامًا أَسْوَدَ . فَقَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ « هَلْ لَكَ مِنْ إِبِلٍ » . قَالَ نَعَمْ . قَالَ « فَمَا أَلْوَانُهَا » . قَالَ حُمْرٌ . قَالَ « فَهَلْ فِيهَا مِنْ أَوْرَقٍ » . قَالَ إِنَّ فِيهَا لَوُرْقًا . قَالَ « فَأَنَّى تَرَى أَتَى ذَلِكَ » . قَالَ عَسَى أَنْ يَكُونَ نَزَعُهُ عَرَبِيٌّ . فَقَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ « وَهَذَا عَسَى أَنْ يَكُونَ نَزَعُهُ عَرَبِيٌّ » .

“Abu Hurayrah narrated that a man from Banu Fazarah came to the Messenger of Allah and said: ‘My wife has given birth to a black boy.’ The Messenger of Allah said: ‘Do you have camels?’ He said: ‘Yes.’ He said: ‘What colour are they?’ He said: ‘Red.’ He said: ‘Are there any grey ones among them?’ He said: ‘There are some grey ones among them.’ He said: “Where do you think

*they come from?’ He said: ‘Perhaps it is hereditary.’ He said: ‘Likewise, perhaps this is hereditary.’<sup>14</sup>*

Based on the *ḥadīth* above, the Prophet assessed and determined an issue by using an inquisitorial approach. Rather than simply listened to what the other party was saying and made his judgement, he continued to ask questions before giving his final opinion on the matter. The situation proves that the role of a judge is not restricted to ask questions and conduct the trial by himself.

In his article, Ron Shaham (2011) concluded the term *istikshāf* could be used to describe independent investigation carried out by the judge in cases which the testimonies of each party’s witnesses are insufficient, or if the judge feels like the circumstances of the case are not completely clear to him (Shaham, R., 2011: 605-616).<sup>15</sup> Based on the definition, it is clear that *istikshāf* involves the active participation of the judge to ask questions to the witnesses that could affect his decision-making. Further discussion on *istikshāf* as an inquisitorial approach can be found in his article *istikshāf* in Islamic Jurisprudence and Modern Law.”

## **APPLICATION OF THE INQUISITORIAL APPROACH IN MALAYSIAN SHARIAH COURTS**

Under the Shariah legal system, Shariah judges generally practice the adversarial approach in court trials. Shariah lawyers become the intermediate for the disputing parties and witnesses called by the court provide statements or explanation to assist court judgement. It is not uncommon for Shariah judges to ask questions themselves and partake in the trial. For some instances, the judges may resort to the inquisitorial approach to ensure justice is met.

A judge’s active participation in a case can clearly be seen in a Shariah case with the registration number (10007-143-0001-2009 and 10007-143-0002-2009).<sup>16</sup> Under this case, the accused were accused of committing a criminal offence under section 29(1)(a)(b) of the Shariah Criminal Enactment (Selangor) 1995 related to *khalwat*. The case was indeed conducted in an

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<sup>14</sup> Al-Nasā’ī, ‘Abd al-Raḥmān Aḥmad ibn Shu‘ayb ibn ‘Alī ibn Sunān (1996). *Sunan al-Nasā’ī*. Riyād: Maktabah al-Ma‘ārif li al-Nashr wa al-Tawzī’, 540, “Kitāb al-Ṭalāq, Bāb Idhā ‘Arrada bi Imra’atih wa Shakka fi Waladiah wa Arāda al-Intifā’a minh,” no. *ḥadīth* 3478.

<sup>15</sup> See also page 616 of the same article.

<sup>16</sup> In the case JAIS Prosecutor vs MNHZ and SBS, with case registration number (10007-143-0001-2009 and 10007-143-0002-2009). Unpublished case.

adversarial setting. However, the highlight of this case was that the court used an inquisitorial approach to assist in decision-making as far as taking part in the investigation and went to the crime scene in person. This fact was recorded on page 12 in the case's ground of judgement:

*“Berdasarkan gambar yang ditender P7(a) dan P7(b) serta sesi lawatan Mahkamah ke lokasi kejadian...”*

Although the case is a criminal case and not a *mal* case, it does not dismiss the fact that the inquisitorial approach is not a foreign concept in the Shariah courts and can be used as an alternative to the standard adversarial setting in Malaysian Shariah courts. Based on library research and interviews, here are other possible benefits of practising the inquisitorial approach for *mal* cases in Shariah courts that the authors have identified:

#### **a) Avoid Evidence Distortion**

One major advantage of using the inquisitorial approach is the ability to avoid evidence distortion. Although unfavourable, it is understandable for self-interested lawyers to provide evidence, including expert witnesses, that align to the interests of their clients which may detriment the accuracy of the final verdict made by the judge in an adversarial setting (Kim, C., 2017: 209-210). In this situation, lawyers are often better informed than the judges thus allowing them to act as proxies for their clients. Granted, they would most likely present only the evidence favourable on their side of the case (Massenot, B., 2011: 602). There is also the possibility where efforts of lawyers in collecting evidence may be contingent on the wealth of the litigants compared to the efforts of the judge (*Ibid*).

