

Religious Courts in Indonesia and Malaysia: History, Structure, and Jurisdiction

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DOI: <http://dx.doi.org/10.18196/iclr.v4i2.15911>

Abstract

As Muslim-majority countries, Religious Court plays an important role in resolving disputes among Muslims both in Indonesia and Malaysia. This doctrinal legal study employs comparative approach. Comparison is made between the Indonesian Religious Court and the Malaysian Religious Court, particularly in terms of history, structure, and jurisdiction. The result of this study shows that there are some commonalities and differences. Regarding the commonalities, Religious Courts from both countries have a long evolution in three various periods of history, both countries' Religious Courts are mostly organized into three levels, and they both share the same jurisdiction of the courts that only Muslims are subjected to their jurisdictions. For the differences, the history of Religious Courts in Indonesia and Malaysia were influenced by different colonials, all Religious Courts in Indonesia have an integrated and hierarchical structure, while in Malaysia, the structure is separated from one state to another, and the jurisdiction indicates that Indonesia has law uniformity, whereas Malaysia is not uniform in all states.

Keywords: comparative study; Indonesia; Malaysia; religious court

1. Introduction

Indonesia and Malaysia are Muslim-majority countries. In Indonesia, Muslims constitute 87.18% of the total population (*Sensus Penduduk 2010 - Penduduk Menurut Kelompok Umur Dan Agama Yang Dianut | Indonesia*, n.d.), while Muslims make up 61.3% of the population in Malaysia (Mohamad, 2017). As a result, Islamic law holds a significant position in both countries. As a venue for the application of Islamic law, the Islamic Court, also known as the Religious Court, plays an important role in resolving disputes among Muslims.

Since the early days of Islam in Indonesia, Religious Courts have experienced a rollercoaster development. Religious Courts have developed and evolved as a result of the Muslim community's need for a juridical-formal institution based on Islamic law through frequent innovation and improvement. From the beginning of Islam in Indonesia, through the period of Islamic kingdoms, the Dutch and Japanese colonial periods, and the independence period, Religious Courts have seen many ups and downs. The socio-political environment had a significant impact on this institution at all times (Idri, 2009).

Meanwhile, the independent Federation of Malaysia's legal system reflected the plural model that had appeared in Britain's Malay colonies. Most aspects of life were governed by a common body of federal law. The federal law was primarily based on British models at the time of independence. However, a few aspects of Muslim life were to be governed not by federal law but by state Islamic-based law known locally as Sharia law. To apply this law, states were allowed to establish their own state Islamic Court systems, known locally as Sharia Courts (Shuaib, 2012).

The uniqueness of these countries is that, despite having the same cultural roots, they have different legal systems that have been influenced by different colonials. Indonesia is a member of the Continental European legal system, whereas Malaysia is influenced by English law. Hence, the experiences of Religious Courts in both countries are interesting to compare and discuss in terms of commonalities and differences.

Previously, some research has been conducted on the topic related to the Religious Court in Indonesia or Malaysia. *First*, an article by Idri entitled "Religious Court in Indonesia: History and Prospect". This article discusses the evolution of religious courts in Indonesia, from the early period of Islam in the country to the post-independence period. It focuses on the internal and external factors that support the development of religious courts. Furthermore, this paper investigates the evolution of religious courts under the supervision of the Supreme Court. There was no explicit distinction between Islamic and public courts in Indonesia during the early period of Islam. Religious courts had complete control over the judiciary. However, during the colonial era, the Dutch and Japanese limited the authority of religious courts. The status and authority of religious courts did not change significantly after Indonesian independence until the Law was implemented in 1989 (Idri, 2009).

Second, a paper entitled "The administration of Islamic Justice: Position and Jurisdictions of Syariah Court in Malaysia" by Ramizah Wan Muhammad. This paper discusses the position and roles of Malaysia's Syariah Court as an Islamic institution in safeguarding Muslims' faith and upholding Islamic law as the basis of justice. The history of the Syariah Court, one of the oldest institutions in Malaysian legal history, is also highlighted so that the original position of the court prior to colonisation and after colonisation can be seen. It is also important to discuss the jurisdiction of Malaysian Syariah Courts, which is divided into civil and criminal jurisdiction. This information is significant in determining the extent to which Islamic criminal law is applied in Malaysia as a modern Muslim state. Other Islamic institutions or agencies important in the administration of Islamic justice include the enforcement division, prosecution department, and Department of Syariah Judiciary Malaysia (JKSM) (Muhammad, 2020).

Third, an article entitled "Kewenangan Absolut Peradilan Agama di Indonesia pada Masa Kolonial Belanda hingga Masa Pasca Reformasi (The Absolute Authority of the Religious Courts in Indonesia during the Dutch Colonial Period until the Post-Reformation Period)" by Abdullah Tri Wahyudi. This article discusses the absolute competencies of the Religious Court in Indonesia from the Dutch colonial era until the Reformation. It intends to survey the Court's history and development, as well as its competencies. Using a historical perspective, this article explains the topic in chronological order (Wahyudi, 2016).

The difference between this paper to the articles mentioned above is that this paper aims to examine the commonalities and differences between these two Religious Courts in three aspects, namely, history, structure, and jurisdiction. No one has written using a

comparative approach between Indonesia and Malaysia, specifically in terms of those aspects. Using a comparative approach, in fact, has given a new perspective on understanding the history, structure, and jurisdiction of the Religious Courts in both countries.

2. Method

This doctrinal legal study relies on secondary data and employs comparative approach. The focus of this comparative study is to compare the Indonesian Religious Court and the Malaysian Religious Court in terms of history, structure and jurisdiction.

3. Discussion and Analysis

The discussion and analysis in this section are divided into three parts: Religious Court in Indonesia, Religious Court in Malaysia, and a comparison of these two institutions in terms of history, structure, and jurisdiction.

