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“Position and Jurisdictions of Syariah Court in the administration of Islamic Justice in  
Malaysia”

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### Abstract

Malaysia is practising a dual legal system: Common/Civil law and Islamic legal system. The common law system is originally from the UK based since Malaysia was colonised by the British from 1824-1957. The other system is Shariah based system in which Islamic law being implemented in the country. The Supreme law in Malaysia is the Federal Constitution of Malaysia, which was created right after Malaysia gained independence in 1957. The constitution is the supreme law of the land in which all laws created in Malaysia, whether Islamic law or civil law, must conform to the federal constitution. This paper is to discuss the position and roles of Syariah Court in Malaysia as an Islamic institution in safeguarding the faith of the Muslims and upholding Islamic law as the basis of justice. The history of Syariah Court as one of the oldest institutions in the legal history in Malaysia will also be highlighted so that one could see the original position of the court prior to the colonisation and after the colonisation. It is equally important to look at the jurisdiction of Syariah Courts in Malaysia which is divided into civil and criminal jurisdiction. This information is significant to see the extent of the application of Islamic criminal law in Malaysia, as a modern Muslim state. There are also other Islamic institutions or agencies, which are significant in the administration of Islamic justice such as enforcement division, prosecution department and Department of Syariah Judiciary Malaysia (JKSM).

## 1. History of Syariah Court in Malaysia (Pre-1957)

The coming and emergence of Islam in Malaysia is a matter of academic debate<sup>1</sup>. However, the history itself can only be understood by observing the Malay Archipelago as a whole, and the arrival of Islam in Malaysia differed based on the dates and the localities of the arrival<sup>2</sup>. Arrival in this context may refer to two situations: on whether to the arrival of foreign Muslims (Arabs, Indians etc.) to the Malay lands or the acceptance of Islam by the local people<sup>3</sup>. Islam was propagated by the Muslim traders who came from the Middle and Near East, the Indian sub-continent, as well as the Muslim Chinese traders from China.

Further discussion of the history of the Malaysian legal system means to discuss the Malacca Sultanate as the first subject of discussion. It should be noted that even though the Malacca Sultanate was not the first Malay Sultanate that received Islam, it is the focal point of which Islam was spread to the other parts of the Malay Archipelago. The Malacca Sultanate has established a structured political and administrative system in Malaya<sup>4</sup>, of which being referred by the newly established Malay kingdoms after the fall of Malacca and can still be seen applied the government system of Malaysia nowadays.

The administration of justice during this period was largely based on the rulings and policies by the Sultan of Malacca as the head of state and government. Since the Malacca Sultanate was first influenced by the Hindu-Buddhist traditions and later by Islam, therefore certain traditions of governance which suited the Islamic teachings remained with modifications. In other quarters, the coming of Islam to Malacca saw the beginning of attempts to introduce the Shariah and to modify the Malay *adat* (customs) law to accord with Islam<sup>5</sup>. This Islamisation process can be observed through the implementation of *Risalat Hukum Kanun* or *Undang-undang Melaka* (Laws of Malacca)<sup>6</sup> and *Undang-undang Laut Melaka* (Maritime Laws of Malacca), regarded as the earliest and main legal text among other texts of the same period or the following period of time<sup>7</sup>.

Due to the Islamised customs and traditions, the Sultan (king) was considered to be sacrosanct who combined prestigious social position and religious authority<sup>8</sup>. Basically, the administration of the Syariah court during the Malaccan era was largely based on the Sultan, who sat on the top of the court hierarchy<sup>9</sup>. Nevertheless, the Muslim religious elites such as the

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<sup>1</sup> Ramizah Wan Muhammad, *The Administration of Syariah Courts in Malaysia, 1957–2009*, 13 *Journal of Islamic Law and Culture*, no. 2–3 (2012), p. 1 *et. seq.*, available at <<https://doi.org/10.1080/1528817x.2012.748466>>.

<sup>2</sup> Farid Sufian Shuaib, *Powers and Jurisdiction of Syariah Courts in Malaysia*, (2nd ed., Petaling Jaya: LexisNexis Malaysia Sdn. Bhd., 2008), p. 13.

<sup>3</sup> *Ibid.*

<sup>4</sup> Name given during the British rule, referring to Malaysia prior to independence in 1957.

<sup>5</sup> Wan Arfah Hamzah, *A First Look at the Malaysian Legal System*, (Shah Alam: Oxford Fajar Sdn. Bhd., 2009), p. 151.

<sup>6</sup> *Ibid.*

<sup>7</sup> Ahmad Ibrahim, *Position of the Shariah Courts in the Administration of Justice*, in *International Shariah Conference on The Role of Judiciary in the Development of Islamic Law* (Petaling Jaya, 1986), p. 141 *et. seq.*, available at <<http://eprints.um.edu.my/id/eprint/13689>>. Other Malay legal texts used at that time were Laws of Pahang or Pahang Digest, Laws of Kedah, and the 99 Laws of Perak.

<sup>8</sup> Wan Muhammad (2012), *supra* note 1.

<sup>9</sup> *Ibid.*

*Mufti*, the village headman, and the *Kadi* remained to have significant autonomy and exercised considerable authority over the subjects<sup>10</sup>.

As the head of the court system in Malacca, the Sultan have the power to hear any dispute or case which was brought to his unlimited jurisdiction. He would seek advice from the *Mufti* or *Kadi* on religious matters. Based on the historical accounts, most of the cases or disputes around 1600s were handled by the village headman. This shows that the people during this period rarely brought any disputes further to the upper lever, but instead opting for a better alternative – reconciliation method adopted by the headman in resolving societal problems.

It is undeniable that the Malay legal texts and codifications on Islamic laws such as the *Hukum Kanun Melaka* (Laws of Malacca) and the *Undang-undang Laut Melaka* (Maritime Laws of Malacca) did not stated specifically that Malacca Sultanate had a proper hierarchy of courts in settling the cases or disputes<sup>11</sup>. However, the fact was that the structure did exist. Records on Malay history contain descriptions for resolving cases or disputes by the village headman and the Sultan<sup>12</sup>. As stated earlier, the people at that time could not care more on the court system due to that the disputes can be solved by the headman or any devout Muslim scholar. The people did not use the court alternative as they fulfilled their duties and protected each other’s rights without having to go to the court<sup>13</sup>.

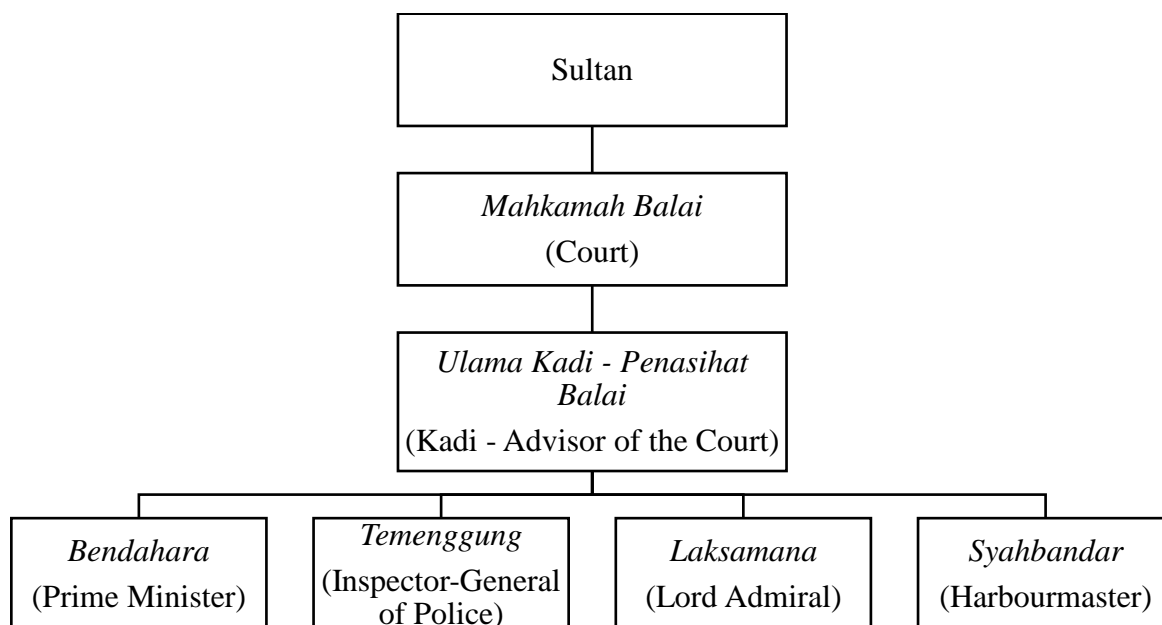


Figure 1: Structure of the Syariah court during the Malacca Sultanate period (1400-1511)<sup>14</sup>

