

## THE INFLUENCE OF CUSTOMS IN THE SANCTIONING OF ISLAMIC LAW AND STATE LAW IN MALAYSIA



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### Abstract

This research aims to examine how Malaysia strives to harmonies the formulation of Civil law, Shariah law, and customary law in its legal system. In 1422, the Law of the Malacca Code was Islamic law and a custom practiced and spread into the Law of the Pahang Code, the Law of Kedah, and the Law of 99 Perak. After the arrival of the British in Malaya, one of the conditions of Malaysia's independence was the adoption of English law based on Common Law with Islam as the official religion of the Federation of Malaysia. This study concludes that first, customary law exerted a significant influence in the formation of laws in Malaysia, as evidenced by the development of laws in Malaysia through the pre-colonial phase of the British occupation, which practiced Islamic law mixed with customary laws, and phases after British colonialism. Second, the global situation in Malaysia does not weaken the development of Islamic law through sanctions, so the relationship between Islamic law and Customs is strengthened by the Malaysian customary constitutional system, Islamic family law, and Islamic jinayah law.

*Penelitian ini bertujuan untuk mengkaji bagaimana Malaysia berusaha mengharmonikan penggubalan undang-undang Sivil, undang-undang Shariah dan undang adat dalam sistem undang-undang nya. Pada tahun 1422 Hukum Kanun Melaka adalah undang-undang Islam dan adat yang diamalkan dan tersebar menjadi Hukum Kanun Pahang, Undang-undang Kedah dan Undang-undang 99 Perak. Setelah kedatangan British di Tanah Melayu, salah satu syarat kemerdekaan Malaysia ialah penerimaan undang-undang Inggeris berasaskan Common Law dengan Islam sebagai agama rasmi bagi Persekutuan Malaysia. Penelitian ini menyimpulkan bahwa pertama, hukum adat memberikan pengaruh yang signifikan dalam pembentukan undang-undang di Malaysia dibuktikan dengan perkembangan undang-undang di Malaysia melalui fase sebelum penjajahan British yang mengamalkan undang-undang Islam bercampur dengan undang-undang adat dan fase setelah penjajahan Inggeris. Kedua, situasi global di Malaysia tidak membuat pelemahan terhadap perkembangan hukum Islam melalui pengkanunan, justru antara hukum Islam dan hukum Adat mengalami penguatan pada sistem perlembagaan adat Malaysia, undang-undang kekeluargaan Islam dan undang-undang jinayah Islam.*

## INTRODUCTION

Malaysia adopts a system of dualism in jurisprudence, namely Islamic law and civil law, as a result of the British.<sup>1</sup> Thus, two courts are established. Syariah Court and Civil Court.<sup>2</sup> Before the arrival of the colonists, especially the British, Malaysians practised Islamic law and customs. The situation began to change when the British came to Malaya and forced the Malay rulers to accept English residents and advisers.<sup>3</sup> Affairs relating to

<sup>1</sup> Fadlillah Amin, "Perjuangan Penubuhan Negara Islam Dalam Era Kebangkitan Islam Di Malaysia Dan Indonesia, 1982 – 2004" (University of Malaya, 2017).

<sup>2</sup> Nur Syakiran Akmal Binti Ismail, Md Zawawi Bin Abu Bakar, and Asmah Bee Binti Mohd Nor, "Melantik Wanita Sebagai Hakim Di Mahkamah Syariah: Kajian Di Negeri Kedah," *Islam: Past, Present AND Future*, 2004, 491.

<sup>3</sup> Zaini Nasohah, *Pentadbiran Undang-Undang Islam Di Malaysia: Sebelum Dan Menjelang Merdeka* (Utusan Publications, 2004).



the administration of the country, economy, and law were taken over by the British.<sup>4</sup> The power of the king is limited only to matters pertaining to Islam and Malay customs.<sup>5</sup> This continues to this day, where the Constitution, which was also founded by the British, stipulates the division of federal and state powers in.<sup>6</sup> Islamic law under the power of the state is limited only in matters pertaining to munakahat, inheritance.

Before to the arrival of the British in Malaya, Islamic law and customs were the original laws and had been practiced since the Law of the Malacca Canon was introduced in 1422. The law of the Malacca Code extends to other neighboring states, such as the Law of the Pahang Code, the Law of Kedah, and the Law of 99 Perak. These laws continued to be practiced until the British came and were responsible for introducing and implementing English law. One of the conditions of Malaysia's independence is the adoption of English law based on Common Law, with Islam as the official religion of the Federation of Malaysia. This research aims to examine how Malaysia strives to harmonize the formulation of Civil law, Sharia law and customary law in its legal system. Thus, this study summarizes the extent to which the influence of customary law can contribute to the laws in Malaysia and how customary law reaches the global situation in Malaysia through the law with the development of the modern era.

