

## **Comparative Study of the Process of Islamic Law Legislation in Indonesia with Malaysia and Its Implementation into Legislation Regulations**

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### **Abstract**

Islamic law in Indonesia and Malaysia in terms of rules and regulations, to explain the position of customary law, and Islamic law in the statutory system in Indonesia and Malaysia, and to find out how the implementation of Islamic law in Indonesia and Malaysia which is a product of legislation. The results showed that the legislative process of Islamic law in Indonesia and Malaysia is colored by various methods so that it is formed into statutory provisions; Islamic legal legislation in Indonesia is the basis for the formation of laws is a reflection of regulations that become the ideology of the state philosophy not only of Islam but also for adherents of other religions. The Islamic law legislation in Malaysia begins with issues requiring legal certainty to ensure that Muslims can overcome the mistakes and problems faced. There are times when fatwas are merely fatwas and not one law. When the fatwa becomes law, if it is approved by the Sultan and agreed upon by the Majelis Mesyuarat of their respective Kingdoms if the regulation is in line with the basis of the determination, then the law can be applied; on the contrary, the established law is not in line with the vision and mission of the nation, then the product of the legislation will disappear control.

**KEYWORDS** *Fatwa, Custom Law, Islamic Law, Legislature, Majelis Mesyuarat*



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## Abstrak

Hukum Islam di Indonesia dan Malaysia ditinjau dari segi peraturan perundang-undangannya, untuk menjelaskan kedudukan hukum adat, dan hukum Islam dalam sistem perundang-undangan di Indonesia dan Malaysia, serta untuk mengetahui bagaimana penerapan hukum Islam di Indonesia dan Malaysia yang merupakan produk peraturan perundang-undangan. Hasil penelitian menunjukkan bahwa proses legislasi hukum Islam di Indonesia dan Malaysia diwarnai dengan berbagai cara sehingga dituangkan dalam ketentuan perundang-undangan; Perundang-undangan hukum Islam di Indonesia yang menjadi dasar pembentukan undang-undang merupakan cerminan peraturan yang menjadi ideologi falsafah negara tidak hanya Islam tetapi juga bagi pemeluk agama lain. Perundang-undangan hukum Islam di Malaysia diawali dengan permasalahan yang memerlukan kepastian hukum untuk menjamin umat Islam dapat mengatasi kesalahan dan permasalahan yang dihadapi. Ada kalanya fatwa hanyalah sekedar fatwa dan bukan satu undang-undang. Ketika fatwa tersebut menjadi undang-undang, jika disetujui oleh Sultan dan disepakati oleh Majelis Mesyuarat Kerajaan masing-masing, jika peraturan tersebut sesuai dengan dasar penetapan, maka hukum tersebut dapat diterapkan; sebaliknya, undang-undang yang ditetapkan tidak sejalan dengan visi dan misi bangsa, maka produk peraturan perundang-undangan akan hilang kendali.

**KATA KUNCI** *Fatwa, Hukum Adat, Hukum Islam, Legislatif, Majelis Mesyuarat*

## Introduction

According to Azyumardi Azra, the phenomenon of the entry of<sup>1</sup> Islam in Indonesia does not only come from one place, the role of a single group, and not at the same time. However, Muslim scholars agree that Sumatra was the first area visited by Islam, starting from Barus, Aceh, and Pasai in the 12th to 14th centuries and developed rapidly in the 15th to 15th

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<sup>1</sup> Azra, Azyumardi, *Jaringan Ulama Timur Tengah dan Kepulauan Nusantara abad XVII dan XVIII*, Bandung: Mizan, 1994.

centuries A.D. From Aceh.<sup>2</sup> Islam developed in the Javanese area, namely Jepara, Tuban, and Gresik, in the 14th century (1450 AD). Then it continued to the Ternate and Tidore areas in the 15th century, in 1460. Ten years later, Islam entered the Demak area in 1480 and developed rapidly with the establishment of the Demak kingdom from 1575 to 1580 AD. Finally, Islam reached the Banten and Cirebon areas in the same year in 1525 or the 15th century AD. Meanwhile, the Kalimantan area, Buton, and Banjarmasin Islam came in the 16th century AD (1580). The development of Islam in this area marked the establishment of the Banjar kingdom from 1980 to 158. In the same year as the end of Banjar's Islamic empire, Mataram's Islamic empire was established from 1588 to 1749. The entry and development of Islam in Makasar occurred in the early 16th century, 1605-1669. The process of Islamization by scholars gave birth to Muslim communities in various regions that encouraged the establishment of Islamic kingdoms. It started with the first two professional Sufi figures of the trade Sufi faction, which became the people's economic power, and the Sultan's second figure, who spread Islam through his rule.

The history of the entry of Islam in Malaysia dates back to the kingdom of Malacca through Muslim merchants from India and Arab-Persia around the 7th century AD. After the 7th century AD in the 13th century, Islam developed rapidly and spread widely with the discovery of evidence of Islamic nuances. Such as the Terengganu stone monument found in Kuala Barang. This stone is a lettered stone that uses Arabic inscriptions but speaks Malay, so it is marked that the area is an area that has spread Islam. The stone discoveries are inscribed in Arabic, meaning that Islam already existed and was settled at that time; although its discovery was in the 13th century, Islam had developed and was accepted by the public before the evidence was written.

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<sup>2</sup> Hasjmy, A, *Sejarah Masuk dan Berkembangnya Islam di Indonesia*, Bandung: Al-MA'arif, 1989

Related to the development of Islam in Malaysia, Richard Winstead (Osman 1989) stated that the transfer of<sup>3</sup> Islam at that time was facilitated by the fact that the *muballigh* who came from India at that time united the teachings of Islam with the existing belief beliefs. It is the same as the development of Islam in the land of Jawi involving the saints. An example of the expansion of Islam in Malaysia is Indian Muslim merchants, adherents of Sunni Islamic teachings which are heavily influenced by Sufi mysticism. Furthermore, the fusion of Sunni and Sufi practices combined with traditional Malay beliefs and customs - such as animism, allowed for the evolution of the unique form of Islam that is still practiced in Malaysia today.

