

## A Case Study of the Application of Islamic Law in Modernity and Refomism in the Development of Islamic Law and Social Institutions

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### Abstract

*Giving humans Islamic law is one way that Islam, as a religion of peace and blessing for all people, shows mercy. From the time of the Prophet on, Islamic law was put into practice. Despite the fact that its application is different today, it has continued to become a leader for Muslims. There are two significant nations whose legal systems incorporate Islamic law. Despite being part of the law, there are various legal theories that give rise to Islamic law, which is distinct in each region. For this reason, it is important to research modernization and reformism in the growth of Islamic law and social institutions, as well as their difficulties and use cases. The study was conducted using the literature, and it came to the conclusion that even though there are many difficulties because the conflict is political, it is acceptable to implement legal reforms in the context of ijtihad as long as they are based on the text.*

**Keywords:** Islamic Law; Social Institutions; and Legal Reform

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## Introduction

Islam is a merciful religion that extends compassion to all people, not just to its own. From a historical perspective, it is clear that the prophet, as head of state, did not fight the infidels indiscriminately and even offered them protection so long as they were not adversaries. Islamic law actually brought blessings to the entire population at the time, including non-Muslims, despite the stability of Medina's non-Muslim population at the time (Zuhairi Misrawi, 461:2009).

Muslims believe that Islamic law is a norm that can guide life in a better direction, and it appears that having Islamic law present in Muslim society is now essential for handling criminal, civil, and perhaps even family matters. However, even in Muslim-majority nations, Indonesia and Malaysia are the two most Islamic nations, so the spread of Muslims across the nation does not necessarily grant Muslims the right to practice Islamic law. These two nations run a more complex system of government, which is unusual. Such as Malaysia, whose fundamental law is more about using laws set by the federal state which actually adheres to the laws of many other countries, and Indonesia, which adheres to the understanding of Pancasila and Bhinneka Tunggal Ika, which is considered to accommodate many faiths. This is the strategy used by Muslims in each nation to defend Islamic law in those nations. The formation of several laws that accommodated Muslims, including inheritance law, waqf, and the establishment of religious courts, was achieved after Muslims fought in parliament to include laws that accommodated Islamic law in the

nation's constitution. However, because Malaysia formally recognizes Islam as a federated religion, the application of Islamic law there is arguably much more straightforward (Taufik Adnan Amal and Samsu Rizal Panggabean, 154: 2004). Even though it is this way, Islamic law is still only applied in limited circumstances; even today, general civil law still prevails over Islamic law. It is crucial to understand the stark differences between how Islamic law is applied in Indonesia and Malaysia, as well as how each nation is reforming its legal system and social institutions.

## Research methods

The methodology used in this study is a qualitative approach based on literature review and comparison of Indonesia and Malaysia as two countries that apply Islamic law.

## The Findings and Discussion

### Reformism and Modernization in the Evolution of Islamic Law

Islam is clearly a religion that meets the diverse needs of its followers, from the promotion of good morals to counseling in legal, family, and even criminal matters. Islamic law therefore places a high value on *maslahat* (*Maqasid al-Khamsah*). The development of issues, however, when the arguments at hand are so constrained (Abbas Ahmad, 124: 2006), is what ultimately prompts scholars to search for an intelligent solution without departing from the fundamental tenets of the source of law. The Islamic jurists' modernization of this solution is known as *ijtihad*.

Reforming Islamic law is undoubtedly a difficult task; at the

very least, it must be based on accepted standards to avoid creating the "*ijtihad* realm"—a space where issues can arise. Thompson emphasized that the legal system is renewed through constitutional reform (Brian Thompson, 3: 1997). Islamic law differs from other laws in that it is derived from holy revelation from an ontological perspective. Since human social life is constantly evolving and developing, it is difficult for Islamic law to remain static from a social perspective. For this reason, the role of the mujtahid in reforming Islamic law is seen as crucial.

It is possible to reform Islamic law by using the context of contemporary *ijtihad*, but this should not be done hastily; at the very least, the feasibility of studying the legal issues must be known. The current issue must not conflict with texts that are already *qa'* (definitely), nor should there be legitimacy of the academic consensus (*ijm'*). Second, if the postulate is supported by a text, then there must be a chance that the text itself could be interpreted. In addition, it states that *maslahat* is the goal of sharia (*Maqasid al-Sharia*). Fourth, it has nothing to do with religion, philosophy, or *mutasybihat* as it relates to the law. Fifth, there is a current issue that requires a fix (Muhammad Taufiq, 99-100, 2019).