After the fall of Malaccan empire in 1511, the legal digests in Malacca were adopted in the other Malay states which rose to power after the fall of the empire. Through the adoption

<sup>10</sup> Wan Muhammad (2012), *supra* note 1.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> Ramizah Wan Muhammad, *Sejarah Pentadbiran Kehakiman Islam Di Malaysia*, 21 Kanun, no. 1 (2009): p. 1 *et. seq.*.

and implementation of the legal digests, the Islamic laws continued to spread to the other parts of the Malay land. For example, the Pahang Digest was introduced during the reign of Sultan Abdul Ghafur Muhaiyuddin Shah (1592-1614), has shown a strong influence of the implementation of Islamic laws<sup>15</sup>. Some historians were of the view that the implementation of the Pahang Digest was the continuation of the *Hukum Kanun Melaka* (Laws of Malacca)<sup>16</sup>. The extent of the implementation remained uncertain. Yet the fact that the Islamic laws and *adat* laws were implemented harmoniously is undeniable<sup>17</sup>. Other examples of the laws enforced after the fall of Malacca are the 99 Laws of Perak, Laws of Kedah and Laws of Johore<sup>18,19</sup>.

With the implementation of the laws, the Islamic judiciary system and the stable position of Islamic religion in the Malay lands did not stop even though the Malaccan period had ended. It can also be inferred that the period of Portuguese and Dutch colonisation was also the period of maturation before the coming of British as the Islamic judicial system improved became more systematic. The hierarchy and the structure remained unchanged.

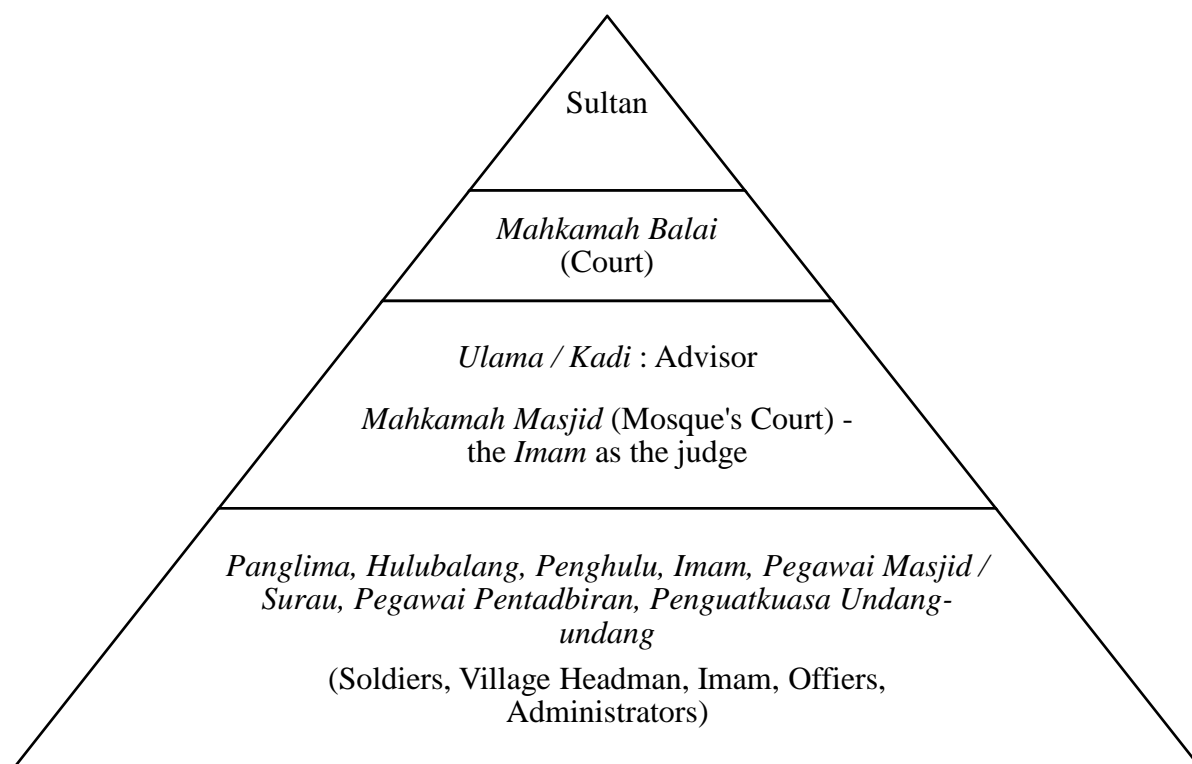


Figure 2: Structure of the Syariah court after the fall of Malacca (1511-1800)<sup>20</sup>

The British intervention in the Malay states began in 1824 after the Anglo-Dutch treaty was signed between the British and the Dutch in London<sup>21</sup>. The agreement was signed to settle disputes between the two colonial powers regarding the territorial boundaries and to plan a

<sup>15</sup> Hamzah (2009), *supra* note 5, pp. 151-152.

<sup>16</sup> Wan Muhammad (2009), *supra* note 14.

<sup>17</sup> Hamzah (2009), *supra* note 5, p. 152.

<sup>18</sup> Wan Muhammad (2009), *supra* note 14.

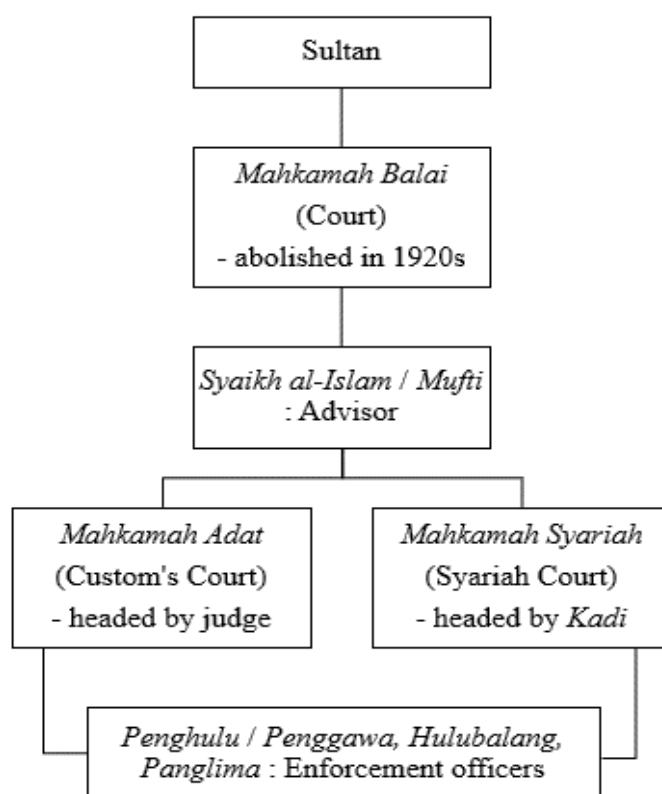
<sup>19</sup> Ibrahim (1986), *supra* note 7.

<sup>20</sup> Wan Muhammad (2009), *supra* note 14.

<sup>21</sup> Wan Muhammad (2012), *supra* note 1.

future without risking further trouble<sup>22</sup>. The British officially interfered in the religious, cultural and internal affairs of the Malay states on 20<sup>th</sup> January 1874 with the signing of the Pangkor Treaty. The British appointed the Residents to run the administration of the states respectively. Some of the objectives of the British intervention after the Federated Malay states was established was to develop a structured administrative system and a communication system, as well as to formulate labour and land policies to downgrade the status of the Sultans of the states and undermine the Islamic laws in existence<sup>23</sup>. Even though the British had officially agreed not to interfere matters of Islamic religion and the Malay customs, yet in fact, they managed to slip into the matters unofficially<sup>24</sup>. For this purpose, the British introduced a court system modelled after the English court system and had eventually appointed English judges to run the courts<sup>25</sup>.

M.B. Hooker was of the view that the introduction of the English civil laws in Malaya which has decreased the Islamic laws was for economical purpose<sup>26</sup>. The British further argued that the Islamic laws were the hindering factor for their mission to develop Malaya, as the philosophy of development of the Western civilisation is materialistic in nature and not in form of spiritual development<sup>27</sup>.