Therefore, it can be seen in the life of Malaysian Islamic society that, until now, most Malaysian Islamic people still believe and apply the value of the mystical belief tradition. Even in a cultural Arasy leaned on formal law, where Malaysia officially made Islam the state religion, the mecca of its shari'a understanding is Imam Shafi'i. At this level, it means that Islam has transformed the culture of the Malays into a force to be based on life, both in the *muamalah* / social field and life in the political sphere.

Looking at the relationship, it is undeniable that customary Law and Islamic Law are real forms that cannot be separated and affect each other's existence. Because both are manifestos of values and symbols. Religion is a symbol that expresses outward obedience, while customary law is a symbol that directs humans to be able to live in their environment.

Thus, the term revolutionizes customary law is not known in Islamic Law. The Prophet Muhammad, with his own companions as in his history, has never revolutionized the law, so long as the existing law does not intersect with the fundamental principle of Islamic Law. This means that in the face of customary Law, Islamic Law has a way to take it, namely:<sup>4</sup>

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<sup>3</sup> Abdul Rohman, *Perkembangan Islam dan Gerakan Politikanya di Malaysia*. JPW (Jurnal Politik Walisongo) – Vol 2, No 1 (2020), p.30

<sup>4</sup> Muhammad bin Ismail al-Bukhariy, *Shahih al-Bukhariy*, Juz IV, h. 181. Al-Nawawi, Shahih Muslim bi Syarhi al-Nawawi, Juz XI (Mesir: Matba'at al-Mishriyah, 1924), p. 53.

1. The benchmark of Islamic Law when declaring that there is no longer validity of customary law, and the old institutions can be seen in terms of principles and in terms of implementation. In this regard, Islamic Law applies as a whole, replacing the old pattern practiced by society. For example, the pre-Islamic Arab custom of drinking *khamar* or gambling does not apply to the traditions of pre-Islamic communities that practiced a lot of gambling and *khamar* as a custom. From this, Islamic Law replaces customary law because pre-Islamic Arabs are no longer relevant to the principle of Islamic Law.
2. If there are differences in principles and implementation between Islamic Law and existing customary law, then the implementation of Islamic Law should be the top priority, and customary law can be implemented when circumstances permit. For example, the difference between the principle of unilateral inheritance according to Arab customs and the principle of bilateral inheritance according to Islamic Law.

The description and example above show that the attitude of Islamic Law to perceive or reject customary law depends on the *maslahah* element and the *mafsadah* element. This means that as long as the customary law can still be useful and does not bring damage, the customer can continue to be enforced and implemented in a community.

Customary Law with Islamic Law in Malaysia can be said to be the same; there is only a slight difference regarding the place that uses the law, meaning that the customary law in force in Malaysia can still run and be accepted as long as it does not conflict with the principles of Islamic Law. Islamic Law is derived from the Holy Book of the Qur'an and hadith, laws that have been agreed upon by jurists in ancient times, and explanations or statements from ancient and modern scholars in custom. Malaysia, which has racial diversity in each region, places Islamic Law as a law that only applies to Muslims as individual Laws, such as marriage, divorce, guardianship, and inheritance.

Meanwhile, customary law, according to Abdul Samad Idris, is the one-on-one practice that is Ghalib or commonly done by a community group in regulating their daily way of life. This means that the law is still passed down for generations in a society, so it is a law that must be obeyed. In addition, the custom is also said to be a reality of social life that does not conflict with sharia or Islamic Law. One example of Malaysian customary law that is contrary to Islam was later abolished, namely:<sup>5</sup>

1. Saka

*Ancak Saka* is a tradition made from bamboo sticks and banana leaves filled with yellow Pulut, Ketupat, and so on, with the aim of being fed to the jinn under the pretext that takes care of his family.

2. Customs of establishing a new home

This custom is carried out, such by hanging young coconuts on each pole of the house and planting iron, gold, and copper-silver as protection for the new home. Many assume that the ceremony is a ceremony of entertaining and has nothing to do with the safety and well-being of the occupants of the house.

From the example above, it can be concluded that Islamic Law views custom with benefits that do not conflict with the principles of Islamic Law itself; if the tradition is contrary to Islamic Law, then indirectly, the custom violates the principles of Islamic Law, as we know that Islamic Law in its implementation has methods and principles.

## Methods

This type of research is field *research*. In this case, the researcher goes directly to the field and engages with the local community and or with participants in order to know the conditions in the field directly while also getting a more comprehensive picture and data about the local situation.

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<sup>5</sup> Noraishah, *Adat Melayu Yang Bertentangan Dengan Islam*, 10 April 2016, (<http://salamukhwahctu.blogspot.com/2016/04/10-adat-melayu-yang-bertentangan-dengan.html?m=1>), 1 Oktober 2021.

The subject of the research is the Legislation, and Institutions related to research, such as the governments of Indonesia and Malaysia, are judicial institutions. Data research collection was carried out in the form of interviews, observations, and documentation studies. Data collection instruments are tools chosen and used by researchers in their collecting activities so that these activities become systematic and facilitated by them.<sup>6</sup> The data collection instruments used in this study are as follows:

1. Live Observation

To obtain objective data, the researcher makes direct observations and plunges directly into the research site.