## METHODS

To answer that question, this study used a method of literature study with a normative socio–Yuridis approach. The primary data source is like laws, court matters, and written customary laws, whereas secondary data sources are relevant journals, articles, websites, and books. Data analysis uses qualitative–descriptive methods with the inductive withdrawal of conclusions.

## RESULT AND DISCUSSION

### Customs Laws In Malaysia

In Malaysia there are several types of customs, namely, Malay Customs, Adat Perpatih, Adat Temenggung, Chinese Customs, Hindu Customs and Customs in Sabah and Sarawak.<sup>7</sup> The Malay custom is very unique, and it is not only considered a convention but has become part of the legal system.<sup>8</sup>

Adat Perpatih puts women first. It is widely practised in Negeri Sembilan, Naning, and Alor Gajah districts in Melaka.<sup>9</sup> This can be seen in the questions of the division of property and hereditary jurai that are passed down only through women. The custom law of perpatih is more restorative in nature. For example, if a person is hurt he will be compensated in the form of a chicken or goat depending on the magnitude of the wound. It is customary to believe that people who make mistakes can change their temperament. This custom law has democratic characteristics that people are protected by law and the government itself is subject to the law.

The Temenggung custom is a practice in most states except Negeri Sembilan and Naning and Alor Gajah districts in Melaka which practice adat perpatih.<sup>10</sup> It is customary for men to be more concerned with men, recognizing men as the head of the

<sup>4</sup> Mohamad Roslaily Rosdi, Azmi Arifin, and Rasyidah Arshad, "Pembaharuan Sistem Perundangan Kelantan Di Bawah Pentadbiran Siam – British, 1902 – 1915.," *KEMANUSIAAN: The Asian Journal of Humanities* 29, no. 2 (2022).

<sup>5</sup> R Sivaperegasam P Rajanthiran, "Islam Di Malaysia Pada Zaman Penjajahan Inggeris," *Proceedings Of The Third Seminar On National Resilience*, 2012.

<sup>6</sup> Muhamad Farid Saad and Marina Ismail, *Kemelut Dan Kepimpinan Melayu Di Pulau Pinang* (UUM Press, 2021).

<sup>7</sup> Izawati Wook et al., "Tanah Adat Masyarakat Orang Asli Di Negeri Sembilan: Kajian Kes Di Langkap, Kuala Pilah, Parit Gong Jelebu Dan Bukit Kepong, Port Dickson," *Kanun: Jurnal Undang-Undang Malaysia* 32, no. 1 (2020): 93–118.

<sup>8</sup> Mohd Rosli Saludin, Mohd Nasir Saludin, and Fazurah Mustaffa, "Amalan – Amalan Adat Di Port Dickson," *Jurnal Tuah* 3, no. 1 (2023).

<sup>9</sup> Jasni Sulong, "Amalan Pembahagian Harta Pusaka Dalam Kalangan Masyarakat Melayu Di Malaysia," *Jurnal Pengajian Melayu (JOMAS)* 23, no. 1 (2012): 99–131.

<sup>10</sup> Mualimin Mochammad Sahid et al., "Modul Adat Perpatih Patuh Syariah Di Malaysia," 2017.

family and in the case of inheritance, men inherit property from father to son. The Temenggung custom also practices autocracy in which all power lies in the hands of the ruler. Property is a property found by a married couple during their marriage.<sup>11</sup>

The Chinese customary laws applicable in Malaya during British rule do not represent the actual Chinese customary law.<sup>12</sup> This is because it was modified according to the needs of the Chinese, who were dating back to Malaya, and also for the benefit of the British administration at that time. During Francis Light, the administration of the law involving the Chinese was handed over to a Kapitan who played a very important role in the lives of the Chinese people at that time. In addition, the Chinese community is also affected by the secret society, which causes a lot of problems. One of the Chinese customary laws used is polygamous marriage. Wives from polygamous marriages are entitled to inherit property when their husbands die. In addition, the manner of marriage according to Chinese customs is also recognised, where there is no need to indicate the existence of an official ceremony but it is necessary to show the intention to have a permanent relationship, prolonged coexistence, and recognition by the husband's family of the marriage.<sup>13</sup>

In Sabah, the customs of the local community are Tuaran custom, Dusun custom, Murut custom, Kwijan custom, and Timogun customs. The important matters that are the customary practise of these indigenous residents and that are accepted as laws are such things as administrative regulations, marriage, adoption, incest, and matters related to property.<sup>14</sup> Sabah has a native court with its own hierarchy and jurisdiction to discuss cases involving indigenous laws.<sup>15</sup>