<sup>22</sup> Wan Muhammad (2012), *supra* note 1.

<sup>23</sup> *Ibid.*, citing Emily Sadka, *The Protected Malay States 1874-1895*, (Kuala Lumpur: University of Malaya Press, 1968), p. xiv

<sup>24</sup> Wan Muhammad (2009), *supra* note 14, citing Moshe Yegar, *Islam and Islamic Institutions in British Malaya*.

<sup>25</sup> Wan Muhammad (2012), *supra* note 1.

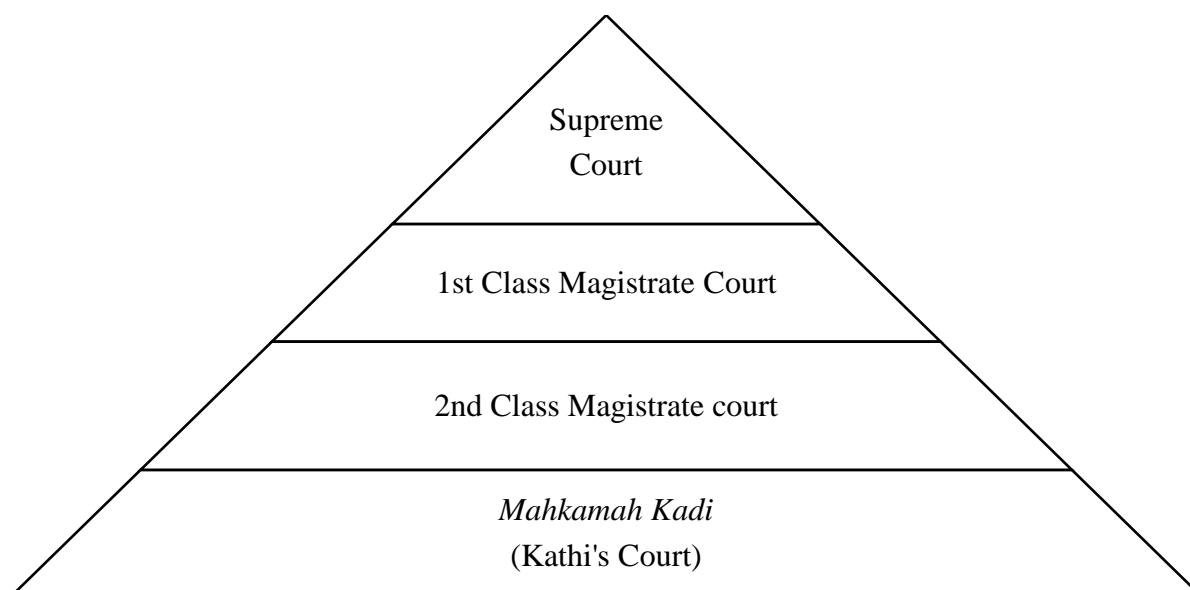
<sup>26</sup> Wan Muhammad (2009), *supra* note 14.

<sup>27</sup> *Ibid.*

Figure 3: Structure of Syariah court during the British colonisation (1800-1900)<sup>28</sup>

During the British intervention, the Islamic judiciary system stood with stronger foundation. The Sultan was still the state’s head of Islamic religion and therefore sat on the highest tier of the Syariah court hierarchy. However, the *Mahkamah Balai* (Court) was later abolished in 1920s, while the *Mufti* remained as the Sultan’s advisor in matters relating to Islamic religion<sup>29</sup>. The bureaucracy of the court started to develop during this period, whereby it can be seen that the court system was been divided into two : the *Mahkamah Adat* (Customary Court) which was headed by the judge and the *Mahkamah Syariah* (Syariah court) which was headed by the *Kadi*.

Somehow, the establishment of the Federated Malay States by the British in 1895 started to change the trend of the administration of justice. The power of the Sultan as the final authority in controlling the administration of Syariah court was replaced by the Judicial Commissioner<sup>30</sup>. Regardless of the demand made by the Malay rulers (the Sultans) to restore their position in administering the Syariah court, the British introduced the Courts Enactment 1905, which provided that any appeal from the Syariah court was to be heard by the British Magistrate Court. Only in 1948 after the rejection to the system became more severe, the British then replaced the 1905 enactment with Courts Ordinance 1948<sup>31</sup>. In this legislation, the Syariah court has been put in the federal court’s hierarchy.

Figure 4: Hierarchy of the courts in Malaya (before 1948)<sup>32</sup>

However, this did not remain long. The Syariah court, which was originally part of the federal courts, was demoted to the state courts with limited jurisdiction<sup>33</sup>. Such form of state-based system had functioned under the purview of the state legislature and had crystallised into

<sup>28</sup> *Ibid.*

<sup>29</sup> Wan Muhammad (2009), *supra* note 14.

<sup>30</sup> Wan Muhammad (2012), *supra* note 1.

<sup>31</sup> Courts Ordinance 1948 (Ordinance No. 43 Of 1948) was later revised in 1972 and changed to Subordinate Courts Act 1948 (Act 92).

<sup>32</sup> Wan Muhammad (2009), *supra* note 14.

<sup>33</sup> Wan Muhammad (2012), *supra* note 1.

an almost rival judiciary with concurrent, though restricted, jurisdiction<sup>34</sup>. Through such a change, the Islamic judiciary system was gradually eroded through the emphasis of separation between “church and state” and bureaucratisation of the states<sup>35</sup>. For example, the Administration of Muslim Law Enactment of Selangor 1952 stipulated that the Sultan in Council may constitute Kadi’s Court for the State of Selangor<sup>36</sup>. Meanwhile, the Courts Enactment of Kelantan 1955 had instituted the Mufti’s Court as an appellate court for any appeal brought from the Kadi’s court<sup>37</sup>. The Administration of Muslim Law Enactment of Penang 1959 on the other hand, had enabled the state legislative council to establish the Syariah courts for the state<sup>38</sup>.

It can be noted that during the era of the British occupation, the position of the Syariah courts, the judges and the officers were greatly undermined. Without proper channels to work and neglect of the welfare of the staffs that had eroded the value of the Syariah court as a proper judicial body to deal with legal disputes relating to the Islamic religion. With such underrated status, graduates from the Syariah faculties were not attracted to serve as judicial officers in the Syariah courts<sup>39</sup>.

### 3. Position of Syariah Courts after Independence (1957-now)

Since Malaysia gained its independence in 1957, there were not many improvements in the administration of the Syariah Courts. Similar issues remained in the system of the courts – lack of resources and budget allocations issue<sup>40</sup>. Yet, over time, constitutional amendments by the Parliament have given the state courts that adjudicate disputes arising under Islamic law an increasing amount of autonomy<sup>41</sup>. In fact, since matters relating to Islamic religion are now under the jurisdiction of the State, this has led to an increasing amount of Islamic legislation being passed by the Malaysian states through their respective legislative assemblies<sup>42</sup>. To discuss further, it must be noted first that the modern administration of Syariah courts in Malaysia after the independence can be categorised into two phases: 1957-1998 and 1998 to the present<sup>43</sup>.

#### 3.1 Position of Syariah Courts before 1998 (1957-1998)

On 31<sup>st</sup> August 1957, the Federation of Malaya gained independence and established a new federal nation, consisting of eleven states of the British colonies in the region, and later

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<sup>34</sup> Wan Muhammad (2012), *supra* note 1, citing Abdul Majid Mohamad Mackeen, *The Shariah Law Courts in Malaya*, in Ahmad Ibrahim, Sharon Siddique and Yasmin Hussin (eds.), *Readings on Islam in Southeast Asia* (Singapore: Institute of Southeast Asian Studies (ISEAS), 1985), p. 229.

<sup>35</sup> *Ibid.*, citing Abdul Aziz Bari, *Judiciary*, in Abdul Rashid Moten (ed.), *Government and Politics in Malaysia*, (Kuala Lumpur: Cengage Learning, 2008), pp. 25-26.

<sup>36</sup> Wan Muhammad (2012), *supra* note 1.

<sup>37</sup> Section 6, Courts Enactment of Kelantan 1955, as cited in Wan Muhammad (2012), *supra* note 1.

<sup>38</sup> Wan Muhammad (2012), *supra* note 1.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> Farid Sufian Shuaib, *The Islamic Legal System in Malaysia*, 21 Pacific Rim Law & Policy Journal, no. 1 (2012), pp. 86 *et. seq.*, available at <<http://digital.law.washington.edu/dspace-law/handle/1773.1/1094>>.

