THE ETHICAL STUDIES OF PEGUAM SYARIE IN SELANGOR

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THE ETHICAL STUDIES OF PEGUAM SYARIE IN SELANGOR

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بسم الله الرحمن الرحيم

I hereby declare that this academic project is my own except for quotations and summaries which have been duly acknowledged.

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ABSTRAK

Kajian ini adalah berkenaan dengan adab atau etika seorang Peguam Syarie di Selangor. Kajian ini bertujuan untuk mengetahui perkara-perkara yang berkaitan dengan etika seseorang peguam dalam mengendalikan sesuatu kes di dalam mahkamah serta batas-batas pergaulan yang perlu dipelihara semasa berada di luar mahkamah. Untuk memperolehi maklumat, penulis telah melakukan penyelidikan di beberapa perpustakaan dan melayari internet untuk mengumpul maklumat-maklumat yang berkaitan. Di samping itu, objectif utama kajian ini adalah untuk mengupas persoalan sebenar adab-adab seorang peguam dari kaca mata perundangan Islam. Harapan penulis terhadap kajian ini adalah agar ianya dapat memperlihatkan kepada masyarakat tentang tanggungjawab sebenar seorang peguam yang bukan hanya terikat kepada prosedur mahkamah bahkan meliputi kehidupan seharianya di luar mahkamah.

ABSTRACT

This academic project focuses on the ethics of Peguam Syarie in Selangor. This study seeks to know the matters that are related to the ethics of a lawyer in managing cases in the court, the attitudes and manner that should be preserved outside the court. For information gathering, the writer performs the research in several libraries and internet to collect the related information. Furthermore, the objective of this study is to discover the ethics that a syarie lawyer should uphold according to the Islamic point of view. The writer expects this study could demonstrate to the society about the true obligation of a lawyer, who is not only tied down to the court procedure but also to his daily routine out of the court.

ملخص البحث

يتناول هذا البحث سلوك المحامي في سلنجور. والغرض من البحث هو معرفة الأمور التي تتعلق بأداب المحامى في إدارة قضايا في المحكمة وحدود تصرفاته داخلها وخارجها. يحصل الكاتب على المعلومات البحث بالرجوع إلى المكتبات واستخدام الإنترنت. وبجانب ذلك، أن هذا البحث أيضا هو معرفة آداب المحامي في نظر القضاء الإسلامي. والرجاء الكاتب من هذا البحث هو بيان المجتمع عامة عن مسؤولية المحامي الحقيقية التي لا ترتبط بالمحكمة وإجراءاتها وحدها، بل تشتمل أيضا على حياته اليومية خارج المحكمة.

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GLOSSARY

adil	Virtuous.
ayah	Verses of the Quran.
amir	One who commands, leader, commander, head of community, source of authority in any given situation.
amil	Delegation.
a.s.	Abbreviation of " 'Alaihi Al- Salam" meaning "Upon him the Peace". Only reserved for prophets other than Muhammad s.a.w.
baitulmal	Islamic state treasury.
baligh	Of the age of majority.
caliph	(Khalifah) a successor to the Prophet. Someone who rules, or bears responsibility, on behalf of Allah.
dirham	Money value during Rasulullah S.A.W. period.
fasid	Irregular.
fasiq	A person who habitually breaks religious prohibitions.
fiqh	Jurisprudence.
fuqaha	Islamic jurists.
hadith	Sayings of the Prophet Muhammad s.a.w.
hukm	Legal rule.
hudud	Several specific crimes and punishments laid down in the Qur'an.
ijma'	Consensus of opinion of the 'ulama.
ila'	Oath of a husband not to have sex with his wife for four months or more, or within an unspecified period of time.
imam	Leader.
khulu'	Separation upon a request by the wife.