In Sarawak, the customary laws of the locals are governed through the Native Customs (Declaration) Ordinance 1996. This ordinance compiles the laws of Iban customs, Bidayuh customs, and Kayan–Kenyah customs. Other customs, such as Lun Bawang, Kelabit, Kajang, Renan, Bisaya, and Melanau Liko, are still in the process of compiling.<sup>16</sup> Among the above–mentioned customs, the Iban custom is more prominent and widely used as the customary law among the races in Sarawak. The Iban custom is more concentrated in the second part of Sarawak where most of the Ibans reside. The Iban custom covers almost the entire aspect of the life of the Ibans. Some of the Iban customs that are recognized as legal are those related to administration, marriage, adoption, incest, property, and tort. Sarawak also has a native court and its own hierarchy to discuss cases involving native customary law.<sup>17</sup>

## Islamic law and customs before the colonization

### a) *Law of the Malacca Code (HKM)*

Islam began to flourish in Southeast Asia in the 13th century but only began to gain a foothold in Malacca in the 15th century. Prior to the advent of Islam in Malaya, most of its communities practised Hindu customs and professed Hindu teachings.<sup>18</sup> The effect of this Hindu teaching can be clearly seen in the Malacca Law, especially the Law of the Malacca Code (HKM) and the Law of the Sea of Malacca. In addition, the earliest statement relating to Islamic Law in Malaya can be found on the stone found in Kuala Berang in 1899, which notes that Islam has reached Terengganu since the 13th century. However, there is no clear and solid evidence to claim that Islamic law was

<sup>11</sup> Asjad Mohamed and Jasni Sulong, "Perubahan Bentuk Amalan Wasiat Masyarakat Melayu: Kesan Kedatangan Islam," *Melayu: Jurnal Antarabangsa Dunia Melayu* 9, no. 2 (2016): 195–222.

<sup>12</sup> Zulhilmi Paidi et al., *Kenegaraan Malaysia* (UUM Press, 2018).

<sup>13</sup> Noor Aziah and Mohd Awal, "Pengenalan Kepada Sistem Perundangan Di Malaysia" (Petaling Jaya: International Law Book Services, 2010).

<sup>14</sup> Mastura Abd Wahab et al., "Pengetahuan, Sikap Dan Amalan Belia Di Lembah Klang Terhadap Unsur–Unsur Tradisi Dalam Perlembagaan Persekutuan," *E-BANGI* 19, no. 3 (2022): 91–107.

<sup>15</sup> Aziah and Awal, "Pengenalan Kepada Sistem Perundangan Di Malaysia."

<sup>16</sup> Nasohah, *Pentadbiran Undang-Undang Islam Di Malaysia: Sebelum Dan Menjelang Merdeka*.

<sup>17</sup> Aziah and Awal, "Pengenalan Kepada Sistem Perundangan Di Malaysia."

<sup>18</sup> Fadhlina Ahmad et al., "Pengaruh Kedatangan Islam Terhadap Senibina Dan Ornamenasi Pada Rumah Tradisional Melaka," *Regional Symposium of The Malay Archipelago 2012 (SIMPOSIUM NUSANTARA 9 2012)*, 2012.

implemented in Terengganu at that time. Thus, HKM is considered Islamic law and was established in Malay land in the 15th century.<sup>19</sup>

HKM is a collection of Malay customs and Islamic law enacted during the reign of Sultan Muhammad Syah (1424–1444). Wan Ahmad Fauzi, as quoted by Nasohah, explained that before that date, the Malacca Sultanate had laws in unwritten form, which are Malay customs, wa'adat Sang Sapurba, and royal decrees. The Malay custom existed before the advent of Islam and originated in Palembang. When the king of Malacca professed Islam, the Qur'an and al-Sunnah thus took place as the highest legal sources, thus influencing the written and unwritten laws of the Malacca Malay Sultanate and overriding the legal source of Melaka Tua.<sup>20</sup>

Malay history proves that there are several unwritten legal terms that exist, such as the terms decree, Daulat, wrath, gift, award, and beta, which have legal value. The drafting and collection of HKM are believed to date back to the time of Sultan Muhammad Shah (1424–1444 M) and were later completed during the reign of Sultan Muzaffar Shah (1445–1458 M) in the heyday of the Malacca Malay Sultanate.