2. Interview

In this study, in-depth interviews were used that were based on the technical criteria of the interview. The interview method used is a guided free interview; that is, the interviewer only brings guidelines that are an outline of the things to be asked. Interviews are not always conducted in formal situations, but accidental questions are also developed according to the flow of discussion related to research

3. Documentation

Another method used by researchers in data collection is by means of documentation in the form of documents from the inheritance distribution process, such as photos, vocal cord recordings, books, journals, articles, and so on related to the research theme.

Based on the formulation of the problem and the purpose of the study, the analysis data is carried out descriptively - qualitatively to describe and describe the state of the research object at the present moment as it is based on the facts. This research is an attempt to reveal a problem or circumstance, or event as it is so that it is only a disclosure of facts. Through this technique, it will be known. <sup>7</sup>How the legislative

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<sup>6</sup> Suharsimi Arikunto, *Manajemen Penelitian*, (Jakarta: Rineka Cipta, 2000), p. 134.

<sup>7</sup> Lexy, J Moleong, *Metodologi Penelitian Kualitatif*, (Bandung: PT Remaja Rosdakarya, 2008), p. 6.

process of Islamic Law in Indonesia with Malaysia and its implementation into laws and regulations.

## **The process of forming a draft Islamic law in Indonesia and Malaysia**

The process of forming a draft Islamic law in Indonesia that will be made by the state office is certainly to achieve the goal within a certain time. According to Ismail Sunny, illustrating that the politics of law is a process of acceptance of Islamic Law by being described into two principles, first: <sup>8</sup>*The persuasive source* in which every Muslim can be believed to be willing to accept the applicability of Islamic Law; and secondly, the period of *authority source* in which every Muslim believes that the prevailing Islamic punishment has the power to be carried out. In other words, Islamic Law can apply formally juridically if it is codified in national legislation.<sup>9</sup>

The transformation of Islamic Law in the form of legislation is a product of the persistence of scholars, mass organization figures, religious officials, and Muslim scholars with the power elites, namely politicians and state officials. For example, the Islamic law legislation that has been fought for, one of which is the birth of Law No. 1 of 1974 concerning marriage and PP No. 28 concerning the representation of a property. Both strengthened the judiciary by giving birth to Law No. 7 of 1989 concerning religious justice. To full fill, the substance of Islamic Law, Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law was subsequently passed by Law No. 17 of 1999 concerning the implementation of hajj and Law No. 38 of 1999 concerning zakat management.

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<sup>8</sup> Sudarno Shobron, "Strategi Politik Hukum Islam Di Indonesia Masa Depan", dalam Jurnal Suhuf, Vol. 21, No.1, 2009, p. 13.

<sup>9</sup> Didi Kusnadi, "Hukum Islam Di Indonesia (Tradisi, Pemikiran, Politik Hukum dan Produk Hukum)" dalam <http://badilag.net> on date June 6, 2022.



For political decision-making, Islamic law at the legal and executive levels in terms of Islamic legal legislation (legal drafting) should refer to the legal politics embraced by the state power bodies collectively. State law can be established as a written regulation that is codified if it has gone through a political process in the state power bodies, namely the legislature and executive as the monitor of the law later and meets the requirements and draft laws that are feasible to be implemented.

The process of forming laws according to presidential instruction No. 15 of 1970 outlines concerns the process of forming laws and government regulations as follows:

1. Each Department and non-governmental institution prepare a draft law and a design of government regulations relating to their respective fields<sup>10</sup>
2. The Minister or Head of a non-Departmental Government Agency reports to the President on the subject matter and its urgency and seeks the approval of the President.<sup>11</sup>
3. If approved by the President, the Minister or Head of government agencies of the Department shall form a committee. If the material is in the field of other Departments and non-Departmental Government Agencies, of course, an interdepartmental committee is formed, and a non-Departmental Government Agency is.<sup>12</sup>
4. The results of the aforementioned Committee are circulated to:
  - a. Ministers and Heads of non-Departmental Government Agencies whose relationship with the material is regulated in order to obtain response and consideration
  - b. Minister of justice to obtain responses and considerations from a legal point of view
  - c. Secretary cabinet for the preparation of the draft, he continued:<sup>13</sup>

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<sup>10</sup> Article 1 Inpres No. 15 of 1970

<sup>11</sup> Article 2 ayat (1) Inpres No. 15 of 1970.

<sup>12</sup> Article 2 ayat (2) Inpres No. 15 of 1970.

<sup>13</sup> Article 4 Inpres No. 15 tahun 1970.

- 1) Responses and considerations received from ministers and heads of non-Departmental Government Institutions
- 2) To manage these responses and considerations, the Department or the initiating non-Departmental Government Agency shall conduct a consultation and coordination with the Department or non-Departmental Government Agency concerned.<sup>14</sup>
- 3) The results that have obtained unanimity of opinion on the material of the R.P.P. Bill are submitted to the President, accompanied by an explanation of the subject matter of the design and the process of cultivating it.<sup>15</sup>

After being ratified and being carried out in the trial, it enters the next stage, namely:<sup>16</sup>

- 1) The government submits the bill to the Leader of the House of Representatives with the mandate of the President.
- 2) If the bill is approved by the House of Representatives, the DPR will be conveyed back to the President with a letter stating the approval.
- 3) The President passed the bill into law by signing it
- 4) State Secretary invited with its placement in the State Gazette of the Republic of Indonesia

As Montesquieu's opinion relates to the division of state power is divided into three parts, namely the legislative power as a lawmaker, the executive power that exercises, and the power to judge or the judiciary. So in legalizing<sup>17</sup> Islamic Law in legislation is necessary to process through the legislative and executive institutions, and when the legislation has been approved, it is necessary to conduct a material test of the law through the judicial body.

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<sup>14</sup> *Ibid.*

<sup>15</sup> Article 5 Inpres No. 15 tahun 1970.