3.1. Religious Court in Indonesia

3.1.1. History

The history of the Religious Court in Indonesia can be divided into three periods: the Islamic kingdom period, the Dutch and Japanese colonial period, and the period after independence. There is also a discussion of the history of *Syar'iyah* Court in Aceh.

3.1.1.1. The Islamic Kingdom Period

Soon after Islam arrived in the archipelago, Islamic law was enacted. As a result, the existence of Islamic law has long been a feature of public life. Aside from pure religious rituals (*ibadah mahdah*) in daily life, the Islamic law of marriage (*fiqh al-munakahah*) was soon observed. Along with the growing Muslim population, Islamic law extended to a wide range of other human activities that, in some way or another, reflected local traditions. Religious Courts at that time differed from one kingdom to another. This variation was observed in a number of areas. First, diversity was highly dependent on how religious officials and scholars, in general, conducted the Islamization process, as well as the forms of integration between Islamic law and pre-Islamic customs. The autonomy and unique environments of the respective kingdoms were the second cause of this diversity in Religious Courts. Third, there was variation in the hierarchy of Courts and their authority to perform functions concerning government power in general, as well as the source of accepted law-making authority. These various factors were related to elements of local tradition and the Islamization process, which was still in its early stages, as well as the position of the judiciary in the organizational structure of various kingdoms. It received less attention in some kingdoms, whereas it was a central institution in others (Idri, 2009).

3.1.1.2. The Dutch and Japanese Colonial Period

During the Dutch Colonial period, the Religious Court (*Priesterrad*) was officially established in 1882 with the issuance of Stbl. No. 152 of 1882. Even though a Religious Court was officially formed, the Dutch government did not enforce it in the same way that general Courts were (District Council). They did not provide budgets or salaries for the Religious Court's staff except for the head of the Court, and this was only because of his position as an adviser. Also, Religious Courts' authority was very narrow because they were limited to family matters (*ahwal shakhsiyah*) and did not hear other civil cases, let alone criminal offences.

This limitation was understandable because the Dutch colonial authority opposed the formal imposition of Islamic law except in the area of family law, specifically marriage and inheritance (Idri, 2009). To keep Muslims away from their teachings, the Dutch government continues to curtail and limit the authority of the Religious Courts (Martius, 2016). They only permitted Muslims to practice Islamic law because it served their political interests. It did help them maintain their grip on Indonesia (Melayu, 2013).

Meanwhile, during the Japanese occupation of Indonesia (1942-1945), there were no significant changes to the Religious Courts. The existing state of affairs persisted until Japan was defeated in World War II. The Japanese government enacted the Regulation of the Government Court of the Dai-Nippon Army through Law No. 14 of 1942. The court was essentially a continuation of the existing courts. Because of the unfavourable situation, Japan did not implement major changes practically. However, the names of the courts were changed to Japanese, such as the District Court was replaced with *Gun Hooiin*, the District Court was replaced with *Keen Hooiin*, the *Raad van Justitie* (District Court) was replaced with *Tihoo Hooiin*, and the Religious Court was replaced with *Sooryo Hooiin* (Rachmat, 2015). The Religious Courts at this time were under threat due to conflicts between national figures. The Islamic group wants to keep the Religious Courts and restore their authority in the field of inheritance, whereas the nationalists want to abolish them because the state must separate religious affairs from state affairs, so it does not need to be based on Islamic law. However, the Religious Courts were not abolished because Japan surrendered unconditionally to the Allies and Indonesia declared independence as an independent and sovereign country on August 17, 1945 (Wahyudi, 2016)

3.1.1.3. After the Independence Period

Religious Courts were under the Ministry of Justice at the time of independence. Following the establishment of the Ministry of Religious Affairs on January 3, 1946, Religious Courts and Religious Higher Courts were transferred to the Ministry of Religious Affairs by Government Decree No. 5/SD on May 15, 1946. From then on, the Ministry of Religious Affairs was in charge of restoring and improving Religious Courts based on pre-independence practices. The government then issued Regulation No. 45, 1957, based on Article 98 of the Temporary Constitution and Article 1 paragraph (4) of the Emergency Constitution No. 1 of 1951, to establish Religious Courts outside of Java and Madura, South and East Kalimantan. Religious Courts had the authority to settle marriage, inheritance, *hadanah*, endowments, grants, and charity. Religious Courts were established and can be found in almost every region of Indonesia. Furthermore, some indigenous Courts in various regions have been converted into Religious Courts (Idri, 2009).

3.1.1.4. Syar'iyah Court in Aceh

Since the colonial era, the people of Aceh have been acknowledged as a religious community (Zulfan, 2018). In the life of the nation, they put on the hat of respectable scholars (*ulama*). After a lengthy process, Indonesia ratified Law No. 14 of 1999 on Implementation Privileges in the Special Province of Aceh in 1999. Essentially, the enactment of Law No. 44 of 1999 has resulted in new developments in the Aceh Province, particularly in the judiciary. This province has been given the authority to create and manage privileges (article 2, paragraph 1). Furthermore, TAP MPR Decree IV 1999 on the Outlines of State Policy also mentioned the establishment of a special autonomy governed by laws in the Aceh Special Region. Aceh's special autonomy can be interpreted as the government's recognition of the Acehnese people's long history. This is seen as a recognition of the state that has been bestowed upon this region