### Islamic Institutions for Society

Different definitions are given to social institutions in general. In this case, it can be interpreted that social institutions are closely related to the culture of the Muslim community, which is formed from official sources of law recognized by the Qur'an and the hadith of the Prophet saw. Some

scholars give meaning to social institutions or penitentiaries so that social institutions lead to regulating and ordering the behavior of a group of human beings based on certain norms. Social institutions include those related to politics, justice, the government, the law, health, security, and welfare (M. Yusran Asmuni, 101: 1997).

The limited details of cases in the Qur'an and hadith force the mujtahids to *berijtihad* as much as possible to take new approaches, such as the linguistic approach, which is then called *qawaid lugawiyah*, but it was not enough to understand the rule of law so that *qawaid al-tasyri'iyah* was developed. The need for a more general rule to distinguish between one *ijtihad* and another with a general basic rule as a reference in insinuating resulted from the fact that *qawaid al-tasyri'iyah* is constantly evolving, giving rise to *qawaid al-fiqhiyyah*. It is necessary for the mujtahids to create universal guidelines that are representative of some *furu'* in jurisprudence because this will make creating laws easier. This is due to the scope of the discussion of jurisprudence. As is well known, the mujtahids have agreed to five principles, namely (Moh. Mufid, 19:2019)

- a. Everything is influenced by the intention.
- b. You could consider custom to be law.
- c. The absence of doubt cannot dispel confidence.
- d. Emergencies ought to be avoided.
- e. Narrowness (difficulty) can draw ease.

The above formulations are then used by mujtahids to generalize the

law to bring order to society while still being based on reliable legal sources. The law that has been formed based on direct orders or the outcomes of *ijtihad* is then used to regulate society, and the rule is then referred to as *sharia* or Islamic sacred law. This law falls into one of five broad categories (Billah, 9–10:2022):

1. The six chapters that make up the pillars of faith are part of the problem of creeds.
2. issues with behavior or traditions.
3. The five chapters that make up the Islamic pillars are an offering to Allah (swt).
4. Later, *muamalah* cases—such as marriage, inheritance, waqf, and other matters—were referred to as Islamic civil law.
5. *Jinayat* law, or Islamic criminal law, refers to cases that have implications for general punishments that need to be regulated.

### **The Application of Islamic Law in Indonesia**

In order to achieve world independence, the founders of Indonesia were aware that there was the intervention of Allah swt. They expressed this awareness humbly and gratefully by stating at the beginning of the preamble to the 1945 Constitution with the editorial: "By the blessing and mercy of Allah Almighty," and this was sufficient to bring about the nation's independence (IPR). This spirit is undoubtedly always accompanied by the desire to integrate Islamic law as a significant component into Indonesia's judicial system (Yudi Latif, 2014:11).

Islamic law was actually in effect in Indonesia long before the country attained independence, just as it was during the two Dutch East Indies law periods (Hazarin: 17, 1973):

The Dutch East Indies were reluctant to interfere during the period of reception or full acceptance of the law (*receptio in complexu*), during which time they fully recognized the Islamic law that had long been in effect in Indonesia as being applicable to the Islamic kingdoms in Indonesia.

This theory is contained in Constitution of Indies-Belanda but is rejected because it gives priority to customary rather than religious orders. The period of acceptance of Islamic law as part of customary law, and Islamic law can only be accepted when customary law can accept this.

At least two categories can be used to describe how Islamic law is applied in Indonesia. First, it is only applicable to Muslims according to Islamic positive law. Second, all Indonesians are expected to adhere to the principles of Islamic law. Regarding the first point, this is evident from the ongoing legal politics that is later reflected in the new law's Transitional Rules of Article II of the 1945 Constitution. The first category differs from the others in that it still applies western and customary law while not being recognized as a single body of law, limiting its authority to civil law issues that are then governed by the Religious Court. This regulation is contained through the legal and political process, as well as the struggle of Islamists and national leaders who are concerned with the situation of Muslims, similar to Law No. 1 of 1974 concerning marriage, Government Regulation (PP) No. 28

concerning *waqf*, Law No. 7 of 1989 regarding Religious Justice, Presidential Instruction No. 1 of 1991 regarding the Compilation of Islamic Law, Law No. 40 of 1999 concerning Hajj, and Law No. 32 of 1999 concerning zakat (Thohir Luth, 102-103: 2011).

