

Rights To Access Justice for Persons with Disabilities in Malaysian Shariah Courts: A Case Study in The Shariah Courts of Malacca

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Abstract

People with disabilities (PWD) are entitled to the same rights as others as they have equal potential to live a fulfilling life. The Malaysian government has taken extra measures through its laws and policies to protect the rights of PWD. However, challenges persist in implementing legal protection where cases involving PWD are often underserved. This study explores the current practices and challenges faced by the Malaysian Shariah Courts in Malacca in addressing legal proceedings involving PWD litigants. This research adopts a qualitative study through semi-structured interviews with five (5) Shariah Court Officers from three (3) districts in Malacca and examines the court files. The data gathered were analyzed using thematic analysis to identify practices and challenges of the Shariah Courts of Malacca in dealings with legal proceedings involving PWD as litigants. The study reveals the flexibility of the Shariah Courts within the court procedure, providing a support system and prioritising the welfare of the PWD. It also found significant challenges including communication barriers, expensive interpreter fees, uninformed of PWD's disabilities, inadequate facilities and the absence of guidelines. This study highlights the need for improvements including the establishment of proper guidelines to assist Shariah Courts in assessing the applications and equipping the Shariah Officers with adequate training to ensure the effective realization of PWD's rights to access justice in Malaysia.

Keywords: Access To Justice, Persons with Disability, Islamic Family Law, Malaysia Shariah Courts

INTRODUCTION

Persons with disabilities (PWD) are specifically mentioned in the 2030 Agenda for Sustainable Development Goals (SDG). Under the Disability Inclusive SDGs: Strategies to leave no one behind, reducing inequalities were among the five goals highlighted (Krishnan, 2020). This goal emphasizes the inclusion of PWD in every aspect of human life.

The right to access justice for persons with disabilities (PWD) in Malaysia represents a crucial aspect of the nation's commitment to inclusivity and equitable legal representation. As a signatory party to the United Nations Convention on the Rights of Persons with Disabilities (CRPD), Malaysia is obligated to realize through its legislation, administration, policies and programs (Article 4) that PWDs have equal access to justice and are afforded the necessary support to participate fully in legal proceedings (Article 13).

The Malaysian government has shown a positive effort in empowering PWD in Malaysia. This is evident through the enactment of the Persons with Disabilities Act 2007, the formulation of the National Policy for Persons with Disabilities 2007 and the National Plan of Action for Persons with Disabilities 2016-2022 and the establishment of the National Council for PWD (Tahir et al., 2020). Specific strategies targeting PWD include advocacy, accessibility, social protection and support services aiming to ensure equal opportunity and access for PWD as stipulated by the law (Tah & Mokhtar, 2018). Additionally, there are provisions under the Public

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Authorities Protection Act 1948 that protect PWD in any form of legal action, prosecution, and proceedings in court (Tahir et al., 2020).

The Malaysian Ministry of Women, Family and Community Development through the Department of Social Welfare has classified the disabled into seven (7) main categories which are hearing disability, visual disability, physical disability, learning disability, speech disability, mental disability, and various disabilities and speech disabilities (Jabatan Kebajikan Masyarakat, 2021).

However, the existing legal provisions are considered weak in their implementation (Astro Awani, 14 July 2018). This is supported by the Malaysian Bar Council, which has criticized the Persons with Disabilities Act 2008 for its shortcomings in implementation and enforcement, urging authorities to review the Act to ensure its effectiveness in preserving the welfare of PWD (The Star, 20 September 2019).

According to the World Health Organization on Disability, in 2023, approximately 1.3 million people experience significant disability. This represents 16% of the world's population or 1 in 6 of the global population (World Health Organization, 2023). In Malaysia, it is estimated that out of a total population of 32 million, approximately 4.5 million individuals are affected by some form of disability (Krishnan, 2020). However, the registered number of PWD is 637,537 as of 31 January 2023, which accounted for 1.9% of the country's population (Jabatan Kebajikan Masyarakat, 2023). This indicates a significant discrepancy between estimated and officially registered cases.

According to Roslan et al. (2021), statistics showed an increase in registered PWD with the Malaysian Department of Social Welfare with 60.6% of them being Muslims. This automatically places them under the jurisdiction of the Shariah Courts based on the State List, Ninth Schedule of the Federal Constitution without exception. Therefore, the Shariah Courts should have the capacity to manage cases involving PWD to ensure that justice can be felt. However, the lack of suitable services for PWD in the Shariah Courts hinders the efforts of this vulnerable group to obtain justice.