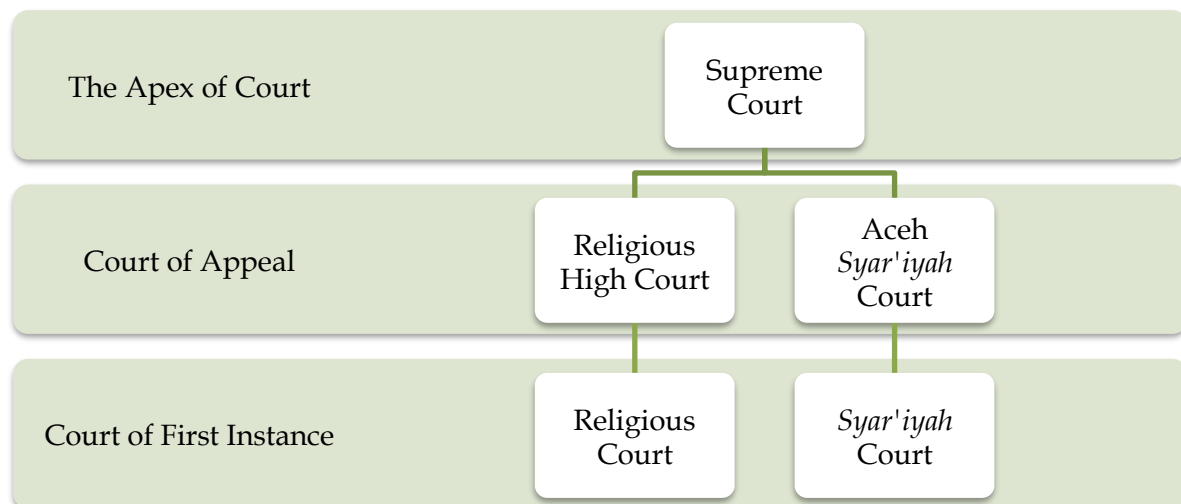
as a result of the struggle, as well as the fundamental values of the society that must be passed down from generation to generation as the foundation of spiritual, moral, and humanitarian values (Razi & Mokhtar, 2020). Implementation of privileges includes four things (Melayu, 2013):

- 1) Implementing religious life
- 2) Implementing of *adat* life
- 3) Implementing education
- 4) The role of the ulama in the legislation process of provincial policy

The establishment of the *Syar'iyah* Court was declared valid on March 4, 2003. Referring to the decision of the President of the Republic of Indonesia Number 11 of 2003, the *Syar'iyah* Court directly replaced the function and the authority of the Religious Court and the authority of the Religious High Court was replaced by the Provincial *Shari'iyah* Court. Since then, all facilities, infrastructure, employees and equipment of the court and the jurisdiction of the Religious Court in Aceh Province belonged to the *Shari'iyah* Court in the Regency/City in Aceh Province. The *Syar'iyah* Court is used as an Islamic Sharia court with absolute authority over all aspects of Islamic Sharia, according to the arrangements specified by qanun (Aceh regional Islamic law) (Iskandar et al., 2022).

3.1.2. Structure

The structure of the Religious Court in Indonesia can be seen in the diagram below:



Indonesia has a unitary judiciary that follows a body of national law that is uniform. Article 24 of the Constitution contains the fundamentals of this structure. This article establishes four parallel systems of Courts, each with its own set of competencies, all organized under the supervision of the Indonesian Supreme Court. One of these three systems is the Religious Courts. General Courts, Military Courts, and Administrative Courts are also part of the judiciary. The Religious Judicature Act of 1989 established the structure and powers of the Islamic branch of the Indonesian judiciary. The Act established Religious Courts as the first instance courts, known as *Peradilan Agama*, in each district and municipality, as well as a Religious High Court as the court of appeal, known as *Peradilan Tinggi Agama*, in each province (Cammack & Feener, 2012). As of 2018, there were 441 Religious Courts, including *Syar'iyah* Courts in Aceh (*Mahkamah Agung Republik Indonesia*, n.d.).

Previously, Religious Courts had somewhat limited authority because all decisions made by a Religious Court had to be approved by state or public Courts. Religious Courts then underwent significant change following the enactment of Law No. 14 of 1970 on Judicial Power and Law No. 1 of 1974 on Marriage. The position of Religious Courts as one of the judicial powers became clearer and was further strengthened by Law No. 7 of 1989 on Religious Courts. With the implementation of this law, such approval was no longer required, bringing Religious Courts to the same level as other Courts. As a result, Religious Courts are autonomous and independent in carrying out their responsibilities. All of these institutions' legal products are legally binding and are on par with the products of other judicial institutions (Melayu, 2013).

The supervision of the Religious Courts was, for many years, divided between the Ministry of Religion, which exercised administrative authority over the courts, and the Supreme Court, which had the ultimate authority on the law applied by the courts. However, in 2004, the Supreme Court was given complete control of the Religious Courts (Nurlaelawati & Rahim, 2012). This was due to a one-roof system policy. The policy of the one-roof system is to create judicial independence. The effect of being under one roof under the auspices of the Supreme Court on the existence of Religious Courts is that their position has been aligned with other judicial institutions in Indonesia (Ibrahim, 2013).

Meanwhile, *Syar'iyah* Court is a special Court in Aceh that falls under Religious Court jurisdiction. Aceh is one of the provinces within the Republic of Indonesia with its own set of privileges and specificities, particularly in terms of applying Islamic law as the province's positive law. In the context of administering Aceh's religious privileges, one of them was given the right and opportunity to establish the *Syar'iyah* Court (Yusrizal et al., 2019). This Court was established in 2003 following the issuance of Presidential Decree No. 11 of 2003 (Adhani, 2019). This is not a completely new institution but rather a development of the existing Religious Court. Aceh *Syar'iyah* Court serves as an appellate Court in the province's capital, and *Syar'iyah* Courts serve as the first instance Courts in each district in Aceh Province. There are 23 *Syar'iyah* first instance Courts as of 2018 (*Statistik SDM Hakim Mahkamah Syar'iyah Se Wilayah Aceh Per 31 Oktober 2018*, n.d.).