Analyzing the second point about the development of Islamic legal values in laws that can be applied generally, it is certain that it can apply not only in civil matters but also in criminal matters, even in constitutional and administrative laws of the state. In order to solve this problem, it takes art in regulating laws which then requires political power, the art of drafting laws which are then used to instill Islamic legal values in laws that regulate and control the lives of all. Since the Indonesian Ulema Council (MUI) consistently issues fatwas, even though they are not legally binding, the renewal of Islamic law can also be seen in this form. Similarly, Naggroe Aceh Darussalam (NAD) is granted a special right to apply Islamic law; however, this right is also restricted to light-handed civil or criminal penalties.

### **The Application of Islamic Law in Malaysia**

The history of the development of Islam in the Malay land, which is very thick with Islam and its culture and laws, is actually inseparable from the development of Islamic law that took place in Malaysia. Even the king of Permaswara Iskandar Shah embraced Islam in 1914 AD so that it influenced the Malacca law, which was very thick with Islamic law (Rahman Astuti, 169: 1999). It was for this reason that the generations that came after were so enthusiastic about applying Islamic

law, even though it eventually faded as a result of the colonization of various nations, which eventually led to the dominance of western law in this country.

There are at least five significant factors that contributed to Malaysia implementing Islamic law:

As was already mentioned, Malaysian culture is heavily influenced by Islamic Malay culture. As a result, the community's culture has been merged with Islam, and Islamic law is also based on social developments.

The United Malaya National Organization (UMNO) party and the Islamic Party in Malaysia (PAS) are the two main political parties that fight for the application of Islamic law. This is one of the key reasons why Islamic law can be applied effectively in a neighboring country with a 56 percent Muslim population.

In terms of the constitution, Malaysia amended the 1957 constitution with a new one in 1964, confirming that Islam, as stated in Pasal 3 A Ayat 1 of the Constitution of Malaysia adopted on August 23, 1957, is the official religion of the federated state. As a result, the Islamic nomocracy practiced in Malaysia is based on the principles of deliberation as stated in Pasal 38 Ayat 1, justice as stated in Pasal 7 Ayat 1, and equality (Mohammad Tahir Azhary, 158-161: 1993).

Aspects of Colonization and Reformation: Since Malaysia was once a British colony, it was previously governed by the Straits Settlements of 1936, which Malaysia later amended. Following independence in 1957, Malaysia as a federal state gave up control over the legislative or administration of Islamic law to the



states. The leaders of each nation hold the position of head of the Islamic faith. There are also Islamic Religious Councils spread out across the state.

Islamic laws in Malaysia that generally deal with not only civil cases but also criminal matters, even constitutional law, are evidence that these supporting factors enable Islamic law in Malaysia to develop successfully and be more targeted. The following details represent:

- a. Observance of Islamic Law
  1. Kedah 1983 Shari'a Court Act
  2. Administration of Kelantan Shari'a Court Act of 1992.
  3. The Federated Territories' Administrative Law of Islamic Law from 1985.
- b. Family Law
  1. Islamic Family Law of the Federal Territory, 1984. Law in the Family.
  2. Law in Kelantan Region Islamic Family Law of 1983.
- c. Criminal Procedure and Civil Procedure
  1. Islamic Federal Territory Criminal Procedure Laws for both criminal and civil cases.
  2. Law in the 1984 Kelantan Islamic Criminal Procedure Law.
  3. Prove the Federal Territory's Islamic Criminal Procedure Law.
  4. Laws in Sharia Courts of Federal Territory Baitul Mal to Prove. (1993; Sudirman Tebba: 95)

### **Islamic law cases in Malaysia and Indonesia Malaysian and Indonesian laws on marriage registration**

However, it is important to be aware that because Malaysia's Islamic legal system is left up to each state, there may occasionally be differences in how marriages are registered there. Pasal 2 Ayat (2) of the Law on Marriage of 1974 in Indonesia emphasizes this, stating that the registration must be recorded in accordance with applicable law. This registration is carried out by a marriage registrar employee who has been formally appointed by the Minister of Religious Affairs. Pasal 3-11 of PP No. 9 of 1995 explains the procedures for applying for marriage, including registration.

Notify the local registrar of the will to perform the marriage as in P3.

The marriage will to enter into the marriage as in P8 is announced by the registrar's office.