Yaziz and Ali (23 August 2021) mentioned that ineffective communication makes it difficult for parties attending the Shariah Courts to obtain accurate information to resolve conflicts. Furthermore, the unavailability of court officers to assist this group complicates the justice process because each party fails to understand the emotions and intentions of the parties, consequently deterring them from attending court if conflicts arise in life.

This study aims to explore the current practices and challenges of the Shariah Courts of Malacca in addressing legal proceedings involving PWD litigants.

METHODOLOGY

This research employs a qualitative study through in-depth semi-structured interviews with five (5) Shariah Court Officers including the Chief Shariah Judge, Shariah Judges and Court Registrar. These officers represent three (3) distinct districts of the Shariah Courts in Malacca namely Melaka Tengah, Jasin and Sungai Rambai. The informants selected have more than 15 years of experience in court proceedings including those involving PWD. The data gathered from the interviews were analyzed using thematic analysis aiming to extract information regarding practices and challenges faced by PWD in legal proceedings in the Shariah Courts of Malacca. The judge's experiences and perspectives hold particular significance in providing a nuanced understanding of their behaviours, actions and thoughts, aligning well with the thematic analysis process (Hatch 2002; Creswell 2003). Additionally, the study also analyses court files and documents to comprehensively comprehend and compare various sets of evidence across diverse situations within the same research. Therefore, the data collected are sufficient and constitute a valid representation of the general views of the Shariah Courts of Malacca.

RESULTS

DEFINITION AND CONCEPT

The United Nations Convention on the Rights of Persons with Disabilities defines disability as:

“Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.” (Article 1)

Malaysia on the other hand, adopted the above definition whilst omitting the phrase ‘on an equal basis with others’. The Persons with Disabilities Act 2008 stated:

“Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers may hinder their full and effective participation in society.” (Section 2)

The same Act further mentions that a person with severe disabilities is:-

“...[a] person suffering from one or more disabilities who is dependent on others for basic daily living activities.” (Section 39)

The definition of disability is not conclusive and rather vague. Hence, the ambiguity opens doors to broader interpretation by relevant experts in this area (Abdullah et al., 2010; UNICEF Malaysia, 2014). The ambiguity extends to the interpretation of various types of disabilities, whether physical, mental, intellectual, or sensory.

The term disability was challenged in the case of *Karunairajah a/l Rasiah v Punithambigai a/p Poniah* [2004]2 MLJ 401, Abdul Hamid Mohamad FCJ decided that:

“Even without looking at a dictionary the word 'disability' is always used in relation to 'physical' or 'mental.’”

His Lordship quoted the definition of disability from the Concise Oxford Dictionary as referring to a physical or mental condition that limits a person's movements, senses, or activities, disadvantage or handicap especially one imposed or recognized by the law. He then defines the terms physical and mental and comes to the conclusion that these two words are used to describe the two opposing or complementary elements of a human being; the physical and the mental elements. Physical is defined as relating to the body as opposed to the mind, and mental is a disorder or illness of the mind.

CURRENT PRACTICE OF THE SHARIAH COURTS OF MALACCA

In examining the current practices concerning cases involving PWD in the Shariah Courts of Malacca, three (3) distinct themes have been identified. These themes shed light on the approaches taken by the court in navigating the complexities of PWD cases, with the anticipation of contributing to the pursuit of justice and inclusivity within the legal domain.

FLEXIBILITY OF THE COURT

In cases involving PWD litigants, many are hesitant to disclose their disabilities during the initial stages of court proceedings. This is due to fear of stigma or discrimination, lack of awareness of their rights or concerns about the effectiveness of accommodations.

“Most PWD litigants appear to be physically normal and do not like to associate themselves with any disabilities.” (Informant 1)

Consequently, the court may inadvertently overlook their specific needs and treat them under standard protocols without special accommodations. However, upon becoming aware of the disability, the court will be more flexible and responsive adapting its procedures to cater to the unique requirements of the disabled person.