3.1.3. Competence (Jurisdiction)

The term "competence of Court" in Indonesia is similar to the term "jurisdiction of the Court" in Malaysia. Competence of Court is divided into two types of competence, absolute competence and relative competence. Absolute competence, or *attributie van rechtsmacht* (in Dutch), is the authority concerning the division of powers between the judicial bodies. In other words, absolute competence is the authority on the problem areas that have specifically been regulated in the legislation to be the right of examining, deciding and judging. Judging authority of these case areas is absolute, meaning that what has been determined to be the power jurisdiction of Courts becomes the absolute authority without being able to be intervened by other jurisdictions (Iman, 2018). Relative competence sets forth the competence to administer justice between Courts of the same type (*distributie van rechtsmacht*) (Sufiarina, 2015). The relative competence of the Court is the authority of a particular judicial environment based on the jurisdiction of its territory to answer the question "Which regional Court is authorized to try a case?" It can be concluded that the term absolute competence is equal to attribution and relative competence is the same as delegation (Ndun et al., 2020).

The Religious Court's absolute competence is mentioned in Article 49 (1) of Law No. 7 of 1989, as amended by Law No. 3 of 2006: "The Religious Court's duty and authority are to

examine, decide, and resolve cases at the first level among people who are Muslims in the areas of marriage, inheritance, will, grant, waqf, zakat, *infaq*, *shadaqah*, and sharia economics." . Sharia economy is the new authority of the Court after the amendment. Sharia banks, sharia microfinance institutions, sharia insurance, sharia reinsurance, sharia mutual funds, sharia bonds and sharia securities medium term, sharia securities, sharia financing, sharia mortgage, and sharia business are all part of the sharia economy. Even though the Law on Religious Courts was later amended by Law Number 50 of 2009, the absolute competencies of the Religious Courts were still in charge of only 9 areas as stated in Article 49 of Law Number 3 of 2006 (Cahyani, 2019).

Furthermore, in the Elucidation of Article 49, it is explained that "between people who are Muslim" includes people or legal entities who automatically submit themselves voluntarily to Islamic law regarding matters that are under the authority of the Religious Courts following the provisions of this Article. Aside from this provision, the legal subjects who can litigate in the Religious Courts are: First, Muslims. Second, non-Muslims who voluntarily submit to Islamic Law. Third, legal entities that are conducting business in accordance with Islamic law (Rahmi, 2013).

The Religious Courts' relative competence is simply their authority to hear the case based on the Court's level and region (territory). In Article 4 paragraph 1 of Law Number 50 of 2009 that "Religious Courts are domiciled in the municipality or district capital and the legal area covers the municipality or district". Thus, each Religious Court has a specific legal area covering one municipality or one district, but it does not rule out the possibility of an exception (Cahyani, 2019). For example, if a Yogyakarta resident wishes to file a divorce, he or she must go to the Yogyakarta Religious Court. Then, if an appeal is decided to be filed, he or she must go to the Yogyakarta Religious High Court (Sufiarina, 2015).

Meanwhile, for *Syar'iyah* Court in Aceh, it has been stated in Qanun No. 1 of 2002 on the Islamic Courts governing competence of *Syar'iyah* Court as stipulated in Article 49 of the Qanun No. 10 of 2002. The absolute competence of the *Syar'iyah* Court is identical to the competence of the Religious Court, in accordance with Article 49 of Law No. 3 of 2006 added by certain competencies in the area of *jinayah* (criminal law) based on *qanun* of Aceh (Sufiarina, 2015). This means that Sharia (Islamic law) which is enforced in Aceh is no longer limited to Islamic civil matters, but also includes criminal law (Huda, 2020). The relative competence of the Shariah Court in Aceh as the successor of the Religious High Court in Aceh covers the entire jurisdiction of the province of Aceh, supervising 20 Shariah Courts at the municipality/regency level (Sufiarina, 2015).

3.2. Religious Court in Malaysia

3.2.1. History

The history of the Religious Court in Malaysia can be divided into three periods: the Malacca Sultanate period, the British colonial period, and the period after independence.

3.2.1.1. The Malacca Sultanate Period

The Malacca Sultanate was not the first Malay Sultanate to accept Islam, but it was the focal point from which Islam spread throughout the Malay Archipelago. It established a structured political and administrative system in Malaya, which was referred to by newly established Malay kingdoms after the fall of Malacca and can still be seen applied to Malaysia's government system today. The implementation of *Risalat Hukum Kanun* or *Undang-undang*

Melaka (Laws of Malacca) and *Undang-undang Laut Melaka* (Maritime Laws of Malacca), considered the earliest and main legal texts among other texts of the same or subsequent period, can be observed as part of the Islamization process (Muhammad, 2020).

The administration of the Islamic judiciary at the time was heavily influenced by the Sultan's position as head of state or Khalifah - or Allah's vicegerent. The Sultan commanded not only social prestige but also religious authority at the time. In practice, even though other Muslim religious elites, such as the Mufti, village headman, and Qadi, had been granted significant autonomy powers to exercise judicial powers over the subjects, the real power was vested in the Sultan, who stood at the top of the judicial hierarchy (Haron & Ahmad, 2016).

Following the fall of the Malaccan empire in 1511, Islamic laws spread to the rest of Malay land. Even after the Malaccan period ended, the Islamic judiciary system and the stable position of the Islamic religion in the Malay lands continued. The judicial system improved and became more systematic, while the hierarchy and structure remained unchanged (Muhammad, 2020).