<sup>16</sup> Amiroeddin Syarif, Perundang p. 140.

<sup>17</sup> Asshiddiqie, Jimly, *Pengantar Hukum Tata Negara Jilid II*, Jakarta: Sekretariat Jendral dan Kepaniteraan Mahkamah Konstitusi Republik Indonesia, 2006.

The process of forming a plan of Islamic Law in Malaysia is born from a ruling that comes with one issue or problem from many questions, especially new problems that have not been in, such as objects not enshrined in the Quran Sunnah or the books of the previous scholars. After that, in Malaysia, scholars, and scholars who fought to ask Mudzakarah Majelis National Fatwa to produce a new ruling on the issue. For example, the teachings of heresy, misguided, or everyday life may cause suspicion of the ruling. If the Council issues a fatwa and many people want to question its authority, there is no fine on a person. However, if this issue is brought to the Mufti of the States/Federal Territories, they will study it in more detail and then be brought to the Sultan of their respective states to obtain the Gazette/Royal Approval and be used as a new law. If there is no problem or debate on the part of the Mufti or the Sultan, then the plan will be brought to the Parliament/State Legislative Assembly and will be used as a civil rule, not Islam. After obtaining the Gazette, then a ruling will be enforced on all Muslims in their respective states/territories, and if anyone violates or questions a ruling openly, then it will be punished by Shariah *Jinayah* in that State.

The following is the code of issuing the ruling or opinion of syara' by the fatwa committee:

- 1) The meeting of the Mudzakarah M.K.I. committee through the process of issuing the law/fatwa began when the Council of Rulers Meeting ordered the Fatwa Committee of MKI to provide a legal/fatwa opinion on an issue that arises in the community. The issues presented will be studied in-depth, prepared into a relevant paper, and then presented at the MKI. Fatwa Committee Meeting. When the meeting has issued the opinion of the ruling/fatwa, then the opinion of the ruling/fatwa will be submitted to the Council of Rulers through the National Council for Islamic Religious Affairs Malaysia. The opinion of the ruling/fatwa, which has been approved by the Council of Rulers, will

be brought to the Fatwa Committee of the States without being amended and subsequently gazetted as the state fatwa.

- 2) Mudzakarah Committee M.K.I. The process of issuing this law/fatwa is through applications from the Muslim community or certain parties. The issues presented will be reviewed, prepared into a relevant paper, and then presented to the Mudzakarah Fatwa Committee of MKI. The opinion of the ruling/fatwa decided in mudzakarah will be brought to the Fatwa Committee of the States, and states can amend the decision or accept it without amendment as a state fatwa and subsequently gazetted. The opinion of the ruling/fatwa decided in mudzakarah will also be submitted for the approval of Majelis of the Rulers through the National Council for Islamic Religious Affairs of Malaysia. Certain parties who are experts will be called to provide views and explanations on issues that are unclear or require detailed explanations and briefings so that all members of the Fatwa Committee of MKI get accurate information to make and decide decisions.

## **Laws containing Islamic sharia values in Indonesia and Malaysia**

As stated in Law No. 23 of 2011 concerning zakat management, it is a reflection and one of the clear examples that Islamic Law in Indonesia can already fully contribute to pure law. Zakat is arranged to purify treasures and souls. Purification of property and soul means individual theological significance for a person who performs zakat for those who are entitled. If that meaning is seen, zakat worship is only individual, that is, the vertical relationship between a person and his God. Meanwhile, the social dimension of zakat plays an important role in reducing poverty, injustice, and economic injustice for the sake of social justice. By paying zakat, there is a circulation of wealth in a society that is not only enjoyed by the rich

but also the poor. This is what is at the core of zakat teachings in the Islamic dimension socially.<sup>18</sup> However, the urgency of zakat is not widely understood by Muslims, so its existence seems to be “*visible but not felt.*”

If you look at the basic concept of zakat as a mechanism for redistribution of wealth a Muslim is the transfer of material assets owned by the rich to be distributed to the non-possessed (poor) and common interests. The diversion should be made on the basis of one's own consciousness as a form of social consciousness. However, because humans basically have a lust for wealth, the presence of institutions that have the authority to carry out "coercion" of the transfer of these assets is inevitable. The first step of zakat is to eliminate social inequality in society. If you look at the history of Islam, zakat was originally intended as the main tool to eradicate poverty and erase the gap between the rich and the poor in the time of the Prophet Muhammad S.A.W. Whereas in Malaysia; the assembly was authorized to collect zakat and fitrah from every Muslim in Selangor State in accordance with the Law of Sharak on behalf of His Majesty the Sultan.<sup>19</sup>

## **Institutions that have the right to carry out sharia/Islamic law legislation into the laws of Indonesia and Malaysia**

Before the law is implemented into a provision, of course, it must pass through various very strict proses both in terms of formal and material; here, the role of the institution that decides the regulation must be able to see in the future whether asceticism made will have a good or

<sup>18</sup> As Quoted by Prof. Dr. Suparman Usman, MA, “Strategi pengelolaan zakat dalam mengurangi kemiskinan” dalam Marifin Purwakanta, Noor Aflah (ed) southeast asia zakat movement, (Padang, FOZ, DD, Pemkot Padang, 2008), p.156.

<sup>19</sup> Zusiana Elly Triantini, “Urgensi Regulasi Zakat Dalam Pertumbuhan Ekonomi Di Indonesia,” *Jurnal Istinbath* 14, no. 1 (2015): 85–99.

bad impact so that with these provisions there can arise a sense of security and comfort towards the community as a stakeholder, the following institutions are entitled to legislate into law:

## 1. Legislature

The legislature is an institution whose task in the modern constitutional system is called the parliament, in which the parliamentarians are directly elected by the people. The parliament elected by the people becomes an important instrument in the implementation of democracy and is the participation of the people's principle in the form of representation. The concept of democracy places participation as an important core, meaning that it requires the participation of society in public policy making. Based on this, the legislature is a power that reflects the sovereignty of the people.