kufr	An unbeliever, a person who does not believe in the One True God, and feels no sense of gratitude or trust in a Divine Creator. A person who commits Kufr.
li'an	Accusing one's wife of committing adultery or fornication by way of imprecation.
mahjur 'alaihi	A person under interdiction, e.g. a bankrupt is prohibited by law to manage his property.
mandub	Commendable.
mubah	Permissible.
messenger	Arabic "*Al- Rasul*", the prophet.
mu'amalah	Transactions.
mukallaf	Persons with full legal compentence.
mumayyiz	A child who have attained the age of discernment.
nikah	Marriage contract.
qadi	Judge.
r.a.	Abbreviation of "*Radhi Allahu 'An Hu*" meaning "Upon him the Blessings of Allah".
rights of Allah	*Hudud*, matters of Allah.
rights of Man	Property, debts, qisas etc.
ruju'	Reconciliation after a revocable divorce.
s.a.w.	Abbreviation of "*Sallallahu 'Alaihi Wa Sallam*" meaning "Peace be upon him". It is compulsory for a Muslim to utter this blessing whenever he hears the Prophet Muhammad's name being mentioned.
s.w.t.	Abbreviation of "*Subhanahu Wa Ta 'ala*" meaning "The Almighty God".
sahabah	Companions of the Prophet s.a.w.
sahih	Valid.
shar'ie	Legally recognized by the shari'ah.
sulh	Compromise.

sunnah	Sayings, deeds and approvals of the Prophet s.a.w.
talaq	Divorce.
ta'zir	Discretionary punishment for offences not amounting to hudud.
'ulama	Plural of '*alim*, Islamic jurists.
wajib	Mandatory or obligatory.
wakalah	Agency.
wakil	Agent, representative.
wali	Legal guardian.
zakah	A tax levied on every competent Muslim.
zihar	Drawing comparison between one's wife with another woman from the prohibited degrees of marriage.
zina	Adultery or fornication.
zimmi	Non Muslim living under Islamic government.

TRANSLITERATION

ARABIC WORDS TRANSLITERATION SYSYEM

1) ALPHABET

Arabic	Latin	Example	Transliteration
ء	,	فأر	fa'r
ب	b	برد	burd
ت	t	تل	tall
ث	th	ثوب	thawb
ج	j	جدار	jidar
ح	h	حليب	halib
خ	kh	خادم	khadim
د	d	ديك	dik
ذ	dh	ذهب	dhahab
ر	r	رفيق	rafiq
ز	z	زميل	zamil
س	s	سلام	salam
ش	sh	شعب	sha'b
ص	s	صخر	sakhr
ض	d	ضيق	dayq
ط	t	طازخ	tazij
ظ	z	ظالم	zalim
ع	~	عقل	'aql
غ	gh	غلام	ghulam

ف	f	فيل	fil
ق	q	قلب	qalb
ك	k	كلام	kalam
ل	l	لب	lubb
م	m	مال	mal
ن	n	نجم	najm
ه	h	هول	hawl
و	w	ورق	waraq
ي	y	يم	yamm

2) Short Vowel

Arabic	Latin	Example	Transliteration
_____	a	كتب	kataba
_____	i	علم	‘alima
_____	u	غلب	ghuliba

3) Long Vowel

Arabic	Latin	Example	Transliteration
ى،ا	a	عالم، فتى	‘alim, fata
ي	i	عليم، داعي	‘alim, da’I
و	u	علوم، أدعو	‘ulum,Ad’u

4) Diphthong

Arabic	Latin	Example	Transliteration
و	aw	نوم	nawn
ي	ay	ليل	layl
ي	iyy	شافعي	shafi'yy (ending)
و	uww	علو	'uluww (ending)

5) Exemptions

5.1 Arabic letter ء (hamzah) found at the beginning of a word is transliterated to the letter "a" and not to'.

Example: أكبر transliterated to: akbar (not 'akbar).

5.2 Arabic letter ة (ta' marbutah) found in a word without ال (al), which is coupled with another word that contains ال (al) at the beginning of it is transliterated to the letter "t".

Example: مكتبة الإمام transliterated to: maktabat al-imam

However if the Arabic letter ة (a' marbutah) found in a word with ال (al), in a single word or in the last word in a sentence, it is transliterated to the letter "h".