For example, in the case of expert witnesses, section 33(1) of the Shariah Court Evidence Act states;

*“When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions or relating to determination of nasab, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions or relating to determination of nasab, are qarinah.”<sup>17</sup>*

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<sup>17</sup> Section 33, The Shariah Court Evidence Act (Federal Territories) Act 1997

The above section explains that the type of evidence provided by expert witnesses in determining matters that the judge could not decide himself due to inexpertise is considered as *qarinah*. The judge, however, has no power to call upon the expert witnesses to court. His power to do so is subjected to section 118 of the Shariah Court Civil Procedure (Federal Territories) Act 1998 where the judge is only allowed to call and question witnesses or deponents that have been called and brought forward by the lawyers and their clients.<sup>18</sup>

Through Practice Direction Number 7 Year 2019, the judge's power is expanded where he may resort for the inquisitorial approach and summon any person to testify as a witness<sup>19</sup> if deemed necessary. The judge is also allowed to question any person present throughout the trial to testify. He may even reorganise the trial process for the sake of justice through inquisitorial means. The judge may appoint experts or witnesses to provide statements and assist the investigation without being biased, as could happen in an adversarial setting where witnesses called upon by parties misinterpret their role. By avoiding evidence distortion, the court consequently has a higher chance of preventing wrongful convictions and acquittals.

#### **b) Inquisitorial approach as a 'support system' to the practice of Sulh**

As recommended in Islam, the Shariah courts encourage effective dispute resolution (Mohd Arshad, 'A.H & Che Soh, R., 2012: 216). The type of cases that are predetermined to register under the Shariah courts' jurisdiction is listed under Practice Direction Number 1 Year 2000 based on different registration codes. Having jurisdiction over criminal and *mal* cases, the Shariah courts have made it mandatory for specific *mal* cases to go through sulh proceedings first before they can be brought before trial including child custody, matrimonial property and alimony cases (Sutherland, Elaine E., 2012: 213).<sup>20</sup> In these proceedings, sulh officers are appointed as mediators, and only the sulh officer in charge and the disputing parties are allowed to be present throughout the proceeding.

If the sulh is successful and disputing parties come to an agreement, a sulh agreement will be prepared by the sulh officer. If the parties have appointed lawyers beforehand, they may refer to their lawyers about the sulh agreement even though the lawyers are not allowed to be present in sulh sessions. The

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<sup>18</sup> Section 118 Counter-examination, The Shariah Court Civil Procedure (Federal Territories) Act 1998 (Act 585)

<sup>19</sup> Number 4(1)(c) Practice Direction Number 7 Year 2019, JKSM.

<sup>20</sup> Practice Direction Number 1 Year 2010, JSKM.

disputing parties must sign the sulh agreement in front of the judge where the judge will endorse the sulh agreement as a court order thus resulted in a *res judicata* case. If the proceeding fails, the case will be brought to trial for adjudication. *Ex-parte* cases and cases that have gone through the mediation process under the Legal Aid Department of Malaysia are not required to go through *Majlis Sulh* at the registration stage (*Ibid*).

Unlike the adversarial system, using the inquisitorial approach provides a small, if not more, leeway for the judges to execute judge-led mediation during court trials due to its nature. The inquisitorial approach involves the judge's active participation, where the judge is the one who controls the momentum of the trial. With the existence of Practice Direction No. 7 Year 2019, Shariah judges have a broader jurisdiction to carry out more in-depth questions or question parties during court trials whenever the judge finds appropriate.<sup>21</sup> Thus, they are not limited or obliged to follow through a case trial through the common-practised adversarial method (Sa'odah Ahmad & Nora Abdul Hak, 2010: 213-237). Suppose the judge believes that the case can end amicably while the trial is still ongoing. In that case, he is open to practising judge-led mediation without needing to postpone the trial. Through the inquisitorial approach, the judge will be able to ask questions and navigate the case trial whilst attempting to mediate the case directly without being bound by the general conditions.