Legislative institutions or representative institutions, according to Jimly Asshiddiqie, have three functions, namely the regulatory function (legislation), the supervisory function (control), and the representative function (representation). *First*: is the regulatory function. This regulatory function relates to the authority to determine regulations that bind citizens to binding legal norms and limit a rule that will later be issued. So this authority can mainly only be exercised as long as the people themselves agree to be bound by the legal norms in question. Because the branch of power that is assumed to have the right to regulate is the representative institution of the people, the highest regulation under the constitution must be made and determined by parliament with the mutual consent of the executive.<sup>20</sup> The legislative function also concerns four forms of activity as follows:

- a) Legislative initiation initiatives<sup>21</sup>

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<sup>20</sup> Jimly Asshiddiqie, Pengantar Hukum Tata Negara Jilid II, (Jakarta: Sekretariat Jendral dan Kepaniteraan Mahkamah Konstitusi Republik Indonesia, 2006), p. 32

<sup>21</sup> Article 20 ayat (1) Undang-undang Dasar 1945

- b) Discussion of the draft law (law-making process)<sup>22</sup>
- c) Approval of the passage of the draft law (law enactment approval)
- d) Granting binding consent or ratification of treaties or international agreements and other binding documents.

*The second:* is the supervisory function. Theoretically, the functions of control or supervision by the state parliament as a representative institution of the people can be distinguished as follows:<sup>23</sup>

- a) *Control of policy making*
- b) *Control of policy executing*
- c) Oversight of budgeting and state spending (*control of budgeting*)
- d) Supervision of the implementation of the state budget and expenditure (*control of budget implementation*)
- e) *Control of government performance*
- f) Supervision of the appointment of public officials (*control of the political appointment of public officials*) in the form of approval or rejection or in the form of giving consideration to the DPR.

Because basically, parliament must take part in the formulation of government policy regulations and not conflict with the constitutional law that has received government approval.

*Third:* representative function. The function of parliament as the most basic institution of people's representatives is the function of representation or representation itself. Representative institutions without representation are certainly not meaningful at all. In that connection, it is important to distinguish between the notions of *representation in presence* and *representation*; the first is formal, that is, a representation that is viewed in terms of physical presence. Meanwhile, the second understanding is substantive, that is, representation on the basis of aspirations or ideas.

## 2. Executive

<sup>22</sup> Article 20 ayat (2) Undang-undang Dasar 1945

<sup>23</sup> Jimly Asshiddiqie, Pengantar Hukum Tata Negara Jilid II, (Jakarta: Sekretariat Jendral dan Kepaniteraan Mahkamah Konstitusi Republik Indonesia, 2006), p. 36

The executive is the state government responsible for implementing or carrying out the law from the birth of regulations. In other words, the executive carries out the main substance of the law that has been passed by the legislature. Executive power is usually held by an executive body that usually consists of heads of state, such as the king and the President. As explained above, the President has executive power where the President as the head of state is also the head of government. As head of state, a president is an official symbol of the country. As head of government, the President is assisted by the vice president and cabinet ministers' government who are tasked with holding executive power to carry out government tasks.<sup>24</sup> The President as the holder of executive power, has several powers, including:

- a) Holds the power of government according to the 1945 constitution.<sup>25</sup>
- b) Submit a draft law to the House of Representatives. The President discusses and approves the bill with the House of Representatives and passes the bill into law.<sup>26</sup>
- c) Establishing government regulations replacing laws
- d) Establishing government regulations<sup>27</sup>
- e) Judiciary

In addition to the executive and legislative bodies, the country also has an Indonesian judicial body that functions to exercise the judicial power of government. Judicial power is the power of an independent state to administer the judiciary to uphold law and justice based on Pancasila and the State Constitution.

*First*, the Supreme Court is the highest-level court (cassation) of the four courts below it. *Second*, the Constituency Court, in accordance with Article 24C of the 1945 Constitution, has the authority to adjudicate in the first and last instances whose decisions are final to test the law against the

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<sup>24</sup> Budiardjo Miriam, *Dasar-Dasar Ilmu Politik*, (Jakarta: Gramedia Pustaka Utama, 2005), p. 45.

<sup>25</sup> Article 4 ayat (1) Undang-undang Dasar 1945

<sup>26</sup> Article 5 ayat (1) Undang-undang Dasar 1945

<sup>27</sup> Article 5 ayat (2) Undang-Undang Dasar 1945



constitution, decide disputes over the authority of state institutions whose authority is granted by the constitution, decide on the dissolution of political parties, and decide disputes about the outcome of elections.<sup>28</sup> *Third, the* Judicial Commission, in accordance with Article 24B of the 1945 Constitution, is an independent institution that has the authority to propose the appointment of judges and has other powers in order to maintain and uphold honor, dignity, and behavior.<sup>29</sup> Malaysian institutions that formulate legislation are:

- 1) Yang Di-Pertuan Agong (Chairman of the Sultan) served as the Leader of the constitutional kingdom under the Constitution of Malaysia. As the Federal Head of State, the Power of the king is limited by the Law of the Federal Parliament. Executive power is in the midst of the Yang di-Pertuan Agong.
- 2) Yang Di-Pertuan Negeri (Sultan Negeri) is the official title of governor in Malaysian states that do not have monarchical power, namely Pulau Pinang, Malacca, Sabah, and Sarawak, with his function as the head of the state in the parliamentary democratic system. His role in making policy included appointing the head of state government namely the chairman of the minister and withholding the proposed dissolution of the state's State's invited Council. on the other hand, a state-owned person must act on the advice of an example minister in appointing a member of the Executive Council, giving a state of honor by giving a meal in his state.
- 3) The State Government is a subdivision government of a state in the formation of a federal government, with which it shares political power with the federal or state State government. A state government can have political autonomy in some matters or remain under the control of the federal government.