Example: المكتبة الأهلية transliterated to: al-maktabah al-ahliyyah

قلعة qal'ah

دار وهبة dar wahbah

ABBREVIATIONS

A.S.	'Alayh al-salam
Abd.	Abdul
B	Bin
Dr.	Doctor
H	Hijriyyah
Hj.	Haji
Hlm	Halaman
Ibid	Ibidiem
I.K.I.M	Institut Kefahaman Islam Malaysia
No.	Number
n.a.	no author/ no artist
n.d.	no date/ no year
n.pb.	no publisher
p.	page
pp.	pages
Prof.	Professor
R.A.	Radhiyallahu 'Anhu
S.A.W.	Sallallahu 'Alaihi Wasallam
S.W.T.	Subhanahu Wa Ta'ala
Vol.	Volume
&	And

CHAPTER 1

CHAPTER 1

CHAPTER 1

INTRODUCTION

The duty of court is to uphold justice. This justice will only be upheld with permission of clarification that is introduced through the administration of law that is just and fair. There are many verses of Al-Quran and al-Sunnah that are ordered onto a person, especially those who are the most involved directly in justice administration in deciding on one matter. As Allah says:

ان الله يأمركم ان تؤدوا الأمانات الى اهلها واذا حكمتم بين الناس ان تحكموا بالعدل

"Allah commands you to fulfill your trusts to those to whom they (your trusts) are due; and when you judge between man and man, that you judge with justice".[1]

In another verse Allah says:

يا ايها الذين امنوا كونوا قوامين لله شهداء بالقسط ولا يجرمنكم شنان قوم على الا تعدلوا

" O you who believe! Stand out firmly for Allah, as witness for just (and fair) dealing, and do not let the hatred of others to make you lean towards wrong, and go away from Justice".[2]

Both verses emphasize and order a person to be just to another when making a decision and also they ask for unbiasness because this will bring injustice.

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[1] Al-Quran. Al-Nisa' 4:58 (All Quranic translations in this writing are based on Professor (Dr.) Syed Vickar Ahamed. 1999. *The Glorious Qur'an.* Holmdel: New Jersey. Translations from other sources will be cited accordingly).

[2] Al-Quran. Al-Maidah 5:8.

In one hearing, the most involved parties will introduce clarifications. Clarifications that are introduced will assist the judge in giving a decision and uphold justice. This relation is what Rasulullah s.a.w. said in al-Sunnah while he was sending Ali bin Abu Talib to Yemen as a Kadi. He reminded Ali as follows:

" If you judge an argument between two persons, do not give the punishment until you have heard both sides fairly and equally. Then it will be clearer and just for you to befall the punishment".

(Hadith narrated by Abu Daud)

Hence in building groups' justice is involved when conducting the duty accordingly to what is true and not, only for specific purposes according to passion.

1.1 The meaning of Peguam Syarie

In Islamic Law, the concept of Peguam Syarie is known as al-Wakalah bi al-Khusumah.[3]The word of Wakalah is from the Arabic word which means to take care of, to guarantee, to complete and to surrender.[4]The Dictionary of Mu'jam Lughat al-Fuqaha' defines the wakalah as to substitute someone to serve the task for someone else.[5]

In the Kamus Dewan, the lawyer is referred to people who defend someone in proceeding.[6]

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[3] Abdul Rahman al-Jaziri. 1392. *Kitab al- Fiqh 'ala al-Madhahib al-Arba''ah*. Beirut: Dar al-Fikr. Jilid 3. p.168.

[4] Mahmud Saedon Awang Othman.1996. *Institusi Pentadbiran Undang-undang Kehakiman Islam*. Kuala Lumpur: Dewan Bahasa dan Pustaka. p.118.

[5] M. Rauwwas Qal'ah Ji. 1985. *Mu'jam Lughat al-Fuqaha'*.Damsyik: Dar al- Nafais. p.509.

[6] *Kamus Dewan Bahasa Edisi Baru*.1989. Kuala Lumpur: Dewan Bahasa dan Pustaka. p.925.