The Chief Judge of JKSM, Dato' Dr Hj Mohd Na'im Hj Mokhtar (2020) explained that it is indeed rare for Malaysian Shariah judges to practice the inquisitorial approach or judge-led mediation. The reason is that most of the judges apply the adversarial approach in adjudication, and there are already around 73 sulh officers appointed throughout Malaysia to handle the mediation process. However, in an interview with a sulh officer in Johor, it was founded that there are only five sulh officers currently appointed in Johor to mediate cases in all nine districts of Johor. Due to the small number, these sulh officers are circulated around Johor to deal with sulh matters. For instance, a sulh officer situated in Muar not only has to cover sulh cases in the district but has to go around other districts as well due to a limited number of sulh officers available in the state.<sup>22</sup> Due to this situation, appointments for sulh are limited where they need to be made early at a fixed time.<sup>23</sup> This situation indicates that

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<sup>21</sup> Mohammad Fadzil Esa (Shariah Judge, Tangkak Shariah Court, Johor), in interview with author on 5 March 2020.

<sup>22</sup> Siti Fadhilah Ahmad (Sulh Officer, Muar Shariah Court, Johor), in interview with author on 17 March 2020.

<sup>23</sup> Mohammad Fadzil Esa (Shariah Judge, Tangkak Shariah Court, Johor), in interview with author on 5 March 2020.

there is an issue of lack of manpower for sulh proceedings in certain Shariah courts.

Through the inquisitorial approach, judges are allowed to encourage parties to settle their disputes at any stage before or after a trial has begun, even at the appeal level. This suggestion is also mentioned under Practice Direction No. 4 Year 2016 of the Civil courts. As stated in the practice direction, there are three ways of mediation that can be executed where one of them is judge-led mediation.<sup>24</sup> Even though this practice direction is not one implemented by JKSM, the approach can be administered or used by Shariah courts as long as it does not go against Islamic law.

### **c) Inquisitorial Approach to assist in the backlog of cases in Shariah courts**

The current Corona Virus 2019 (COVID-19) pandemic has affected all forms of daily business and matters worldwide. For Malaysian Shariah Courts, they have postponed all matters and cases scheduled, particularly during the period of Movement Control Order (MCO) issued by the Malaysian government to control the spread of the virus. The cases postponed include divorce cases, alimony, child's maintenance, as well as sulh proceedings.<sup>25</sup> As a result, not only do Shariah courts continue to suffer from a backlog of cases, cases for sulh proceedings too became piled up. *Mal* cases concern daily family issues, and postponement of cases may significantly affect the welfare of family members.

Through the inquisitorial approach, judges will be able to cut a lot of dead wood away (The Hon I.F. Sheppard AO QC, 1999: 25). This means that a judge may remove or eliminate anyone he believes to be unnecessary or redundant; hence the trial becomes less time-consuming. At the same time, if the judge believes that the person's presence is significant, he may simply call the person forward to testify based on the jurisdiction provided by Practice Direction Number 7 Year 2019. The judge also does not have to rely on written 'explanations' which may lead to the prolonging or postponement of the case,

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<sup>24</sup> Practice Direction No. 4 Year 2016, JKSM, "Practice Direction on Mediation".

<sup>25</sup> Abd Razak Mohd Ali (2020). "COVID-19: Semua Urusan di Mahkamah Syariah seluruh Perak Ditangguhkan", <http://www.astroawani.com/berita-malaysia/covid-19-semua-urusan-di-mahkamah-syariah-seluruh-perak-ditangguhkan-234670>, accessed on 14 June 2020. See also Malik Muhamad (2020). "COVID-19: Manfaat tempoh PKP untuk batalkan Hasrat Bercerai", <https://www.bharian.com.my/berita/nasional/2020/03/669316/covid-19-manfaat-tempoh-pkp-untuk-batalkan-hasrat-bercerai>, accessed on 14 June 2020.



especially when lawyers may require time to prepare proper affidavits for future court sessions.

Another reason why the inquisitorial approach may be ideal for *mal* cases is that it does not necessarily rely on the presence of lawyers. The trial will solely be within the judge's control from beginning to the end as he handles the case brought forward by the disputing parties and consequently helps reduce the financial cost of the parties involved. Lawyer services can be quite costly, and unless the parties pay for the amount required to proceed with the next step, the trial process may end up stagnant or without progress. However, for less-able citizens who face financial difficulties or domestic abuse, and are eligible under the Legal Aid Act 1971, they may seek legal and mediation services provided by the Legal Aid Department. Through this service, these citizens have the opportunity to get legal services at a lower rate than the Government as an alternative to the services offered by private lawyers.<sup>26</sup>

According to Zulzaidi Mahmud and Ahmad Hidayat Buang (2017), studies related to the Syariah judicial system in Shariah courts are indeed active. Unfortunately, there are little studies done towards the methodology of sentencing by Shariah judges, the application of the appropriate judicial principles according to Islamic principles, descriptions, references, trial records, considerations and judgements of the judge (Mahmod, Z. & Buang, A.H., 2017: 208-209). In particular, these authors also highlighted the need to conduct a detailed and thorough study on the methodologies on Malaysian Shariah judges in making decisions involving family cases.