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<sup>28</sup> See Article 29 Undang-Undang Nomor 48 tahun 2009

<sup>29</sup> See Article 40 Undang-Undang Nomor 48 tahun 2009

- 4) The State Religious Office/Region of Islamic Religious Office Of The Fellowship Region (JAWI) is a ministry of stateState that acts as the basic implementer of programs and projects approved by the Islamic Religious Majlis of the Guild Region (MAIWP)
- 5) The position of The State/Regional Mufti introduces and applies Islamic Law in society. The requirement to become a mufti is to master the knowledge of Usul Fiqh, Fiqh, and Islamic Sharia and have a noble and healthy nature.
- 6) The National Fatwa Mudzakarah Council considers, decides, and issues fatwas on any matter relating to the Islamic religion referred to it by the Council of Rulers. The Committee will submit its opinions to the National Council for Islamic Religious Affairs Malaysia (MKI), which then submits them together with the recommendations to the Council of Rulers.

## **Islamic Law Legislation is very important for the development of Law in Indonesia and Malaysia**

Looking at the history of the Islamic law struggle that occurred before independence, of course, Muslim scholars must continue the struggle that has been carried out, such as regulations that can bind humans to Islamic teachings, regardless of the need for the legalization process of Islamic Law through state institutions, the presence of individual Islamic legal thoughts is urgent and significant today.

Its existence in the state order system is very enriching and can be used as another alternative to Islamic legal thinking that will be practiced in the community. Most importantly, it can be taken as a counter-discourse over state regulatory legislation efforts. Any form of misappropriation and error that occurs from the process of codification of Law (Islamic or otherwise) can immediately be corrected or at least

eliminated. In fact, along with the rolling of the *civil society* movement and democratization, the presence of alternative Islamic legal thinking, which can later be interpreted as a Fiqih of empowerment in the context of developing a cultured (civilized) society by building a fairly high strengthening and independence in society, so that it does not depend on state policies and limits state power so as not to intervene. This is possible because the exclusive disposition of Islamic legal thought that led to a single movement of fiqh ideology, as seen in the historical record, has proven to have been able to place the jurisdiction of Islamic Law outside the mainstream of the process of integrating Islamic Law into the structure of the State.

The importance of Islamic law legislation in Malaysia is also to safeguard the interests and five principles of Maqasid Sharia:

- 1) maintaining religion; Islamic sharia is basically derived from maintaining the existence of religions, both the valid religion of the Prophet Muhammad and other religious religions.
- 2) Preserving life, the Islamic Shari'a also values the life of a person, not only the life of the conqueror of Islam but also the life of the wicked and the infidels.
- 3) Preserving the intellect, the Islamic Shari'a values the human intellect so that it is forbidden for humans to drink *khamar* so as not to get drunk so that their intellect is maintained.
- 4) Preserving property, The Islamic Shari'a values one's property so that threatening the barn who steals his legal property is cut off his hand.
- 5) Maintaining the nasab, Islamic Law also keeps the nasab through the prohibition of adultery in which the perpetrator is punished by flogging and stoning.

## **The legislative process of Islamic Law in Indonesia and Malaysia in legislation**

The legislative process of Islamic Law in Indonesia is formed on the basis of national law. In the Republic of Indonesia, it is not allowed to establish a national law without the basis of Islamic Law as well as for other peoples, the laws and regulations are not justified in conflicting with the religion of the religion concerned. In the Decree of the People's Consultative Assembly of the Republic of Indonesia, No. IV / MPR-RI / 1999 concerning Policy Direction, it has also been determined that Islamic, Western and customary law are the sources of the formation of national law are the source of the formation of national law.<sup>30</sup>

Item Western law was born from the legacy of the colonel colonizers for 350 years, so it became a relic that is still applied to the whole. Meanwhile, customary Law in Indonesia was born on the basis of the natural thinking of the Indonesian nation that lives until now, and while Islamic Law is a system of law that is sourced in the holy book of the Qur'an and explained by the Prophet Muhammad with hadith and is concrete by *mujtahid* for its truth. There are four types of views on the diversity of Muslims, namely the book of fiqh, the decision of the Religious Court, religious regulations in Muslim countries, and fatwas of clerics. The four factors have a major influence on the legislative process of Islamic Law in Indonesia. Moreover, Islamic Law has actually been in effect since the first arrival of Islam in Indonesia, where the stigma of the law that applies is categorized into customary Law, Islamic Law, and Western Law. Meanwhile, Islamic Law is viewed from two aspects, namely:

- 1) Islamic Law, which applies juridically formally, means that it has been codified in the national legal structure.
- 2) Normatively applicable Islamic Law is Islamic Law which is believed to have sanctions or legal equivalents for the Muslim community to carry it out.

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<sup>30</sup> By Rasyid Rizani et al., Arskal Salim, ' Pluralisme Hukum Di Indonesia: Keberadaan Hukum Islam Dalam Peraturan Perundang- Undangan Nasional', Harmoni , (Oktober – Desember, 2008,) p. 19. 2 *Ibid.*," 2008, pp. 17–20.