3.2.1.2. The British Colonial Period

The British intervention in the Malay states began in 1824, following the signing of the Anglo-Dutch Treaty in London by the British and Dutch. Following that, the British officially intervened in the religious, cultural, and internal affairs of the Malay states on January 20, 1874, with the signing of the Pangkor Treaty. Even though the British had officially agreed not to interfere in matters of Islamic religion and Malay customs, they were able to sneak in unofficially. To that end, the British established a Court system modelled after the English Court system (Muhammad, 2020).

The Sultan remained the religious leader of the state and sat at the top of the Sharia court hierarchy. Nonetheless, the establishment of the position of Judicial Commissioner in 1896 ended the Sultan's control, as the latter was replaced as the final judicial authority by the former (Haron & Ahmad, 2016). The position of the sharia judges and officers was also severely weakened. The Sharia Court's jurisdiction was reduced to that of state Courts with limited jurisdiction. The British emphasis on church and state separation has gradually eroded the Islamic judiciary system. They ignored the judges and officers by not providing them with proper channels of communication. As a result, the Court's value as a judicial body dealing with legal disputes involving the Islamic religion was diminished (Muhammad, 2020).

3.2.1.3. After the Independence Period

The Federation of Malaya gained independence on August 31, 1957, and established a new federal nation consisting of eleven British colonies in the region, which was later renamed Malaysia in 1963 with the addition of North Borneo and Sarawak. The structure of the judiciary remained unchanged after the country gained independence. Except for the Sharia Courts, the establishment, jurisdiction, and powers of all Courts are within the legislative powers of the federal government. Otherwise, all Civil Courts, from the highest to the lowest tier, are established under federal law. Sharia courts apply to Muslims, and the laws that apply to them are those enacted by the state (Muhammad, 2020).

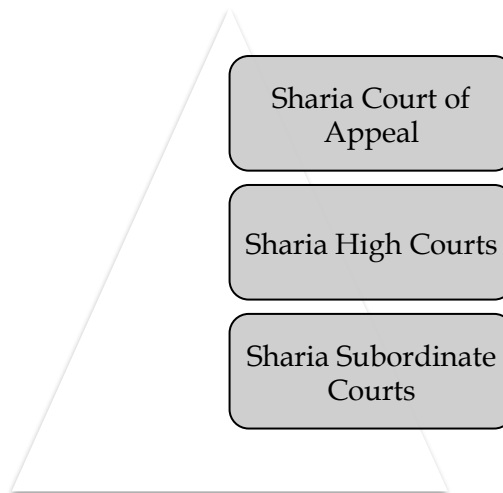
Prior to 1998, there was no specific mechanism or guidelines for managing the Sharia Court, leaving everything to the officers' discretion and creativity. The officers' broad

discretion resulted in a lack of uniformity in the application of Islamic law in Malaysia. Worse, there was not even one Sharia Court complex or facility operating on its own, and the legal officers appointed to run the institution were both in quantity and quality. Executives constantly influence and interfere with Religious Departments, Sharia Courts, and Fatwa Institutions, while the powers granted to these institutions are frequently contradictory and overlap (Haron & Ahmad, 2016).

Due to such issues with the administration of the Sharia Courts system, the federal government took the initiative to improve the administration of the Sharia Courts. The Cabinet agreed on a proposal to restructure Malaysia's Sharia Courts during their meeting on July 3, 1996, and thus established a special work committee to discuss this plan. The works committee proposed establishing a centralized federal department called *Jabatan Kehakiman Sharia Malaysia* (JKSM - the Department of Sharia Judiciary Malaysia) to serve as a coordinator of efforts to standardize the administration and management of Sharia Courts throughout Malaysia, which was later established on March 1, 1998. It is emphasized that, despite the establishment of the JKSM, the Sharia Courts remain under the jurisdiction of the states. JKSM was established to bring uniformity to the administration of Islamic law, i.e., the Sharia Courts in the states (Muhammad, 2020).

3.2.2. Structure

The structure of the Religious Court in Malaysia can be seen in the diagram below:



Malaysia's current Islamic judiciary structure is the result of a nationwide restructuring that began in the 1980s. Throughout the 1980s and 1990s, each state and the Federal Territories enacted legislation governing the Islamic judiciary in their respective jurisdictions. These acts established a three-tiered Sharia court structure, similar to Malaysia's civil court structure. Sharia Subordinate Courts are the lowest in the hierarchy. The Sharia High Court has supervisory and revisionary jurisdiction over all Sharia subordinate courts, either on its own initiative or on the application of a party interested in the matter. The Sharia Court of Appeal

hears appeals from both criminal and civil lower courts and then makes final decisions (Zin, 2012).

However, there is an exception in the State of Perak, which has a new structure of sharia court. The establishment of the Perak Sharia Supreme Court is a new layer of the appeal process in the Sharia Court, which previously only had three layers, namely the Sharia Subordinate Court, the Sharia High Court and the Sharia Court of Appeal. On December 5, 2018, the Perak State Assembly approved a proposed amendment to Section 44 of the Islamic Religious Administration (Perak) Enactment 2004 that would allow the state to establish a supreme court. The existence of this new institution provided a platform for issuing principles concerning the outcome of the law and Sharia laws in the state of Perak (*Perak Sharia Supreme Court Allows Appeal Against Decision of Sharia Court of Appeal*, 2020).

The structure of Malaysia's judiciary reflects the distribution of legislative power. Federal law issues are heard by a nationwide system of "civil courts," which can be traced back to common law courts established by British colonial authorities. In addition to the civil court system, each state and federal territories maintain a Sharia court system with jurisdiction over matters governed by Islamic law as enacted by the states. Each of the fourteen Sharia court systems is a self-contained and autonomous structure. The administration of Islamic law was delegated to the states. The highest law of the federation, the 1957 Federal Constitution, states that matters pertaining to Islamic law are within the legislative power of the state's legislature, with each state having its own statutes and Sharia courts (Zin, 2012).