## **CONCLUSION**

In conclusion, the inquisitorial system is not a foreign concept in both Islamic Law and Malaysia's current legal system. With established and supportive laws, the inquisitorial system may just be the right additional tool to ensure that Shariah civil cases are judged justly and fairly with fewer complications to ensure justice is achieved. The inquisitorial approach plays a critical role, particularly when the judge feels like there is information 'hidden' or needs to be explored during a typical adversarial proceeding that may lead injustice towards the litigants. It could also assist in improving the administration and procedural system in Shariah courts.

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<sup>26</sup> Legal Aid Department of Malaysia (2020). "Umum", <http://jbg.gov.my/index.php/ms-my/perkhidmatan/umum>, accessed on 11 November 2020.

Likewise, it is equally important to be wary of the possible drawbacks or disadvantages when using the inquisitorial approach as any change is bound to have legal ramifications. The grass is not always greener on the other side. As judges carry heavy responsibilities, the Shariah legal community particularly the litigants and lawyers need to work together hand in hand to assist the judge even though some legal practitioners might view the inquisitorial system as a process alien to the Shariah proceedings. Justice is a shared responsibility between the judge, lawyers and litigants where all play essential roles to avoid issues and difficulties faced by the court regardless of which legal system is applied during a court trial (Muhammad, F.S. & Ruskam, A., 2015: 64).

This article does not intend to suggest changing the current adversarial legal system in Shariah courts. Instead, it aims to clarify that the Shariah legal systems in Malaysia are also in a period of legal change, as mentioned by Ainsworth (2017). There is a high possibility that these both adversarial and inquisitorial approaches have already informally converged at some areas, if not merge and blend in together as one hybrid system in Malaysian Shariah court trials. The mixing of these two legal systems is known as the adquisitorial system (Quadri, K.M. et al., 2015: 31-36). The nature of the Shariah courts being adquisitorial was confirmed by Dato Hj Na'im who said;

*“Some of the judges do take the initiative to lead or to do mediation between the parties. You see, sister. In our Shariah procedure, I’ve explained during my presentation; it’s basically a mix of adversarial as well as inquisitorial in nature. So it combines both adversarial and inquisitorial. We know, if it is the adversarial system, then the judges do not play an active role. While in the inquisitorial system, the judges do play an active role. So, when I mention that our Shariah civil procedure, is combined, it’s basically a hybrid of adversarial as well as the inquisitorial judicial system. So, some of our judges do play, if not all, because most of them are basically adversarial judges in nature. Probably few of them take the approach of being inquisitive.”*<sup>27</sup>

Given the advantages and success achieved under the adversarial approach, the Shariah jurisdiction authorities, particularly JKSM, made an astute decision by inserting the inquisitorial system as a welcome procedural tactic for the judges instead of changing the current existing framework altogether as it can lead to more chaos than benefits.

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<sup>27</sup> Dato' Dr Haji Mohd Na'im bin Hj Mokhtar, Chief Judge of JKSM in an online conference “Application of Mediation in Shariah Courts of Malaysia” (2020, 1<sup>st</sup> September) during Q&A session.

For added value, further researches are required to explore the hybrid of adversarial and inquisitorial legal systems including researches on appropriate inquisitorial execution, procedures and techniques by Shariah judges, the effectiveness of said system compared to the dominant adversarial system and cost-benefit studies as to which approach is more cost-effective. Researches about the perceptions of the Malaysian Muslim society related to administrative and procedural implementation in Shariah courts would also provide insights to improve the structure and status of Shariah courts. In addition to the suggestion made by Zulzaidi Mahmud and Ahmad Hidayat Buang (2017), these researches may be used as guidance to current and future judges on the procedural execution in family cases.

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Acts under Shariah Courts in Johor  
Practice Direction No. 4 Year 2016 Practice Direction on Mediation

### **List of Interviews**

Mohammad Fadzil Esa (Shariah Judge, Tangkak Shariah Court, Johor), in interview with author on 5 March 2020.  
Siti Fadhilah Ahmad (Sulh Officer, Muar Shariah Court, Johor), in interview with author on 17 March 2020.