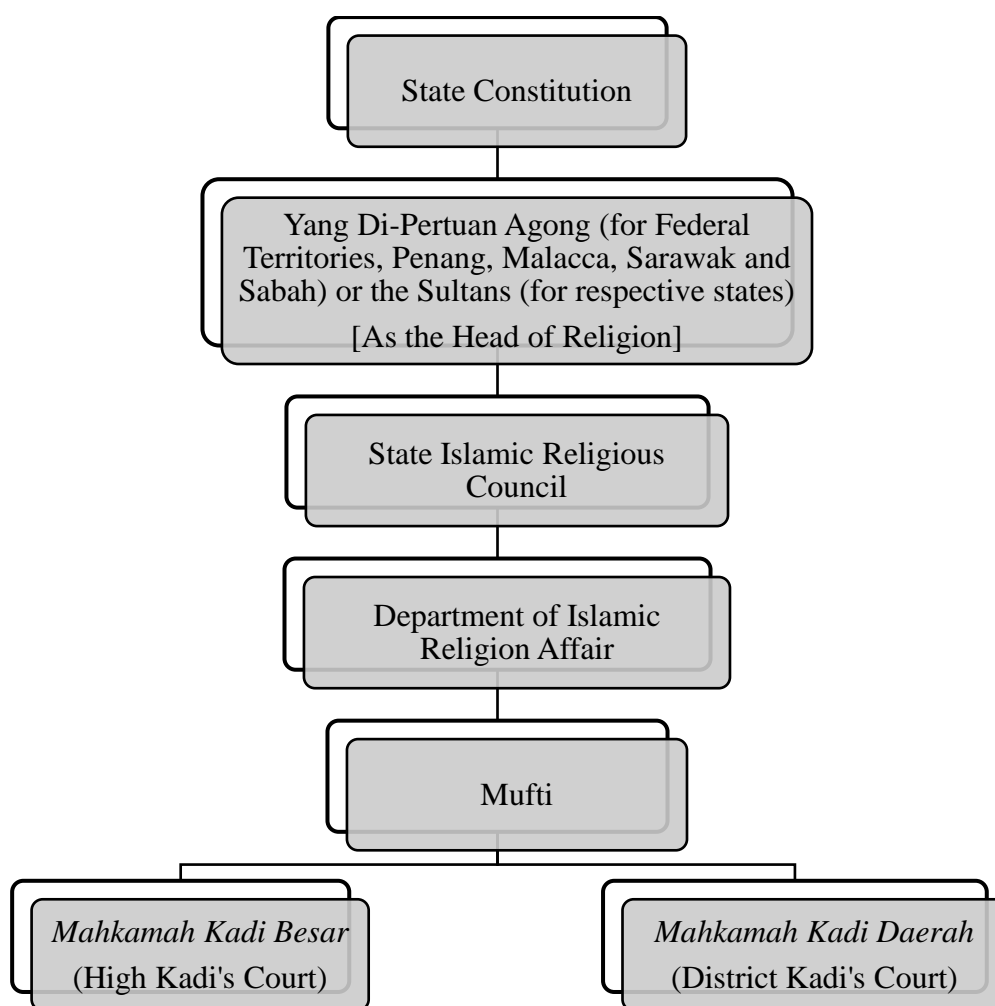
<sup>42</sup> *Ibid.*

<sup>43</sup> Wan Muhammad (2012), *supra* note 1.



eventually be called Malaysia in 1963 with the coming of North Borneo<sup>44</sup> and Sarawak. Upon the independence, the structure of the judiciary body during the independence remained, with the Supreme Court retained as the apex court of the land. During the formation of Malaysia in 1963, the term ‘Federal Court’ came into force replacing the term ‘Supreme Court’. In 1985 the Supreme Court was renamed as the apex court of the federation, replacing the Federal Court<sup>45,46</sup> and became the final appellate court in Malaysia with the abolition of appeals to the Privy Council<sup>47</sup>. By 1994, the Federal Court and the Court of Appeal were established through the 1994 constitutional amendment by the Parliament<sup>48</sup>.

The establishment, jurisdiction, and powers of all courts, except the Syariah courts, are within the legislative powers of the Federal government. Otherwise speaking, all civil courts from the highest to the lowest tier are created under the federal law’s umbrella<sup>49</sup>. Syariah courts are applicable for Muslims, and the laws applicable for them were the state-made laws<sup>50</sup>.



<sup>44</sup> In the present day, North Borneo is called Sabah. The change of name took effect on the Malaysia Day in 1963.

<sup>45</sup> Wan Muhammad (2012), *supra* note 1.

<sup>46</sup> Hamzah (2009), *supra* note 5, p. 204.

<sup>47</sup> Hamzah (2009), *supra* note 5, p. 204.

<sup>48</sup> *Ibid.*, p. 205.

<sup>49</sup> Wan Muhammad (2012), *supra* note 1.

<sup>50</sup> *Ibid.*

Figure 5: Structure of Syariah Court after independence in 1957<sup>51,52</sup>

Before the 1990s, the structure and administration of the Syariah Courts in Malaysia were in a state of confusion<sup>53</sup>. The redundancy and overlapping of power and jurisdiction between the Religious Affairs office, Mufti’s office and other Islamic institutions and agencies, had eventually downgrade the position of the Syariah court as a respectable and important Islamic legal institution in Malaysia<sup>54</sup>. This happened since Syariah Courts are under the category of State courts, of which the administration of the Syariah courts differed from one state to another states<sup>55</sup>.

The public started to lose its faith in the status of the Syariah courts and regarded them as incompetent institutions to dispense justice<sup>56</sup>. It is further observed that even though the time changed along with the development of complex legal disputes, yet not many people came to the Syariah court to settle their problems due to the less satisfactory service and also the fact that most people tend to keep their family problems private<sup>57</sup>.

Most of the laws enforced at the time Malaysia gained its independence in 1957 were the laws promulgated during the British colonisation era. Due to this, the position of the Syariah courts continued to suffer poor status. The implementation of the Courts of Judicature Act 1964, which gave power to the Civil courts to reverse the decision of the Syariah courts, has shown that the Syariah courts were subordinate to the civil courts<sup>58</sup>.

Prior to the restructuring of Syariah courts in 1998, there was no proper mechanism to administer the Syariah courts’ system effectively and efficiently<sup>59</sup>. There were no proper operation procedure and guideline on the management of the Syariah courts’ administration, as everything was left solely to the discretionary power of the officers in charge of the administration<sup>60</sup>. This has resulted in differences in providing decisions between the Malaysian states.

The situation worsened as the Syariah court did not have its own court complex as how the civil courts operate on their own<sup>61</sup>. Some might opine that the court complex can be listed under the “Want” lists rather than “Need” lists, yet it seems that such building is needed to ensure deliverability of the effective and efficient services by the Syariah courts to the people. Likewise, the judicial officers were inadequate in numbers and performances to run the institutions, making the condition of the Syariah courts’ system depleting.

The structure of the Syariah courts’ administration before 1998 also shows the overlapping of power and jurisdiction between the *Fatwa* institution, the court itself and the Islamic Religious Council. The right position is that the Syariah court must be placed

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<sup>51</sup> Wan Muhammad (2009), *supra* note 14.

<sup>52</sup> Wan Muhammad (2012), *supra* note 1.

<sup>53</sup> *Ibid.*, citing Shamrahayu A Aziz, *Islamic Legal System*, in Syed Arabi Idid (ed.), *Malaysia at 50: Achievements and Aspirations* (Kuala Lumpur: Thomson Learning, 2007), p. 236.

<sup>54</sup> Wan Muhammad (2012), *supra* note 1.

<sup>55</sup> Hamzah (2009), *supra* note 5, p. 229.

<sup>56</sup> Wan Muhammad (2012), *supra* note 1.

<sup>57</sup> *Ibid.* Do note that most of the civil jurisdiction of the Syariah courts are related to Muslim family’s affairs, will be further explained afterwards. See List II, 9<sup>th</sup> Schedule of the Federal Constitution.

<sup>58</sup> Wan Muhammad (2012), *supra* note 1.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

independently without any intervention from any other administrative bodies, as any court institutions, be it Syariah or civil court, must exercise its function freely as possible to uphold the justice freely without fear and bias.