The marriage must take place in front of the clerk of the registrar of marriages, with two witnesses, and using the legal framework of the marital trust described in P10.

The registrar, the two witnesses, the guardian or representative for those who practice Islam, as in P11, and the registrar are required to know and sign the marriage certificate in addition to the bride and groom.

submitted a citation of the marriage license as evidence of the marriage and as a statement of legal certainty in accordance with P12 (Abd. Shamad, 281: 2017).

While marriage registration is also practiced in Malaysia, there are differences in each state's policies, necessitating more stringent regulation of marriage registration. If the marriage takes place across international borders, the ceremony takes place after the marriage contract is signed, but in some nations, like

Kelantan, the registration takes place seven days after the marriage contract and is witnessed by two witnesses, guardians, and registrants. The federal state policy that permits each state to determine Islamic law in their respective regions, as opposed to Indonesia, is the obvious cause of this difference (Mughtar & Billah, 90: 2022).

Another distinction is the severity of the penalties for those who perform marriages without registering them; in Indonesia, this is known as a siri marriage, while in Malaysia, it is known as a syndicated marriage. When it comes to unrecorded marriage, Malaysia is much stricter, enforcing a 6-month prison sentence or a \$1,000 fine (roughly Rp. 3,500,000), whereas Indonesia only imposes a Rp. 7,500 fine under article 45 of PP number 9 of 1945. In 2007, efforts were made to increase the punishment for this unrecorded union. Unfortunately, this bill has not yet become law. In P143 of the Bill on the Material Law of Religious Courts, the fine was increased by Rp. 600,000,- and the sentence was lengthened to 6 months (Neng Djubaidah, 354: 2010).

### Required Wills

A will is defined as a gift from the testator to the beneficiary, either in the form of property, benefits, or receivables that are later transferred after the testator passes away. A will must be carried out according to the pewasiat's wishes according to Islamic law. Those who do not inherit for one reason or another typically receive wills. Like when there are religious differences and no inheritance is given, or when an uncle

is present and no inheritance is given to the grandchildren.

As stated in the Compilation of Islamic Law, Islamic law governs the issue of mandatory wills in Indonesia. In Malaysia, it is stated in the Enakmen Will of Muslims established by the lands of Selangor, Melaka, and Sembilan. Enakmen has much greater legal force than the Compilation of Islamic Law, which is merely a non-binding presidential directive, because its legal entanglements are more binding.

The Compilation of Islamic Law (KHI) mandates the creation of mandatory wills with an allotment of no less than one-third of the estate for adoptive parents and children. In Malaysia, meanwhile, both male and female grandchildren who are descended from the male lineage in the first breed are given categories, with a maximum portion of 1/3 that is equal in value to that which their parents received when they were alive. If one pays close attention, Indonesia changes the beneficiaries of wills so that adoptive parents or children are permitted, rather than inbred families, which violate the principles of inheritance. Malaysia continues to adhere to the *fiqh* rules that are typically applied to blood families in the meantime.

The scope of mandatory wills then grew, and Indonesia allowed non-Muslim group heirs, descendants of stepchildren, children who were not registered with the authorities, and children who were in extramarital relationships to be eligible for inheritance as stated in the National Assembly of the Supreme Court's Decree on October 31, 2012, which was later reflected in the Constitutional Court's official decision

No. 46 / PUU-VI. Meanwhile, Malaysia expanded the granting of mandatory wills to grandchildren or daughters down without being limited to the first generation, based on the 83rd Fatwa of the Office of the Majelis Kebangsaan Fatwa For Hal Ehwal Agama Islam

### Conclusion

In terms of *Maqasid al-Khamsah*, which aims to maintain the *maslahat* of the people, including in institutions that are highly intersected with the ever-renewed social life, modernization and reform in the construction of Islamic law is very possible if it meets the basic criteria, namely the feasibility of *mujtahid* and the realm to be reformed is *ijtihad*. It must be acknowledged that the founder of the Indonesian state had the spirit to apply Islamic law in Indonesia even though the path must be through laws that are fought through political channels, whereas in the application of Malaysian Islamic law it is left to each state to establish. Islamic law in Indonesia is actually fought through the political legal route and also based on the policies of state leaders. The differences between the laws of each country in Malaysia and Indonesia can be attributed to the federal state, which in Malaysia leaves the application of Islamic law to the head of state, while Islamic law is applied in Indonesia based on the fact that the law is more broadly applicable to all Muslims in Indonesia.

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