The Sharia Courts are governed and supervised by the Sharia Judiciary Department of Malaysia (JKSM), which is currently under the Prime Minister's Department. It is led by the Director General, who is also the Sharia Chief Justice. The JKSM's primary function is to standardise the law across states and improve the effectiveness of Malaysia's Sharia Courts (Hanis Wahed, 2015).

3.2.3. Jurisdiction

Malaysia's government is parliamentary in nature, with true federalism practised. State governments are autonomous and independent of the federal or central government, particularly when it comes to the judicial system. Each state has its own constitution, Sharia Courts, and state laws (Chiroma et al., 2013).

The relationship between the Sharia Court and the civil High Court exemplifies the clear concept of duality of law in Malaysia (Md Said et al., 2021). Unlike the High Court, which is established by the Federal Constitution, the Sharia Court is a creation of state law. Article 74 of the Federal Constitution, read in conjunction with the State List, states that Islamic law and Islamic matters, including the establishment of Sharia Courts, fall under the jurisdiction of the State. According to the State List, the State Assembly's legislative power to legislate on Islamic law and Malay customs is limited to 26 issues:

- (a) Succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts;
- (b) *Wakaf* and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State;

- (c) Malay customs;
- (d) Zakat, Fitrah and *Baitulmal* or similar Islamic religious revenue;
- (e) Mosques or any Islamic public places of worship;
- (f) Creation and punishment of offences by persons professing the religion of Islam against precepts of that religion; and
- (g) Constitution, organisation and procedure of the Sharia Courts.

According to the State List, the Sharia Court has jurisdiction only over Muslims and the aforementioned matters. It is also stated that the Sharia Court has no jurisdiction over offences unless expressly granted by federal law (Dahlan & Faudzi, 2015). In practice, Sharia Courts have their own evidence Act and procedural rules that are based on Islamic law (Haji, 2014).

Criminal law is generally under the jurisdiction of the federal government, but state governments can enact their own laws to cover "offences by persons professing the religion of Islam against precepts of that religion-except in regard to matters on the Federal List." Difficulties arise, however, in determining where, constitutionally, criminal law ends and "offences against religious precepts" begin. In practice, the Sharia Courts (Criminal Jurisdiction) Act of 1965, as amended in 1984, defines state governments' ability to effectively enact and enforce Islamic criminal law. This federal law gives Sharia Courts jurisdiction over offences against Islamic precepts by any written law. However, it restricts the sentences that can be imposed. Prior to 1984, the maximum sentence was six months in prison or a 1,000 ringgit fine, or both. The statute was amended in 1984 to limit sentences to three years in prison, 5,000 ringgit, and six strokes of the cane (Shuaib, 2012).

Before 1988, many Sharia court decisions were overturned by civil courts. After Parliament passed the Constitutional (Amendment) Act 1988, Clause (1A) was added to Article 121. LRB (2009) displays the provision of this clause as "*The courts referred to in Clause (1) [High courts and inferior courts] shall have no jurisdiction in respect of any matter within the jurisdiction of the Sharia courts.*" The inclusion of Article 121 (1A) in the Constitution did not guarantee that civil courts would not interfere. In some cases, Sharia courts were not granted jurisdiction to hear the case (Noordin et al., 2012). This change has left the law unclear as to whether civil High Courts will retain judicial review powers, including over matters involving Islam. The amendments, along with subsequent judicial interpretations, have resulted in an expansion of Sharia courts' jurisdiction at the expense of civil courts (International Commission of Jurists, 2019).

The Federal Court stated in the case of *Subashini Rajasingam v Saravanan Thangathoray* ('*Subashini*') in 2007 that "although the Sharia courts are state courts, they are not lower in status than the civil courts... they are of equal standing under the (Federal Constitution) (and) this recognition of the Sharia courts was largely due to Article 121(1A)." In the same year, the Federal Court held in *Lina Joy v Majlis Agama Islam Wilayah Persekutuan* ('*Lina Joy*') that Sharia courts, not civil courts, had jurisdiction to consider cases of conversion out of Islam, even though such cases were not expressly covered by state laws (International Commission of Jurists, 2019).

Furthermore, because Islamic Laws are State Laws, they are not uniformly similar across all states. Consequently, there is no uniformity in the administration of Sharia Courts throughout all states. For instance, because of this no uniformity, inheritance claims are limited to the state in which the majority of the assets are located. It is extremely difficult for a client

to claim his inheritance outside the borders of the state in which he resides. Therefore, uniformity in the application of Islamic Law across states is greatly welcomed (Noordin et al., 2012).

3.3. Comparison between Religious Courts in Indonesia and Malaysia

Based on the discussion and analysis above, there are some commonalities as well as differences in the history, structure, and jurisdiction of the Religious Courts in Indonesia and Malaysia.

3.3.1. Commonalities

There are some commonalities between the Religious Courts in both countries. Firstly, in terms of history, both countries have a long history of Religious Court evolution in various periods, including the Islamic kingdom era, the colonial era, and the period after independence. They have survived many ups and downs to get to where they are today. The position of Religious Courts has strengthened as a result of various changes and improvements.

Secondly, regarding the structure, both countries' Religious Courts are organized into three levels of Court. In Malaysia, the Religious Court structure consists of Sharia Subordinate Courts, Sharia High Courts, and the Sharia Court of Appeal, except for the state of Perak, which has a Sharia Supreme Court. In Indonesia, there are Religious Courts at the district level, High Courts at the province level that serve as appellate Courts, and the Supreme Court at the cassation level.

Third, Indonesia and Malaysia share the same Islamic law and Religious Court jurisdiction. Despite the fact that both of these countries have a Muslim majority and that Islam has been given preferential recognition, Islamic law does not apply to everyone, including non-Muslims; only Muslims are subject to Islamic law and Religious Court jurisdiction.