As stated earlier, the Syariah courts are state courts. Therefore, the jurisdictional power of the Syariah courts is also confined to the legislation made by the legislative assemblies of the respective states. Prior to 1998, the state enactments were only confined to family laws and Syariah courts enactments. There were confusions and assemblages containing the provisions on administration of Islam, Syariah courts, Syariah offences, and family law in one legislation, such as the Administration of Muslim Law Enactment of Selangor 1952<sup>62</sup>. Such confusions have discreetly tarnished the position of the Syariah courts as independent judicial bodies which deal with the states’ Islamic matters of religion.

However, in the 1980s, efforts to distinguish the Syariah courts from the extensive power of the State Islamic Religious Council were made<sup>63</sup>. The hierarchy of the Syariah courts was been divided into three tiers, namely the Syariah Appeal Court, the Syariah High Court and the Syariah Subordinate Court. Meanwhile, numbers of suggestions have been made to improve the system of the Syariah courts, which include the status and the jurisdiction of the courts, as well as the elevation of position of the *Syari’e* judges and the establishment of special Syariah judicial service<sup>64</sup>. For this effort, Selangor was the first state to separate the Syariah courts from the Islamic Religious Council through the legislated Administration of Islamic Religion Enactment of Selangor 1989<sup>65</sup>. The other states such as Negeri Sembilan and Pahang followed Selangor’s step in 1991. There were states which also introduced two different enactments in order to separate the two bodies, i.e. an enactment only for administration of the state’s Islamic religion and the other enactment specifically for Syariah courts of the state<sup>66</sup>.

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<sup>62</sup> Other example on existing laws relating to Islamic judicial administration prior to 1998 restructuring were Administration of Islamic Law Enactment of Negeri Sembilan 1992, Administration of Islamic Religious Affairs of Terengganu Enactment 1986, and the Administration of Muslim Law of Melaka Enactment 1955.

<sup>63</sup> Wan Muhammad (2009), *supra* note 14.

<sup>64</sup> *Ibid*.

<sup>66</sup> For example, Kelantan has introduced the Syariah Court Enactment 1982 while Kedah has enacted the Syariah Court Enactment 1995, as an effort by the state authorities to separate the Syariah Courts and the Islamic Religious Council.

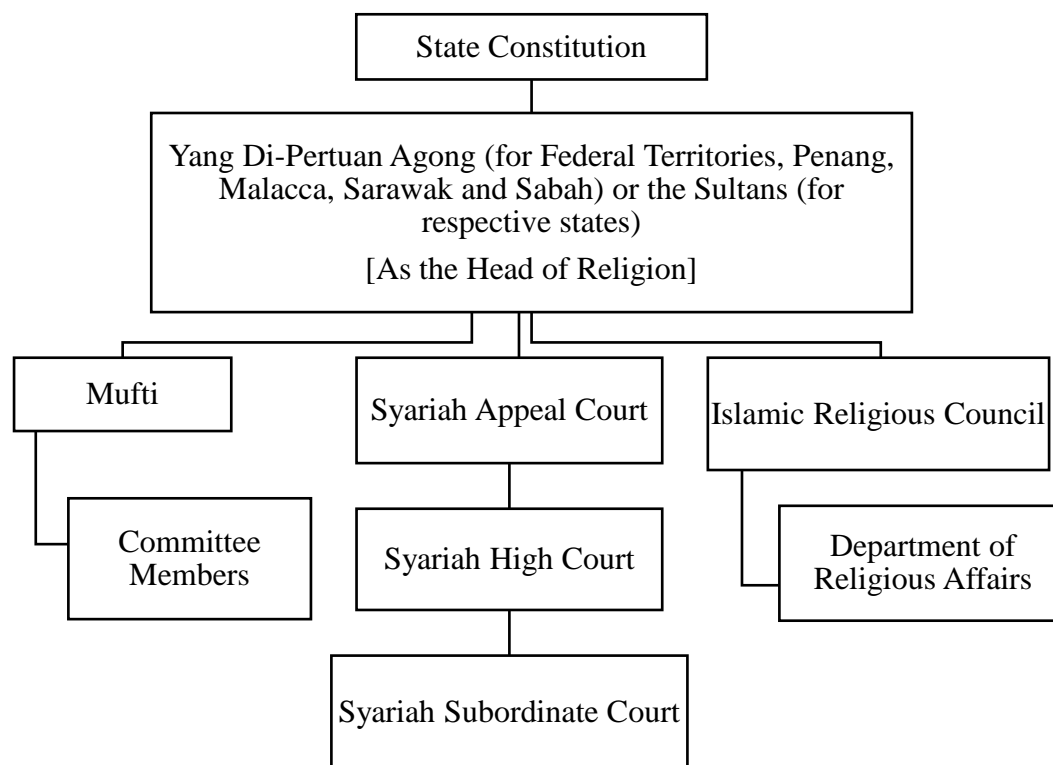


Figure 6: Administration of the Syariah court in 1980s (before 1998)<sup>67</sup>.

### 3.2 Position of Syariah Courts after 1998 (1998 – now)

Due to the problems which occurred in the administration of the Syariah Courts system, the federal government took the initiative to improve the administration of the Syariah Courts.<sup>68</sup> The Cabinet during their meeting on 3<sup>rd</sup> July 1996 agreed for a proposal to re-structure the Syariah Courts in Malaysia and therefore established a special work committee to discuss this plan, which was chaired by Tun Ahmad Sarji Abdul Hamid, the then Chief Secretary to the Government of Malaysia<sup>69</sup>. The work committee proposed for that a centralised federal department named *Jabatan Kehakiman Syariah Malaysia* (JKSM – Department of Syariah Judiciary Malaysia) to be established as a coordinator of the efforts to standardise the administration and management of the Syariah Courts throughout Malaysia, which was later established on 1<sup>st</sup> March 1998<sup>70,71</sup>.

<sup>67</sup> Wan Muhammad (2009), *supra* note 14.

<sup>68</sup> Wan Muhammad (2012), *supra* note 1.

<sup>69</sup> Jabatan Kehakiman Syariah Malaysia, *Latarbelakang JKSM*, (Malaysia, 2018), available at <<http://www.jksm.gov.my/index.php/ms/profil-jabatan/pengenalan/latarbelakang-jksm>>.

<sup>70</sup> Jabatan Kehakiman Syariah Malaysia (2018), *supra* note 70.

<sup>71</sup> Wan Muhammad (2012), *supra* note 1.