“Upon identifying a PWD during ongoing hearings in open court, immediate measures are taken to stand down proceedings and transition them to a more conducive and accommodating environment within the private chamber. This facilitates the participation of PWD and ensuring their rights to be heard.” (Informant 4)

“An example of such flexibility is the relocation of courtrooms from their original courtroom on the first floor to more accessible ground floor locations after identifying the presence of PWD in legal proceedings.” (Informant 5)

The practical steps taken by the court to transition proceedings to a more accommodating environment demonstrate a responsive commitment to ensuring equal access to justice for PWD. These immediate measures facilitate active participation of PWD and upholding their rights to be heard. The court's flexibility in adapting to the needs of PWD promotes inclusivity within the legal system and upholds the principles of equality for all individuals, regardless of their disabilities.

PROVIDING A SUPPORT SYSTEM

The provision of a support system for PWD in court is crucial for ensuring their effective participation and access to justice. The court has made a significant effort to engage with professional interpreters affiliated with organizations such as Persatuan Melaka Orang Kurang Upaya (OKU). These interpreters, considered 'friends of the court' (Sahabat Mahkamah), play a pivotal role in facilitating communication between PWD and court officials. Their specialized training and expertise enable them to accurately convey information and directives, thus, enhancing comprehension within the legal context. By serving as intermediaries, these interpreters contribute to mitigating communication barriers and ensuring that PWD can fully engage in legal proceedings.

"We work closely with Persatuan Melaka OKU in supporting PWD. This collaboration helps the court leverage the expertise of the organization to enhance the overall experience for PWD." (Informant 3)

The establishment of a strategic partnership between the court and Persatuan Melaka OKU is essential in strengthening support for PWD. By working hand-in-hand, stakeholders can develop tailored solutions to address the diverse needs of PWD and promote equal access to justice for all individuals.

Alternatively, the participation of family members is also important in providing emotional support and assisting in communication with court officials.

"The meticulous registration of cases requires the assistance of family members or a diligent interpreter to ensure effective communication and comprehension within the legal context". (Informant 5)

"In the context of faraid proceedings, assistance from external parties, not necessarily those directly involved in the litigation, facilitates in acquiring pertinent documents to be presented in court and consequently expedites the case." (Informant 1)

"In instances involving PWD with hearing and speech impairments, trained interpreters facilitate communication with the parties through writing and sign language. The husband eventually nodded and gave manual cues as nuanced gestures in pronouncing talaq in the case of divorce proceedings." (Informant 3)

The involvement of family members is essential in creating a supportive environment for PWD in legal settings. Their multifaceted roles contribute to enhancing accessibility, understanding and the overall experience of PWD within the legal system. Family support encompasses communication facilitation, emotional support, and logistical assistance, all of which contribute to ensuring the effective participation of PWD in the legal process. Their presence offers reassurance, comfort and encouragement, ensuring the confidence and morale of PWD during challenging times. Their assistance alleviates the burden on PWD, enabling them to focus on participating effectively in court proceedings.

PRIORITIZING THE WELFARE OF THE PWD

The Shariah Courts of Malacca demonstrate the commitment to prioritize the welfare of the PWD above procedural formalities. This approach encompasses the allocation of appropriate time frames for legal proceedings allowing PWD sufficient opportunity to participate fully and meaningfully. Additionally, the court provides supportive facilities tailored to the specific requirements of PWD, further enhancing their accessibility and comfort within the legal environment.

"Some cases take longer than usual upon request of the PWD. In one case, the PWD requested to consult certain authorities outside the court like the Department of Social Welfare (JKM) for advice. So we had to defer the date to a later date to give him the chance for such consultation." (Informant 4)

“The case of divorce without permission of the court required further investigation to know the intention of the husband when pronouncing talaq outside court. The case postponement aims to ensure the parties understand and receive adequate information and advice after consulting various parties.” (Informant 5)

This is evident through the successful resolution of many legal disputes involving PWD. These cases are often resolved through reconciliation, resulting in mutual decisions for all parties involved. Importantly, the resolution process reveals no subsequent complaints from PWD indicating their satisfaction with the proceedings and outcomes.

“This engagement can be seen in the successful reconciliation of legal disputes and the absence of complaints from the PWD involved in any litigation in court proceedings.” (Informant 3)

The commitment to prioritizing the welfare of PWD reflects a broader principle of inclusivity and equity within the court. By placing the needs of PWD at the forefront of its operations, the court ensures that they are afforded equal opportunities to access justice and participate in legal proceedings. This proactive approach not only upholds the rights and dignity of PWD but also fosters a more inclusive and equitable legal system for all individuals, regardless of their abilities or circumstances.