Farid Sufian Shuaib (2001) explains that Peguam Syarie refers to those who practise in Syariah courts in Malaysia and is governed by the respective States' Peguam Syarie Rules.[7]

According to Mohamed Azam Mohamed Adil (1997) a conceptual lawyer is a pious person that concerns law, can seek permission to take sides and push group's guilty falseness according to law knowledge by true who for building the right[8]. Then a lawyer must believe with renewed confidence that he is sided by one who is true. He is forbidden to defend a person if he knows that the person is guilty. A lawyer must behave with honesty, fairness, and just when introducing one case that is managed by him to the court.

According to Mahmood Zuhdi Abd. Majid, a Peguam Syarie is a competent person in syarak's law, registered and has a license from the Islamic department as Peguam Syarie under Majlis Agama Islam[9]. However, the rule to determine the position of a Peguam Syarie is not the same between one state to another. Only their principle is one must be qualified and competent in Islamic.

The definition of Peguam Syarie according to Sharifah Zubaidah Syed Abdul Kader (1995) in her article, a Peguam Syarie (Syarie Lawyer) is a person who is given the right by rules enacted by any state (or the Federal Government in respect of the Federal Territories) to appear and represent his client in every Syariah court case within the confines of such state or Federal Territories, respectively[10].

According to al-Marhum Syaikh Mohd Abu Zuhrah, lawyer is a pious person about laws that can seek to defend the truthfulness of the true group and push the

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[7] Farid Sufian Shuaib et al. 2001.*Administration of Islamic Law in Malaysia*. Kuala Lumpur: Malayan Law Journal. p.283.

[8] Mohamed Azam Mohamed Adil.1997. " Peguam Syar'I: Amalan dan Kedudukannya di Malaysia". *Jurnal Syariah*. Kuala Lumpur: Bahagian Pengajian Syariah Akademi Pengajian Islam Universiti Malaya. Vol.V.No.2. July. p.240.

[9] Mahmood Zuhdi Abd. Majid. *Pengantar Undang-undang Islam di Malaysia*. Kuala Lumpur: Penerbit Universiti Malaya. p.195.

[10] Sharifah Zubaidah Syed Abdul Kader. 1995. *How to Become a Syarie Lawyer*. 1 CLJ exlix.

falseness of the guilty group according to law wishing to its knowledge in upholding the right, obligation, permanence and reinforcement to public freedom.[11]

1.2 The sources of Peguam Syarie

The sources of Islamic Legislation or legal's syarie can be divided to two divisions, based from the Al-Quran and the al-Sunnah.

1) Al-Quran

Allah S.W.T. sent the Prophet Muhammad s.a.w. as a caliph to administer the world by bringing the religion of Islam which consists of belief, Islamic Law and moral. Islamic Law or law of Islam that is brought by him is aimed to uphold justice regardless of race, religion and colour of skin. As Allah says:

لقد ارسلنا رسلنا بالبينات وانزلنا معهم الكتاب والميزان ليقوم الناس بالقسط

" We have sent our messengers before with clear Signs and sent down with them the Book and the balance (between right and wrong), that men may stand together in justice "[12].

This verse explains that Allah had sent the Messengers with holy books of teaching and clarification from Allah to build justice as demanded by Allah. Rasulullah s.a.w. was ordered to always be just and there is no compromising in upholding justice.

In another verse Allah says:

ان الله يأمركم ان تؤدوا الامانات الى اهلها واذا حكمتم بين الناس ان تحكموا بالعدل

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[11] *Al- Khitabah.* Edisi 1.Dar al-Fikr al- Arabi. p.175.

[12] Al-Quran. Al-Hadid 57:25.

" Allah commands you to fulfill your trusts to those to whom they (your trusts) are due; and when you judge between man and man, that you judge with justice ".[13]

This verse clearly orders in just administration to those who are the most involved directly to be just in implementing any trust that is given. Allah also orders the person to punish fairly, regardless of religion, culture, race or colour of skin.