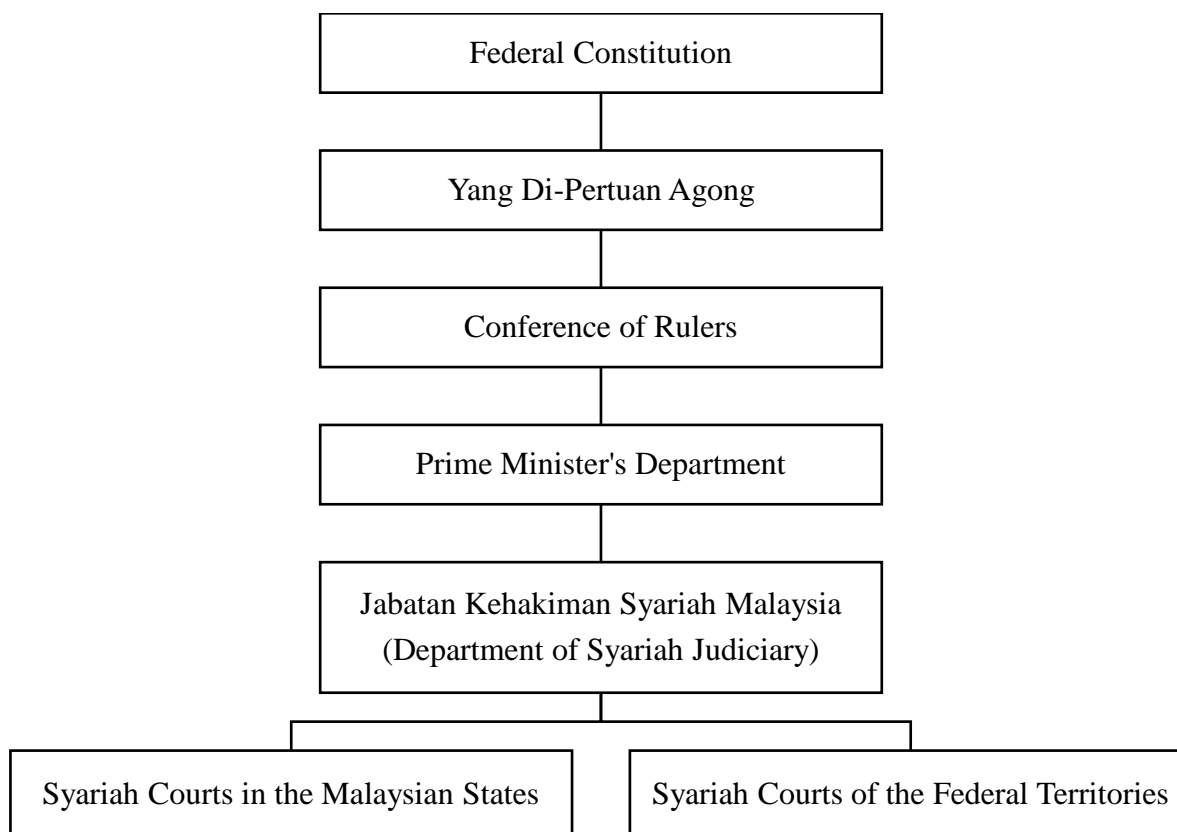


Figure 7: Administration of the Syariah court, 1998-present<sup>72</sup>

The coordination by the JKSM regarding the administration of the Syariah courts also includes the judges, *syarie* prosecutors, *Sulh* officers (mediators), as well as the physical structure of the Syariah courts (the Syariah courts complex)<sup>73,74</sup>. Although JKSM was established by the federal government via the Prime Minister’s Department, such establishment did not revoke the conferment of jurisdiction of Syariah courts to deal with matters relating to Islamic religion among the Muslims in the Malaysian states, as any initiative and coordination made by the JKSM is still subject to the consent of each state’s authority. Additionally, the state legislatures need to expressly confer jurisdiction on the Syariah courts through enactments<sup>75,76</sup>. It is noted that any proposal by the Prime Minister’s Department relating to JKSM and the states’ Syariah courts will also be conveyed to the Conference of Rulers for their notice and further discussions in their meeting.

To ensure a smooth administration, JKSM has introduced a proper hierarchical administrative structure in its department. JKSM is headed by the Director-General, who is also the Chief Syarie Judge. He is assisted by four Syariah Appeal court judges. The hierarchy continues with the Chief Registrar and followed by the Syariah legal officers, which include

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> Wan Muhammad (2009), *supra* note 14.

<sup>75</sup> Act for Federal Territories and Ordinance for Sarawak.

<sup>76</sup> Shuaib (2008), *supra* note 2, p. 82, commenting on *Ng Wan Chan v. Majlis Ugama Islam Wilayah Persekutuan & Anor.* (No. 2) [1991] 3 MLJ 487. See also *Lim Chan Seng v. Pengarah Jabatan Agama Islam Pulau Pinang & another case* [1996] 3 CLJ 231, as the court in this case took similar approach as how in *Ng Wan Chan*.

the *Syari’e* prosecutors, *Sulh* officers, Registrars, legal research officers and others on the bottom of the hierarchy<sup>77</sup>.

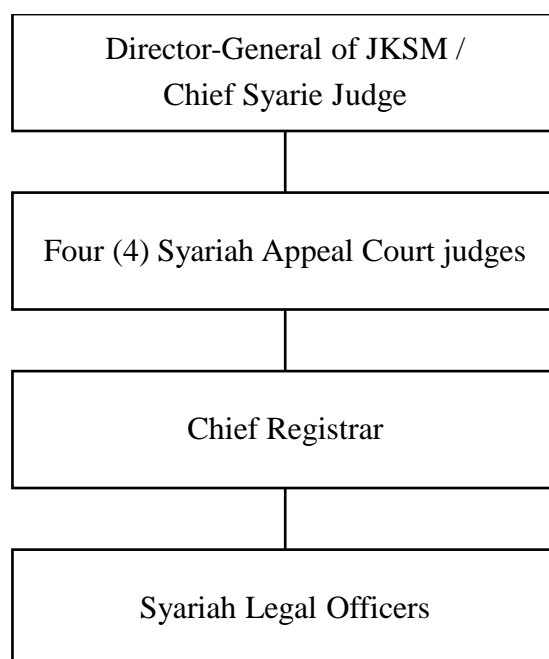


Figure 8: Administrative hierarchy of Department of Syariah Judiciary Malaysia (JKSM)<sup>78</sup>

As a reinforcement effort to standardise the Syariah courts administration in Malaysia, a joint scheme was also introduced in 1998 to upgrade the status of the Syariah courts and to improve the welfare and interest of the Syariah officers<sup>79</sup>. However, this scheme can only be enabled with the consent of the Head of Religion in each state, who is the Sultan or Yang di-Pertuan Agong (for Federal Territories, Penang, Malacca, Sarawak and Sabah). Therefore, on 17<sup>th</sup> May 1999, a Syariah Joint Service Treaty was signed between the Federal Government and the states of Selangor, Perlis, Melaka and the Federal Territories to serve this purpose. Negeri Sembilan and Pulau Pinang only joined the treaty in August 1999, followed by Sabah in 2000<sup>80</sup>.

It is highlighted that even though the JKSM has been established, the Syariah courts are still under the jurisdictions of the states. JKSM was been established to bring uniformity to Islamic law administration, i.e. the Syariah courts in the states. In addition, since the headquarters for JKSM is in the Federal Territory of Kuala Lumpur, it is expected that the laws relating to Syariah courts administration of the states are modelled based on the Syariah courts of the Federal Territories<sup>81</sup>. It is applaudable that the Malaysian states did not object much to

<sup>77</sup> Wan Muhammad (2009), *supra* note 14.

<sup>78</sup> *Ibid.*

<sup>79</sup> Wan Muhammad (2012), *supra* note 1.

<sup>80</sup> Wan Muhammad (2012), *supra* note 1.

<sup>81</sup> The laws which has been introduced by the Parliament to administer Islamic law and to be upheld by the Syariah courts in Federal Territories are as follow: Administration of Islamic Law (Federal Territories) Act 1993, Islamic Family Law (Federal Territories) Act 1984, Syariah Court Evidence (Federal Territories) Act 1997, Syariah Court

the suggestion by the Federal government. of Most of the states took the steps to follow the laws enacted by the Parliament for Federal Territories. At the state level, the *Jabatan Kehakiman Syariah Negeri* (JKSN - Department of State Syariah Judiciary), was established to work as a feeder to JKSM at the federal level. Both departments will supervise the administration of the Syariah courts in their respective states<sup>82</sup>.

One of the objectives of the Syariah courts is to give swift and efficient treatment to each case registered in each court<sup>83</sup>. Accordingly, cases registered shall go on trial within 21 days after the date of registration<sup>84</sup>. As stated earlier, the Muslims in Malaysia tend to keep their disputes private, i.e. not opting for the Syariah courts to solve legal disputes. For this purpose, JKSM has also introduced the *Sulh* or mediation method as an alternative by any disputing Muslims to solve their problem without going for trial<sup>85</sup>. This alternative was introduced first in 2001 in Kuala Lumpur, and has been followed by other states’ Syariah courts ever since. *Sulh* is encouraged especially in family matters as it saves time, privacy-friendly, as well as providing comfort for disputing parties to get better solution with long-term effect. *Sulh*, as the conventional mediation, has proven to benefit both disputing parties and the Syariah courts, since the bureaucracy of the process for the case settlement can be reduced.

Another alternative taken by JKSM was to establish the *Bahagian Sokongan Keluarga, JKSM* (BSK – Family Support Division) which deals specifically with family matters<sup>86</sup>. BSK was purposed to be an enforcement unit for the Syariah courts’ decision relating to family matters. Failure of any disputing party to comply with the court’s decision in such a case will be enforced by legal action by the division. Apart from that, JKSM has also improved the recruitment and service scheme of the *Syari’e* judges and the *Syari’e* legal officers in the Syariah courts<sup>87</sup>. Practice Directions manual was been introduced in 2000 as a guideline for all members of the Syariah courts pertaining to administrative aspects, substantive laws, procedural rules of the operation of the courts. E-Syariah portal, too, was introduced to support this improvement<sup>88</sup>. This portal will help the disputing parties to register their case online, of which will increase the efficiency of the Syariah courts in Malaysia. All efforts stated will help to ensure the effectiveness and uniformity in administering Syariah cases in all states in Malaysia.