CHALLENGES FACED BY THE SHARIAH COURTS OF MALACCA

Amidst the pursuit of justice and inclusivity, the Shariah courts encounter challenges arising from the diverse needs and circumstances of PWD litigants. These challenges highlight the complexity of ensuring equitable legal proceedings for all individuals, regardless of their physical or cognitive disabilities.

COMMUNICATION BARRIER

Despite the support provided by a professional interpreter from Persatuan Melaka OKU, the educational limitations among PWD contribute to communication breakdowns and misunderstandings, particularly due to variations in sign languages. The formal sign language used may not be comprehensible to some disabled individuals, as it differs from informal sign language.

“Most PWD uses informal sign language when communicating. Whereas the interpreters use formal sign language. This can lead to miscommunication and misunderstanding from both sides. This is very concerning as it can potentially result in unjust outcomes for the individuals involved.” (Informant 5)

PWD come from diverse backgrounds, with some relying heavily on family support due to their lower level of independence. Conversely, those affiliated with organizations receive strong support and tend to be more self-sufficient. Additionally, some prefer court-appointed interpreters over those from associations.

“PWD with cognitive impairments (lembam) face greater challenges compared to those with physical disabilities, as they struggle to comprehend the requirements of attending court. Cases involving them are often prolonged due to the need for external assistance, such as from the Department of Social Welfare (JKM). Trials sometimes occur in chambers instead of open courts to facilitate communication, comfort, and suitability.” (Informant 4)

The communication barrier between PWD and court officials presents a significant challenge in ensuring fair and just legal proceedings. The disparity between the informal sign language commonly used by PWD and the formal sign language employed by interpreters can lead to misunderstandings and misinterpretations, jeopardizing the integrity of the legal process. Moreover, the interpreters may struggle to accurately convey legal information using unfamiliar language to the PWD.

EXPENSIVE INTERPRETER FEE

While the presence of interpreters undoubtedly facilitates communication between PWD litigants and the court, the very expensive fees associated with their services pose a significant barrier for many individuals involved in legal proceedings. The exorbitant cost per session renders interpreter services financially unaffordable for a substantial portion of the population, particularly those from marginalized or low-income backgrounds. As a

result, individuals with disabilities may be effectively excluded from accessing justice due to their inability to bear the expense of interpreter fees.

“The cost for engaging an interpreter is RM300 per session. Not many can afford the service as most PWD comes from low-income backgrounds.” (Informant 2)

This financial constraint aggravates existing inequalities within the legal system, disproportionately affecting PWD who may already face economic hardship or financial insecurity. Without access to interpretation services, PWDs are unable to fully comprehend legal proceedings or effectively communicate their needs and concerns, thereby compromising their ability to participate meaningfully in the judicial process. Furthermore, the unaffordability of interpreter fees perpetuates systemic discrimination against PWD, reinforcing societal barriers that prevent them from exercising their rights and accessing essential services.

UNINFORMED OF DISABILITY

The reluctance of many PWD litigants to disclose their disabilities poses a multifaceted challenge within the legal system. This lack of disclosure not only impedes the court's ability to address their needs promptly but also exacerbates broader issues related to data collection and government attention.

“It is difficult to identify the PWD. Often, judges, through his initiative, managed to identify the inability during court hearings. Non-disclosure leads to difficulty in obtaining statistics, consequently, leading to the lack of attention from the government, as it is deemed less important. Also, it will be difficult to provide appropriate space and assistance without disclosure. Early identification could address the issues sooner.” (Informant 1)

By withholding information about their disabilities, PWDs inadvertently hinder the court's capacity to identify and accommodate their specific requirements effectively. Without a clear understanding of the challenges faced by PWD litigants, courts may struggle to provide appropriate accommodations and support services, thereby compromising the fairness and inclusivity of legal proceedings.

Moreover, the underreporting of disabilities among litigants contributes to a lack of comprehensive data on the prevalence and nature of disability-related issues within the justice system. This lack of statistical information diminishes the visibility of PWD within government policies and initiatives, resulting in a corresponding lack of attention and resources directed towards addressing their needs.