Another verse that explains to be just when dealing with justice, where Allah strictly forbids a person to a case he is assigned to be biased. As Allah says:

يا ايها الذين امنوا كونوا قوامين لله شهداء بالقسط ولا يجرمنكم شنان قوم على الا تعدلوا

" O you who believe! stand out firmly for Allah, as witness for just (and fair) dealing, and do not let the hatred of others to make you lean towards wrong, and go away from Justice ".[14]

Islam obliges that justice is built including all aspects, not to consider only the law, division of wealth, deciding any case and exposition of cases during the hearing. Islam demands all of his followers to always be just in all actions that are carried out.

Allah says:

واوفوا الكيل والميزان بالقسط لا نكلف نفسا الا وسعها واذا قلتم فاعدلوا

" Give measure and weight with (full) justice; no burden do We place on any soul, except that what it can bear; whenever you speak, speak justly ".[15]

The verse clearly orders the person to be just in weight matters and give to the one who receives the right fairly according to law.

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[13] Al-Quran. Al-Nisa' 4:58.

[14] Al-Quran. Al-Maidah 5:8.

[15] Al-Quran. Al-An'am 6:152.

Justice must be built in Islam without being influenced by feelings of love or hate, near or far relation[16] and among groups who are assigned to build justice with the group who is involved in any case. This is one of the claims of Allah.[17]

Allah says in Al-Quran:

ان الله يأمركم بالعدل والاحسان

" Allah commands Justice, the acts of Good".[18]

In another verse, Allah says:

وامرت لاعدل بينكم

" And I am commanded to judge justly between you".[19]

Hence, clearly that all verses above explain to us to be just in making any decision regardless of the status a person whether he is rich, poor, holds a high-ranking position and others as all are regarded the same by Allah.

2) Al-Sunnah

There are hadiths related with building justice, where Rasulullah s.a.w. said in one hadith while he was sending Ali bin Abu Talib in Yemen as a Kadi. He reminded Ali who wished:

" If you judge an argument between two persons, do not give the punishment until you heard both sides fairly and equally. Then it will be clearer and just for you to befall the punishment".

(Hadith narrated by Abu Daud)

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[16] Mashhur Hassan Mahmud, 1407H. (1987M). *Al-Muhamat.* Edisi 1. Aman, Jordan: Dar al-Farha'. p.23.

[17] Ahmad Ibrahim et.al. 1997. *Al-Ahkam, Penghakiman dan Kepeguaman.* Kuala Lumpur: Dewan Bahasa dan Pustaka. p.65.

[18] Al-Quran. Al-Nahl 16:90.

[19] Al-Quran. Al-Syura 25:15.

In another hadith narrated by Umm Salamah, Rasulallah s.a.w. gave the reminder to parties in hearing, Rasulullah s.a.w. said:

" I am only a human being, and you bring your disputes to me, some perhaps being more eloquent in their plea then others, so that I give judgment on their behalf according to what I hear from them. Therefore, whatever I decide for anyone which by right belongs to his brother, he must not take anything, for I am granting him only a portion of Hell".

(Hadith narrated by Bukhari)

Both hadiths above explain to a person who is assigned to decide the decision to be just in punishment.

There is an other hadith that touches about the same matter among other things which means:

" Do not be cruel to others, as it is cruelty that becomes the darkness on doomsday and do not be miserly as it has already devastated Muslims before you. It has caused bloodshed and loss of honour among them".

(Hadith narrated by Muslim)

From Abu Hurairah r.a., the Prophet Muhammad s.a.w. said the one who wishes: " Whoever is cruel to his fellow human from any aspect, may it be of honour or others, he should liberate himself from it before he losses all that he has. The cruelty shall be taken in account first even if he has any good deeds. If he is without any good deeds, thus the sin of the fellow humans shall be added to his".

(Al-Bukhari)

The sources determine the meaning of justice in Islam comprises of reality and practicality that ties the life of the world with Islam regulations. From the spiritual aspect, the person is supplied with the feeling of love for justice clearly while hating