The same goes for the legalization process of Islamic Law in Malaysia, starting with the issue of Islamic Law, which requires a law to ensure that Muslims can overcome the confusion and problems faced. There was a time when a fatwa was just a fatwa and not a law. While the fatwa will be legal if it is approved by the Sultan and agreed upon by the respective State Executive Councils.<sup>31</sup>

Before the arrival of the colonists to the Malay Land, the Islamic Law in Malaysia had been accepted in the customs by the local community, and the two customs were the Temanggung custom and the Prapatih custom; if you look at it, the Islamic Law at that time had been implemented. Hamka (2006) explained that the arrival of Islam to the archipelago is very special because Islam itself comes in a state of security and peace, not by means of violence and war. At first, Islam was brought by the Arab swordsman to India and then spread in the Malay Land in the 15th century since the Malays have been Islamicized, including the spread of Islam through the swording of the marriage process, the value of the leadership aspect, and the attitudes of religious groups and others, while in the lay court it is a new law brought by the British intervention which was brought in the introduction of the first charter in 1807 which passed the English Law in the application, it also caused the conversion of Islamic Law to be less limited than the system of justice at the level of communion.

The Federation of Malaya achieved independence in 1957. The highest law in this area is the federal constitution, and the highest legislature is the parliament of the great, the state assembly, and the people's Council. Although Islam has been declared as a federal religion, the stated provisions and powers do not make Islam the ruling of Islamic Law as the law of the country, which is very different from the British colonial period where Islam was the top when Malaya achieved the independence of jurisdiction relating to religion is placed under the

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<sup>31</sup> Interview with Mohammad Hafifi in Yogyakarta, date April 6, 2022.

jurisdiction of the state government through the provisions of the ninth schedule of Senarai.

The trail of the fatwa in Malaysia starts from a problem that occurs in the community, then dealt with by the *mudzakarah* of the national fatwa council; the fatwa is not a problem; if it is issued, then it will be forwarded to the state or federal territory mufti and further to the Sultan, after there is no discussion then it will be continued to the community council of the state after the fatwa arises then the effect of all Muslims under the state of the territory and if It's a stipulation that if anyone violates then, it will get a fine or imprisonment.

## **The position of customary law and Islamic Law in the legal system in Indonesia and Malaysia**

The position of Customary Law and Islamic Law in Indonesia is a series of the formation of laws in Indonesia; there are several legal systems in terms of age; the oldest is Customary Law. Then followed Islamic Law and Western Law. All three of them have their own characteristics and systems, growing and developing in the society and state of the Republic of Indonesia. Therefore, the legal system in Indonesia is called a compound. Its position is mentioned in the legislation and developed by science and judicial practice.

Islamic Law can now apply directly without going through Customary Law; the Republic of Indonesia can regulate matters in accordance with Islamic Law, as long as the arrangement applies only to Indonesians who convert to Islam. In addition, it can also be argued that now in the legal system in Indonesia, the position of Islamic Law is the same as that of Customary Law and Western Law. Islamic Law became the source for the formation of the upcoming National Law in addition to other existing laws, which grew and developed in the Republic of Indonesia.

While the position of Islamic Law in Malaysia in the implementation and application of Islamic Law in the states of Malaya was initially related only to religious matters, however, the longer its use became more widespread. At the time of British intervention, Islamic Law relating to marriage and divorce was based on the custom of Perpatih and Temenggung. The influence of Islam, on the other hand, can be seen in criminal affairs. When Malaya achieves independence, jurisdiction relating to Islam is placed under the jurisdiction of the state government through the provisions of the Ninth Schedule of List II of the State List, which provides: "Except for the Federal Territory of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family laws for persons who profess Islam, including Islamic Law relating to inheritance, testament, and non-existence. testament, engagement, marriage, divorce, dowry, nafaqah, adoption, legality (legitimacy), care, reed, breakdown of property and non-*khairat* trust; Waqf and definition, as well as the regulation of *khairat* and religious trusts, the appointment of trustees and the incorporation of persons in respect of the permanent donation of religion and *khairat*, institutions, trusts, *khairats* and Islamic *khairat* institutions operating in the whole in the State; Malay customs; Zakat, Fitrah and *Baitulmal* or similar Islamic religious products; a mosque or any public place of prayer for Muslims, the creation and punishment of offences committed by a person who professes Islam against the religious order, except in respect of matters included in the Federal List; membership, order and procedure of the Syariah Court, which shall have jurisdiction only over persons who profess Islam and only in respect of any matter included in this provision, but have no jurisdiction in respect of offenses except as given by federal law; regulate the development of doctrine and belief among persons who profess Islam; and Malay customs<sup>32</sup>.

The legislation in Malaysia enshrines a system of dualism, civil and sharia. So, with this field of power, there is basically no conflict in

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<sup>32</sup> Zainul Rijal Abu Bakar, "Al-Quran dan Masyarakat: Undang-Undang," 2010, pp. 12–13.

determining the power to hear and decide a case. Certain areas of power can also determine the causes that may be discussed by the Lower Court, the High Court, and the Sharia Seduction Court. The field of *jinayah* power is not like the Sipil Court; the *jinayah* power of attorney for the Sharia Court is given by the Alliance Institution. The field of power of attorney of the Sharia Court has been determined by the 1965 Act of the Sharia Court of attorney *jinayah*, which states that the Sharia Court may impose a maximum penalty of RM5000.00 in fines or maximum imprisonment of 3 years or flogging six times or a combination of related sentences.

## **Implementation of Islamic Law in Indonesia and Malaysia**

Islamic Law is the most important part of Islamic teachings that cannot be separated or separated from the lives of Muslims on the basis of their Islamic beliefs. So that Muslims and other religious religions will experience inner peace in religious life. Islamic Law became an important foundation in a living order that received the full support of the state. confirmed in Pancasila and the UUD 1945. Some Islamic laws have actually been raised in the legislation. The political struggle of constitutionalism never fades as long as Muslims exist on the earth of the archipelago. Where is the most prominent feature of Islam, namely its nature that is present everywhere (omnipresence)? This is a view that recognizes that where the presence of Islam will always provide the correct moral guidance for human actions that exist on the face of the earth, including in nations and state. The politics of constitutionalism is an attempt to encourage the inclusion of Islamic legal norms in the constitution either directly or indirectly through authorized institutions that are greatly influenced by the dynamics of legal politics. So that Islamic Law will become the source of the formation of national laws in the



country in addition to Customary Law and Western Law. The involvement of Islamic forces, both politically Islamic through structural struggles and cultural struggles, emphasizes more aspects of the content and substance of institutionalized Islamic teachings in the life of the nation and state.