3.3.2. Differences

The differences between the Religious Courts in Indonesia and Malaysia can be seen in the table shown below:

Table 1

The Differences in Religious Courts between Indonesia and Malaysia

| Aspect | Religious Court | |
|--------------|------------------------------|------------------|
| | Indonesia | Malaysia |
| History | Dutch and Japanese Colonials | British colonial |
| Structure | Integrated & hierarchical | Separated |
| Jurisdiction | Uniformity | Non-uniformity |

There are some differences between these two institutions, as displayed in the table. First, the history of the establishment and development of Religious Courts in Indonesia and Malaysia has been influenced by different colonials. Indonesia was colonized by the Dutch

and the Japanese, whereas Malaysia was colonized by the British. During the intervention, each colonial had its own set of values and interests.

Second, in terms of Court structure, all Religious Courts in Indonesia have the same structure, which is coordinated by the Supreme Court as the Apex of Courts. As a consequence of the unitary state, Indonesia has an integrated and hierarchical structure of Religious Courts, and not only Religious Courts but also Courts from other jurisdictions have an integrated and hierarchical structure. Meanwhile, in Malaysia, each state has its own Religious Court system that is run by the state government. This is the impact of state organisation whereby Malaysia uses the federal system. Therefore, so far, Malaysia does not have an Apex of Courts.

Third, Religious Courts' jurisdiction in Indonesia is stated in the law at the national level; thus, all Religious Courts in every province and district have the same jurisdiction, namely jurisdiction in family law and sharia economic matters. Only the *Syar'iyah* Court in Aceh, as a special Court, has jurisdiction over Islamic criminal law matters. In Malaysia, however, Islamic law and Religious Courts are governed by the state. As a result, each state has its own jurisdiction, which may differ from the jurisdiction of another. Criminal law is generally the jurisdiction of the federal government, but state governments can enact their own laws in cases involving Islamic criminal law to cover "offences by persons professing the religion of Islam against precepts of that religion-except in regard to matters on the Federal List". Thus, it demonstrates that Indonesia has law uniformity, whereas Malaysia does not.

4. Conclusion

From the discussion above, we have learned many aspects of Religious Courts in Indonesia and Malaysia. As a result of a comparative study of these two institutions, it can be concluded that there are some interesting commonalities and differences. Regarding the commonalities, both countries have a long history of Religious Court evolution in various periods, including the Islamic kingdom era, the colonial era, and the period after independence. Both countries' Religious Courts are mostly organized into three levels of Court, and Indonesia and Malaysia share the same Islamic law and Religious Court jurisdiction, where only Muslims are subjected to their jurisdictions. For the differences, the history of the establishment and development of Religious Courts in Indonesia and Malaysia has been influenced by different colonials; all Religious Courts in Indonesia have an integrated and hierarchical structure, which is coordinated by the Supreme Court as the Apex of Court; whereas, in Malaysia, the structure is separated between one state to another; the jurisdiction of Religious Court demonstrates that Indonesia has law uniformity, whereas Malaysia does not. It is recommended that further research can be focused on the comparison of how the religious court in both countries develops human resources and manage the administration of the court.

References

- Adhani, H. (2019). *Menakar Konstitusionalitas Syari'at Islam dan Mahkamah Syar'iyah di Provinsi Aceh*. 16(September).
- Cahyani, A. I. (2019). Peradilan Agama sebagai Penegak Hukum Islam di Indonesia. *Jurnal Al-Qadau: Peradilan Dan Hukum Keluarga Islam*, 6(1), 119. <https://doi.org/10.24252/al-qadau.v6i1.9483>

- Cammack, M. E., & Feener, R. M. (2012). The Islamic Legal System in Indonesia. *Pacific Rim Law & Policy Journal*, 21(1), 13-42.
- Chiroma, M., Arifin, M., & Kadouf, H. (2013). The Application of Islamic Law in Modern Muslim States: A Comparative Analysis of the Nigerian and Malaysian Systems. *Journal of Islamic State Practices in International Law*, 9(2), 61-91.
- Dahlan, R., & Faudzi, F. S. (2015). The Syariah Court : Its Position under the Malaysian Legal System. In *Shariah Reports by Malaysian Current Law Journal* (Vol. 1).
- Haji, M. M. (2014). Administration of Islamic Law in Kadhis' Court in Zanzibar: A Comparative Study with the Syariah Courts in Malaysia. *Journal of Malaysian and Comparative Law*, 41(1), 107-124.
- Wahed, H. (2015). Sulh: Its Application in Malaysia. In *IOSR Journal Of Humanities And Social Science Ver. II* (Vol. 20, Issue 6, pp. 71-79). www.iosrjournals.org
- Haron, H. H., & Ahmad, A. (2016). The Islamic Judiciary. In S. M. Gabriel (Ed.), *The Malaysian Judiciary* (pp. 73-96). The Malaysian Current Law Journal.
- Huda, Y. (2020). Islamic Sharia in Aceh and Its Implications in Other Regions in Indonesia. *Petita: Jurnal Kajian Ilmu Hukum Dan Syariah*, 5(2), 189-201. <https://doi.org/10.22373/petita.v5i2.98>
- Ibrahim, M. (2013). Peradilan Satu Atap (the One Roof System) di Indonesia dan Pengaruhnya Terhadap Peradilan Agama. *Asy-Syir'ah*, 47(7), 647-673.
- Idri. (2009). Religious Court in Indonesia: History and Prospect. *Journal of Indonesian Islam*, 3(2), 297-313. <https://doi.org/10.15642/JIIS.2009.3.2.297-313>
- Iman, R. Q. (2018). The Competence of Religious Court in Indonesia and Syahadah Istifadhah (Testimonium De Auditu) in Case of Itsbat Waqf. *Ahkam*, 18(2), 395-414. <https://doi.org/10.1128/AAC.03728-14>
- International Commission of Jurists. (2019). *Challenges to Freedom of Religion or Belief in Malaysia: A Briefing Paper* (Issue March).
- Iskandar, H., Asmara, R., Yusrizal., & Hamdani. (2022). Position of Syar'iyah Aceh Court Based on the Law of the Republic of Indonesia Number 11 of 2006 Concerning the Government of Aceh. *Journal of Law, Policy and Globalization*, 118, 126-130. <https://doi.org/10.7176/jlpg/118-15>
- Mahkamah Agung Republik Indonesia. (n.d.). Retrieved May 28, 2021, from <https://www.mahkamahagung.go.id/id/berita/3365/era-baru-menuju-badan-peradilan-yang-modern>
- Martius, A. H. (2016). Peradilan Agama dalam Sistem Hukum Indonesia. *Jurnal Hukum Diktum*, 14(1), 55-66.
- Md Said, M. H., Nasrul, M. A. B. D., Hak, N. A., & Salim, W. N. M. (2021). Muslim Estate Administration: The locus of Malaysian Syariah Court in Malaysia. *International Journal of Islamic Thought*, 19(1), 73-78. <https://doi.org/10.24035/IJIT.19.2021.197>
- Melayu, H. A. (2013). The Religious Court in Indonesia: A Preliminary Overview of Mahkamah Syar'iyah Aceh. *Journal of Islamic Civilization in Southeast Asia*, 1(1).
- Mohamad, M. (2017). Contesting Syariah Laws in Malaysia: Religion, Human Rights and the