On the other hand, early identification of disabilities is essential for prioritizing the special requirements of PWD within the legal system. By proactively detecting disabilities during the case registration process, courts can streamline access to support services and tailor their procedures to accommodate the unique needs of individuals with visual, auditory, or speech impairments.

“Case registration with early detection could prioritise special needs. Especially if blind, mute or deaf individuals are detected, access to support services can be arranged.” (Informant 2)

This proactive approach not only enhances the accessibility and effectiveness of legal proceedings but also fosters a more inclusive and equitable justice system for all individuals, regardless of their disabilities.

INADEQUATE FACILITIES

The insufficiency of statistical data contributes to the perception that addressing the needs of PWD within the legal system is of lower priority, consequently impeding efforts to secure government funding for essential facilities. This financial constraint persists despite the evident and substantial requirements of PWD.

In light of this funding shortage, courts often turn to external sources such as NGOs and other agencies to fill the gap and provide necessary facilities for PWD. However, even with this supplementary assistance, the available resources often fall short of meeting the diverse and intricate needs of PWD litigants. Consequently, the accessibility and inclusivity of legal proceedings are compromised.

“The court would normally rely on external aid such as NGOs and other agencies to provide the proper facilities. This includes wheelchairs for the disabled. Yet, it is still not enough.” (Informant 1)

“Braille language would be very useful for individuals who are blind, particularly in areas like escalators or signboards for instructions. However, its implementation is costly, making it unattainable without sufficient funding. Likewise, the court could not provide pathways for blind individuals to ensure accessibility for them.” (Informant 2)

The reliance on external aid introduces additional challenges, including inconsistencies in the availability and quality of facilities, as well as potential delays in accessing essential services. Without robust government funding and dedicated infrastructure to support PWD within the legal system, courts may struggle to provide the requisite level of accommodation and assistance needed to ensure fair and effective participation in legal proceedings.

ABSENCE OF GUIDELINES

One of the pressing challenges faced by Shariah courts involves the absence of comprehensive guidelines tailored to the diverse needs of PWD. To address this, it is crucial to recognize the unique requirements of different disability categories, emphasizing the necessity for in-depth examinations.

Developing effective guidelines demands a thorough understanding of the nuanced needs of various PWD groups. This underscores the importance of conducting exhaustive assessments for each disability category to formulate targeted and inclusive guidelines. Without such guidelines, there's a risk of overlooking critical accommodations and support mechanisms essential for ensuring equitable legal proceedings.

“An in-depth study is necessary to develop an effective guideline. The responsibility ideally falls on policymakers working together with academicians, given our constrained time and scope of work.” (Informant 1).

Effective collaboration between policymakers and academicians is essential in formulating these guidelines, as it ensures a comprehensive and well-informed approach. Policymakers bring practical insights into the legal and regulatory aspects, while academicians offer valuable expertise in disability studies and best practices. This collaborative effort enables the development of guidelines that are not only legally sound but also sensitive to the diverse needs of PWD.

Addressing the challenges associated with the absence of guidelines demands a concerted and sustained effort from all stakeholders involved. It requires meticulous attention to detail and a commitment to inclusivity and accessibility in every aspect of legal proceedings. By prioritizing these principles, the legal system can better serve the needs of all individuals, fostering a more equitable and just society. Through ongoing collaboration and dialogue, policymakers and academicians can work together to bridge existing gaps and ensure that PWD have equal access to justice and participation in the legal process.

CONCLUSION

This study highlights the significant efforts undertaken by the Shariah Courts of Malacca in accommodating PWD within the purview of Islamic family law proceedings, pioneering other Shariah Courts in Malaysia. Through qualitative analysis, it has been elucidated how the court has adapted its procedures and facilities to serve the needs of PWD, ensuring equitable justice. The findings underscore the importance of proactive measures such as early identification of PWD, a strong support system and flexible communication channels in fostering an inclusive legal environment. The Shariah Courts of Malacca serve as a commendable exemplar for other judicial authorities, highlighting the potential for positive change and greater inclusivity within the legal framework. However, the absence of a guideline for PWD in courts may hinder the right to access justice. Moving forward, it is imperative for policymakers to develop suitable guidelines for each PWD, necessitating comprehensive research on the needs of each group. This facilitates early identification and preparation of essential services. Furthermore, ensuring appropriate training for court officers is vital to enable effective communication without relying on external interpretation services, aligning with Article 13 CRPD.

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