The implementation of Islamic Law in the Politics of Constitutionalism is reflected in the form of laws and regulations that reflect Islam as a religion against the existence of laws and regulations that developed in Indonesia. At the central legislative level of the Dewan Perwakilan Rakyat (DPR), the Dewan Perwakilan Daerah (DPD). The Islamic Power will always give positive control over the substance or material of the existing laws and regulations in the government, as long as it does not conflict with Islamic values and norms, then the laws and regulations made will be recommended by the Islamic forces, on the contrary, if there are laws and regulations that are contrary to Islamic Law, the Islamic Power will straighten out in accordance with the values of Islamic goodness and truth. Cultural and structural struggles are not as opposed to each other but as strategies of struggle that fill each other so that the implementation of Islamic Law in the politics of constitutionalism can go well.

The implementation of Islamic Law in Malaysia is limited solely under the jurisdiction of the State government, which is primarily related to *non-jinayah* offenses related to marriage issues. Efforts to apply Islamic Law in the country of Malaysia in all aspects of the Korean cultural phenomenon of Islamic Law itself developed in accordance with the entry of Islam into this region. This reason can be said that Islam is accepted even though in this region, there are various tribes and religions. The pluralism of law that occurs in Malaysia due to a large number of religions of yang by the ruler is still appreciated.

Meanwhile, evidence is applied to Islamic Law in Malaysia which consists of three phases the Malay period, colonization period, and independence period. Whereas the codification of the law, which most was

earlier contained in the Terengganu inscription written in Jawi script and contained a list of ten rules and for whoever violated it would be punishable. Meanwhile, the codification can also be a treatise or a brief law book of Malacca concerning Islamic civil and criminal affairs. And after independence, some of the elements involving civil and criminal Islam were handed over by the federal constitution to the state states. The head of religion in each state is held by his ruler, i.e., an Islamic religious council found in each of its regions entering the state, which has the authority to give advice to the ruler or the arc divided.<sup>33</sup>

Another form of application of Islamic Law in Malaysia is not only in civil form but also contained in criminal law; this can be seen from various information that has been raised by Malaysian scholars, including nizam, *uqubah in Islam and its implementation in Malaysia*, Prof, Madya, *uqubah in jinayah qisas and its implementation in majmuk society*.

In addition to the various forms of Islamic criminal justice, there are many new legal formulations established in the national conference held in keddah and discussing Islamic Law, especially those related to the criminal religion as a continuation, a committee was formed consisting of Islamic law experts and legal aid nods to consider amendments, and that they were sent in various countries to study Islamic Law and its application in the country.

## Conclusion

From the discussion above, it can be concluded that the legislative process of Islamic Law in Indonesia and Malaysia is colored by various processes so that it is formed into a statutory provision, Islamic legal legislation in Indonesia, which is the basis for the formation of laws is a reflection of regulations that become the ideology of the philosophy of not only Islam but also for adherents of other religions. To determine the law,

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<sup>33</sup> Mohamed Azam Mohamed Adil and Nisar Mohammad Ahmad, "The Status and Implementation of Islamic Law in Malaysia," no. July (2016): 263–76, [https://doi.org/10.1007/978-3-319-28335-7\\_16](https://doi.org/10.1007/978-3-319-28335-7_16).

it must pass through three legal products, namely custom, Islam, and the products of colonial relics. Malaysia, the legislative process of sharia law/Islamic law/fatwa begins with issues that require a legal basis to ensure Muslims can overcome the mistakes and problems faced. There are times when fatwas are merely fatwas and not one law. When the fatwa becomes law, if it is approved by the Sultan and agreed upon by the Mesyuarat Assembly of the respective Kingdoms of the Country if the regulation is in line with the basis of the determination, then the law can be applied, but if on the contrary, the law is determined not in line with the vision and mission of the nation, then the product of the legislation will lose control, the state will not run well, the laws are violated a lot, human rights will not be realized so that the nation will fall into the abyss of disintegration of the nation.

The current position of Islamic Law can be applied directly without going through the Customary Law; Indonesia can regulate a problem in accordance with Islamic Law, if the arrangement applies only to Indonesians who convert to Islam. In addition, it can be suggested that now in the legal system in Indonesia, the position of Islamic Law is similar to Western customs and laws. Islamic Law is a source for the formation of future national laws alongside other existing laws, growing and flourishing in the Indonesian state. As for the position of Islamic Law in Malaysia, the prohibition and application of Islamic Law in the states of Malaya were initially related only to religious matters. However, the longer its use becomes more widespread. At the time of British intervention, Islamic Law relating to marriage and divorce was based on the custom of Perpatih and Temenggung. The influence of Islam can be seen in the matter of jinayah. When Malaya achieved independence, jurisdiction relating to Islam was placed under the jurisdiction of the state government through the provisions of the Ninth Schedule of List II of the State List.

The implementation of the Indonesian and Malaysian Islamic law legislation products is certainly for progress and peace for everyone who

adheres to it; Islamic Law which has become a product of legislation, will have an influence on the state system both from the application and sanctions for violators. Karena, in accordance with the provisions of the existing law, must make the governing force, and there are sanctions that adjudicate from the product of the law itself.

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