- State's Response. *Journal of Politics and Law*, 10(5), 140.
<https://doi.org/10.5539/jpl.v10n5p140>
- Muhammad, R. W. (2020). The Administration of Islamic Justice: Position and Jurisdictions of Syariah Court in Malaysia. *International Journal of Liberal Arts and Social Science*, 8(4), 43–64.
- Ndun, I., Helan, Y. G. T., & Pekuwal, U. L. (2020). The Absolute Competence of the Industrial Relations Court in Resolving Employment Termination Disputes. *Journal of Indonesian Legal Studies*, 5.
<https://heinonline.org/HOL/Page?handle=hein.journals/jils5&id=36&div=4&collection=usjournals>
- Noordin, N., Shuib, A., Zainol, M. S., Azam, M., & Adil, M. (2012). Review on Issues and Challenges in Islamic Inheritance Distribution in Malaysia. *OIDA International Journal of Sustainable Development*, 3(12), 27–38.
- Nurlaelawati, E., & Rahim, A. (2012). The Training, Appointment, and Supervision of Islamic Judges in Indonesia. *Pacific Rim Law & Policy Journal*, 21(1), 43–64.
- Perak Syariah Supreme Court Allows Appeal Against Decision of Syariah Court of Appeal. (2020). Malaymail. <https://www.malaymail.com/news/malaysia/2020/07/16/perak-syariah-supreme-court-allows-appeal-against-decision-of-syariah-court/1885287>
- Rachmat, A. (2015). Peradilan Agama di Indonesia. *Jurnal Pemikiran Hukum Dan Hukum Islam*, 6(2), 120.
- Rahmi, D. (2013). Ruang Lingkup Kewenangan Peradilan Agama dalam Mengadili Sengketa Ekonomi Syariah. *Syariah: Jurnal Hukum Dan Pemikiran*, 13(2), 1–12.
- Razi, M., & Mokhtar, K. A. (2020). The Challenges of Shariah Penal Code and Legal Pluralism in Aceh. *Jurnal Media Hukum*, 27(2), 195–216.
- Sensus Penduduk 2010 - Penduduk Menurut Kelompok Umur dan Agama yang Dianut | Indonesia. (n.d.). Retrieved April 21, 2021, from <https://sp2010.bps.go.id/index.php/site/tabel?tid=320&wid=0>
- Shuaib, F. (2012). The Islamic Legal System in Malaysia. *Washington International Law Journal*, 21(1), 85.
- Statistik SDM Hakim Mahkamah Syar'iyah se Wilayah Aceh Per 31 Oktober 2018. (n.d.). Retrieved May 28, 2021, from <https://www.ms-aceh.go.id/transparansi-keseekretariatan/data-statistik-kepegawaian/2689-jumlah-sdm-hakim-mahkamah-syar-iyah-se-wilayah-aceh-per-31-oktober-2018.html>
- Sufiarina. (2015). The Position and Competence of the Shariah Court of Nanggroe Aceh Darussalam in Indonesia's Justice System. *Indonesia Law Review*, 5(2), 165–186.
<https://doi.org/10.5014/ajot.2011.001305>
- Wahyudi, A. T. (2016). Kewenangan Absolut Peradilan Agama di Indonesia pada Masa Kolonial Belanda hingga Masa Pasca Reformasi. *Yudisia*, 7(2), 285–304.
<https://doi.org/10.21043/yudisia.v7i2.2156>
- Yusrizal, M., & Amalia, N. (2019). Adat Court vs Syar'iyah Court: Study of the Legal Culture of Aceh Communities Completing the Khalwat Cases. *International Journal of Recent Technology and Engineering*, 7(6), 1367–1370.

- Zin, N. M. (2012). The Training, Appointment, and Supervision of Islamic Judges in Malaysia. *Pacific Rim Law & Policy Journal*, 21(1), 115-132.
- Zulfan, Z. (2018). Model of Local Wisdom Legal Source and State Law in Aceh Government. *Indonesian Comparative Law Review*, 1(1), 51-68.