#### 4. Jurisdiction of Syariah Courts and issues

Under the Federal Constitution of Malaysia, Syariah courts have jurisdiction only over persons professing the religion of Islam accordingly within the boundaries of the respective states or territories (for Federal Territories’ cases). As stated earlier, due to this, there is no uniformity in the administration of the Syariah courts throughout Malaysia.

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Civil (*Mal*) Procedure (Federal Territories) Act 1998, Syariah Criminal Procedure (Federal Territories) Act 1997, and Syariah Criminal Offences (Federal Territories) Act 1997.

<sup>82</sup> Wan Muhammad (2012), *supra* note 1.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*, citing Department of Syariah Judiciary Malaysia (JKSM), *Practice Direction No. 2/ 2001*, (Malaysia, February 2, 2001).

<sup>85</sup> Wan Muhammad (2012), *supra* note 1.

<sup>86</sup> *Ibid.*

<sup>87</sup> Wan Muhammad (2012), *supra* note 1.

<sup>88</sup> *Ibid.*

The structure of jurisdiction of the Syariah courts is the same as the civil courts – divided into two, namely the civil jurisdiction and the criminal jurisdiction. The states’ enactments relating to Syariah courts are bound to specify the civil and criminal jurisdiction as provided by the Federal Constitution<sup>89</sup>:

“... *Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; wakafs ... creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; ... the determination of matters of Islamic law ...*”.

#### 4.1 Civil jurisdiction of the Syariah Courts

The civil jurisdiction of the Syariah courts includes matters relating to personal and family law of the Muslims in the state. Generally, the Syariah courts may hear and determine the dispute in any case which relates to as follows<sup>90</sup>:

- i. Betrothal, marriage, *ruju'*, divorce, nullity of marriage (*fasakh*), *nusyuz*, or judicial separation (*faraq*) or other matters relating to the relationship between the husband and wife;
- ii. Matters regarding disposition of, or claim to, property arising out of any of the matters relating to the relationship between husband and wife;
- iii. Matters relating to maintenance of the dependants, legitimacy, or guardianship, or custody (*hadhanah*) of infants;
- iv. Division of, or claim to, *harta sepencarian* (joint-acquired properties);
- v. Wills or death-bed gifts (*marad al-maut*) of a deceased Muslim;
- vi. Gifts *inter vivos* (*hibah*) or settlements made without adequate consideration in money or money’s worth by a Muslim;
- vii. *Wakaf* or *Nazar*;
- viii. Division and inheritance of testate or intestate property;
- ix. Determination of the persons entitlement to share in the estate of a deceased Muslim or of the shares to which such persons are respectively entitled;
- x. Declaration of that a person is no longer a Muslim<sup>91</sup>;

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<sup>89</sup> Nasimah Hussin, Ramizah Wan Muhammad, and Majdah Zawawi, *Punishment under the Criminal Jurisdiction of Syariah Courts of Malaysia : Issues and Prospect for Reform*, (n.d.), pp. 1-8.

<sup>90</sup> Section 46(2)(b) of Administration of Islamic Law (Federal Territories) 1993 (Act 505).

<sup>91</sup> No specific provision under the Administration of Islamic Law (Federal Territories) 1993, but there are specified provision on this in Section 61(3)(b) of Administration of Islamic Religion (Pulau Pinang) Enactment 2004 and Section 13(3)(b) of Syariah Courts (Kedah Darul Aman) Enactment 2008.



- xi. Declaration of that whether a deceased person was a Muslim or not at the time of his death<sup>92</sup>;
- xii. Registration and adoption of child and for matters relating thereto<sup>93</sup>; or,
- xiii. Other matters in respect of which jurisdiction is conferred by any written law in the states relating to Islamic religion.

## 4.2 Criminal jurisdiction of the Syariah Courts

For criminal jurisdiction, the states’ enactments list several Islamic criminal offences which are triable in the Syariah courts. Generally, the criminal offences can be categorised into six classes – matrimonial offences, offences relating to sex, offences relating to consumption of intoxicants, offences relating to spiritual aspect of Muslim communal life, offences relating to the sanctity of the religion, and miscellaneous offences apart from those mentioned<sup>94</sup>.

As stated earlier, the jurisdiction of the Syariah courts regarding criminal matters is limited to that conferred by the Federal Constitution. To ensure a minimal safeguard to the Syariah courts’ criminal jurisdiction, Parliament has also enacted the Syariah Courts (Criminal Jurisdiction) Act 1965 (Amendment) 1984<sup>95</sup>, limiting the jurisdiction of the Syariah courts to offences punishable with imprisonment for a term not exceeding three years, or with any fine not exceeding five thousand ringgit, or with whipping not exceeding six strokes, or with any combination thereof<sup>96</sup>.

From the brief explanation above, the position of the Syariah courts in Malaysia in extending the applicability of Islamic criminal law is clear. Only a small part of the Islamic crimes and punishments are included under the jurisdiction of the Syariah courts<sup>97</sup>. Core crimes which are prohibited in Islamic religion and law such as homicide, theft, robbery, rape, and abetting towards the commission of these crimes, are under exclusive jurisdiction of the civil courts, as these crimes are crimes listed in the Penal Code. For such crimes, the Syariah courts do not have any jurisdiction to hear the cases, as they have been specifically stated by the Federal Constitution. The civil courts too, has decided that the federal laws do not have to conform to Islamic principles in deciding the case, as what the law has prescribed<sup>98</sup>.

## 4.3 Issues in Syariah courts

### 4.3.1 Jurisdictional issue : Civil court vs. Syariah court

There are few examples where the civil court simply overruled the decisions of the Syariah court, of where the rules to solve the disputes were largely prescribed in the Islamic laws. This is due to the fact that the Syariah court decisions, historically, needed to be enforced

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<sup>92</sup> *Ibid.*

<sup>93</sup> See Section 11(3)(b)(xi) of the Syariah Courts (Sabah) Enactment 2004.

<sup>94</sup> Hussin, Wan Muhammad, and Zawawi (n.d.), *supra* note 90.

<sup>95</sup> Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355).

<sup>96</sup> Section 2 of Act 355.

<sup>97</sup> Hussin, Wan Muhammad, and Zawawi (n.d.), *supra* note 90.

<sup>98</sup> *Che Omar bin Che Soh v. Public Prosecutor* [1988] 2 MLJ 55.

by the magistrates’ court – the lowest court in the hierarchy of civil courts<sup>99</sup>. This has deprived the Muslims from getting the right which they should be entitled from the first place. Curiously, yet interesting to be heard, some of the cases were presided by non-Muslim judges – which has destroyed the value of the Shariah in the Islamic legal system<sup>100</sup>. The civil courts have not only interpreted the Islamic law simply but have also denied the opportunity for the Syariah courts to adjudicate upon the disputes accordingly.

The best example to show the conflicting construction of Islamic law interpretation between the qualified Syariah court and the civil court (said to be well qualified) in deciding case relating to Islamic religion matter can be seen in *Tengku Mariam binti Tengku Sri Wa Raja & Anor v. Commissioner for Religious Affairs, Terengganu & Ors*<sup>101</sup>. In this case, the question of the validity of *wakaf* made by the testator for the benefit of the family and relatives was referred to the *Mufti* of Terengganu, who gave a *fatwa* which declaring the *wakaf* to be valid. The propounding parties then brought this case to the High Court, which decided that it was not bound by the *fatwa* issued by the *Mufti* earlier – showing that the power to decide on Islamic laws appears to be with the civil court.

Farid Sufian in his book, Powers and Jurisdictions of Syariah Courts, when commenting on the decision made in *Tengku Mariam’s* case, has highlighted the problem in the process of propounding the Islamic law, whereby in this case, the High Court has suggested the position of the law by referring to the previous Privy Council’s decisions<sup>102</sup>, which were made by referring to the common law doctrine, instead of referring to the main source of the Islamic laws itself, i.e. the Quran, the Sunnah, and the authoritative opinions by the Muslim jurists<sup>103</sup>. Such silent destruction of the Syariah court system has eventually misled the direction of the Islamic judicial administration in the early years of independence.

In 1988, the constitutional amendment was been made. Through this amendment, a new clause, (1A), was inserted in Article 121<sup>104</sup>. The article is as follows<sup>105</sup>:

121. (1) there shall be two high Courts of co-ordinate jurisdiction and status, namely—
- (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and
  - (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

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<sup>99</sup> Shuaib (2012), *supra* note 41.

<sup>100</sup> Wan Muhammad (2012), *supra* note 1.

<sup>101</sup> *Tengku Mariam binti Tengku Sri Wa Raja & Anor v. Commissioner for Religious Affairs, Terengganu & Ors* [1969] 1 MLJ 110.

<sup>102</sup> Shuaib (2008), *supra* note 2, p. 154, citing and commenting *Abdul Fata Mohamed Ishak v Rasamaya Dhur Chowdri* (1894) LR 22 IA 76, ILR 22 Cal 619; and *Fatuma binti Mohammed bin Salim Bakhshuwen & Anor. v Mohammed bin Salim Bakhshuwen* [1952] AC 1.

<sup>103</sup> Shuaib (2008), *supra* note 2, p. 154.

<sup>104</sup> Added by Act A704, paragraph 8(c), in force from 10-06-1988.

<sup>105</sup> See Article 121 (1A) of the Federal Constitution of Malaysia.

and such inferior courts as may be provided by federal law; and the high Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

(1A) the courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

The amendment was made as an effort by the federal government to prevent overlapping and redundancy of jurisdiction between the civil courts and the Syariah courts, in terms of conflict between the decisions of the two courts<sup>106</sup>. Subsequently, the efforts seemed to have not worked well. In *Shahamin Faizal Kung bin Abdullah v. Asma bte Haji Yunus*<sup>107</sup>, the civil court ruled that the issue regarding the custody of the children in this case was within the jurisdiction of the Civil Courts. Edgar Joseph J. (as he then was) stated that such insertion of Article 121 (1A) in the Federal Constitution did not set aside the Court of Judicature Act 1964 and therefore, the jurisdiction of the civil court was still recognised to hear the case. In other words, the civil court’s jurisdiction was not excluded in hearing the case. It was quite shocking that the civil court did not recognise the jurisdiction conferred by the Federal Constitution, the supreme law of Malaysia<sup>108</sup>, to the Syariah courts through the amendment which has been made to the constitution<sup>109</sup>.

However, in *Mohamed Habibullah bin Mahmood v. Faridah bte Dato Talib*<sup>110</sup>, the Supreme Court did discuss on the issue of jurisdiction of civil court and Syariah courts. Harun Hashim SCJ (as he then was) noted the error made in Shahamin’s case and delivered the following views<sup>111</sup>:

“... it is obvious from the very beginning that the makers of the Constitution clearly intended that the Muslims of this country shall be governed by Islamic Family Law as evident from the Ninth Schedule to the Constitution ... Such laws have been administered not only by the Syariah Courts but also by the civil courts. What art 121(1A) has done is to grant exclusive jurisdiction to the Syariah Courts in the administration of such Islamic Laws. In other words, art 121(1A) is a provision to prevent conflicting jurisdictions between the civil courts and the Syariah Courts...”

Since *Mohamed Habibullah*’s case, the later cases started to recognise the status and exclusive jurisdiction of the Syariah court in Malaysia. Despite the efforts to bring glory to the Syariah courts, it is undeniable that there are judges and writers who still do not accept the special position of the Islamic judiciary system in Malaysia, especially regarding the source of interpreting Islamic laws and the procedural laws provided under the Syariah courts system. For instance, Gopal Sri Ram JCA (as he then was) in *Saravanan Thangathoray v. Subashini*

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<sup>106</sup> Wan Muhammad (2012), *supra* note 1.

<sup>107</sup> *Shahamin Faizal Kung bin Abdullah v. Asma bte Haji Yunus* [1991] 2 CLJ 327, [1991] 3 MLJ 327.

<sup>108</sup> See Article 4 of the Federal Constitution of Malaysia.

<sup>109</sup> Wan Muhammad (2012), *supra* note 1.

<sup>110</sup> *Mohamed Habibullah bin Mahmood v. Faridah bte Dato Talib* [1992] 2 MLJ 793.

<sup>111</sup> *Ibid.* pp. 804-805.

*Rajasingam and another appeal*<sup>112</sup> continued to argue that the duty of the civil courts is to construe written law without regard to the body of Islamic jurisprudence<sup>113</sup>.

To ensure a good connection between the civil court and the Syariah courts, it has been suggested both court systems must work together<sup>114</sup>. Yvonne Tew has commented that jurisdictional complexities should not obscure the fact that constitutional issues remain in the ambit of the civil courts, and that proper engagement (by both civil and Syariah courts) is required to provide meaningful protection of the fundamental constitutional rights of the people<sup>115</sup>.

#### 4.3.2 Act 355 Amendment Proposal issue.

On 26<sup>th</sup> May 2016, the Member of Parliament for Marang proposed in the Parliamentary session for the amendment of Syariah Court (Criminal Jurisdiction) Act 1965 (Act 355)<sup>116</sup>. This amendment is to empower the Act for a higher limit of punishment. The current limit for the punishment provided in the Act are imprisonment for not more than three years, fine not exceeding RM 5, 000 and caning not more than six lashes<sup>117</sup>. The initial proposal by the Marang MP was that to maximise the limit of punishment accordingly to the Islamic laws, but not to the extent of death penalty<sup>118</sup>. On 24<sup>th</sup> November 2016, Marang MP has specify the proposal of the punishment limits as follow<sup>119</sup>:

- (i) Imprisonment to be increased from the limit of three years to 30 years;
- (ii) Fine to be increased from not exceeding RM 5, 000 to not exceeding RM 100,000, and;
- (iii) Caning is to be increased from six lashes to not more than 100 lashes.

The proposal has attracted various responses from the public. It has been a controversial issue as some would call for withdrawal of the proposal from the Parliamentary session as they were of the view that this will enable *hudud* law to be implemented fully in Malaysia. Sceptical and ignorant as it is, such claim by certain parties can be said to be baseless. The proposal made was to increase the limit of punishment can be imposed by the Syariah courts. Ahmad Mustaqim Zaki in his article was indeed correct in commenting that the *hudud* law may and may not be able to be implemented if this Act is to be amended<sup>120</sup>.

The position is yet to be known as the discussion on the proposal is still ongoing in Parliamentary meeting and yet to be decided by the Parliament. However, regardless of the

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<sup>112</sup> *Saravanan Thangathoray v. Subashini Rajasingam and another appeal* [2007] 2 MLJ 705.

<sup>113</sup> Shuaib (2008), *supra* note 2, p. 157.

<sup>114</sup> Shuaib (2012), *supra* note 41.

<sup>115</sup> Yvonne Tew, *The Malaysian Legal System: A Tale of Two Courts*, 7 Georgetown Law Faculty Publications and Other Works, no. 1922 (2011), pp. 3–7, available at <<https://scholarship.law.georgetown.edu/facpub/1922>>.

<sup>116</sup> Government of Malaysia, *Parliamentary Hansard*, (Malaysia, May 26, 2016), p. 49, available at <<http://www.parlimen.gov.my/files/hindex/pdf/DR-26052016.pdf>>

<sup>117</sup> Section 2 of Syariah Court (Criminal Jurisdiction) Act 1965 (Act 355).

<sup>118</sup> Government of Malaysia (2016), *supra* note 118.

<sup>119</sup> Ahmad Mustaqim Zaki, *RUU 355: 10 persoalan mudah yang perlu diketahui* (Malaysia, February 7, 2017), available at <<https://www.malaysiakini.com/news/371708>>.

<sup>120</sup> Zaki (2017), *supra* note 121.

final decision by the Parliament, the position of the Syariah courts must stand as it is, i.e. the Syariah courts shall retain the sole and exclusive jurisdiction as guaranteed by the Federal Constitution. Such a position has been observed in *Dato’ Hj Shahari bin Hj Hassan v. Hj Shamsudin bin Talib & Ors*<sup>121</sup>, which it has been made clear by the Constitution that civil courts shall not deal with any matter pertaining to Islam and that such matter must be heard by judges who are qualified and competent in Islamic law (the *Syari’e* judges and the Syariah courts).

## Conclusion

Syariah courts in Malaysia have transformed into a strong institution in Malaysia with a number of substantive laws, procedural laws and other subsidiary law since independence. The establishment of the Department of Syariah Judiciary (JKSM) is indeed an achievement in history of Islamic legal system as an agency to coordinate the implementation and administration Islamic law as well as to provide opportunities to the staff to explore in research, IT and other skills.

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<sup>121</sup> *Dato’ Hj Shahari bin Hj Hassan v. Hj Shamsudin bin Talib & Ors* [1998] 3 MLJ 705.