HKM is also known as the Law of Malacca. It has 44 clauses. Only 28 clauses consist of the Islamic rulings of the Shafi'i madhhab, which are mixed with custom. The remaining 16 clauses are based on Hindu law and Temenggung customs. This law has jurisdiction over the state center of Malacca, tributaries, hamlets, and conquering colonies of the state of Malacca. In addition, HKM contains details on the responsibilities of the role of the king, the dignitaries, taboos among members of the community, and punishment for the offenses of jinayah, marriage, divorce, muamalat, and family.<sup>21</sup>

In HKM, there are also Islamic family rules that cover the questions of guardianship for women, marriage akad, divorce, and fasakh. In fact, in the law, there is also a law of evidence and events based on Islamic law, such as testimony, oath, confession, manners and qualifications of judges, court procedures, as well as arbitration or sulh. This HKM is clear proof that Islamic law has been implemented in Malaya. For example, in clause 12:3, the person who encroaches on the woman is forced to marry the woman, but according to Islamic law, the criminal must be sentenced to stone to death if he is muhsan and whipped a hundred times if he is not muhsan.<sup>22</sup>

In accordance with the power of Melaka, which had wide power over other neighbouring states in Malaya at that time, HKM also had a wide influence over the states, such as the Law of the Pahang Code (1592), the Law of Kedah (1650–1784), the Law of Johor (1789), and the Law of 99 Perak (1879).

#### b) *Malacca Sea Law*

The Law of the Sea of Malacca is a copy of the law or ruling used on voyages. This law was written during the reign of Sultan Mahmud (1488–1511). The important law is in line with Melaka's position as a large Trade centre in southeast Asia at the time.<sup>23</sup> The law contains 25 clauses. Only one clause is based on Islamic law. While the remaining 24 clauses are from customary law.

<sup>19</sup> Nasohah, *Pentadbiran Undang-Undang Islam Di Malaysia: Sebelum Dan Menjelang Merdeka*.

<sup>20</sup> Nasohah.

<sup>21</sup> Nazri Muslim and Ahmad Hidayat Buang, "Islam Dalam Perlembagaan Persekutuan Dari Perspektif Hubungan Etnik Di Malaysia," *Jurnal Kemanusiaan* 10, no. 2 (2012).

<sup>22</sup> Abdul Kadir Haji Muhammad, *Sejarah Penulisan Hukum Islam Di Malaysia* (Dewan Bahasa dan Pustaka, 1996).

<sup>23</sup> Inawati Inawati, "Perkembangan Kesultanan Malaka Tahun 1424–1511" (Universitas Islam Negeri Alauddin Makassar, 2020).

c) *Law of Pahang*

The laws of the Pahang Code were drafted between 1592 and 1614, also under the influence of Malacca law. This law contains 93 clauses that were not systematically compiled.<sup>24</sup>

d) *Law 99 Perak*

The 99 Perak Law was brought into the state from Hadrat Maut. This law has an Islamic element and is written in the form of a question and answer covering 99 between Raja Nasrun Adil and his minister, Khoja Berza Amir Hakim, covering matters pertaining to the constitution, war, family, property, and jinayah.<sup>25</sup>

The position of Islamic law before the arrival of the British colonialists was not only recognised by historians but also recognised by the courts.<sup>26</sup> In the case of *Ramah v. Laton* [1927] FMSLR 116, this case involved a dispute between two wives over the property left by her husband after the husband died. In its judgement, the court has decided that Islamic Law is not a foreign law but an original law that exists and is adopted and implemented in Malaya. The Court of Appeal in Selangor has ruled that Islamic law is the law of the state, and the court shall recognise and apply it. Judgement in *Shaik Abdul Latif and Ors* case against *Shaik Elias Bux* in the case of *Ramah v. Laton* [1927] FMSLR 116, this case involved a dispute between two wives over the property left by her husband after the husband died. In its judgement, the court has decided that Islamic Law is not a foreign law but an original law that exists and is adopted and implemented in Malaya. The Court of Appeal in Selangor has ruled that Islamic law is the law of the state, and the court shall recognise and apply it. Judgement in *Shaik Abdul Latif and Ors* case against *Shaik Elias Bux* further strengthen this statement. Edmunds, JC in his judgment acknowledged that the law applicable to Malays in the Federated Malay States prior to the arrival of the British was Islamic law adapted to Malay customs. Both cases clearly show there is still a British recognition of local law.<sup>27</sup>

### Islamic law and customs during the colonization

Malaya was colonized for almost 500 years by the Portuguese, Dutch, English, and Japanese colonists. During that period, it can be said that each of those colonists brought their own laws. However, the impact of the arrival of the colonists on the position of Islamic law is clearly different from each other. Although Malacca was colonised for 150 years (1511 – 1641), the Portuguese colonists did little to interfere with the position of Islamic law among its adherents. The law introduced applies only to the Portuguese, whereas the adherents of other religions, including Islam, are handed over to the heads of their religions. The same was done by the Dutch colonists, who occupied the Malaka for 130 years (1641 – 1795).<sup>28</sup>

The arrival of the British to Malaya had a significant impact on the community at that time and especially the Muslims. What the British colonists did was very different from what the Portuguese and Dutch colonists did. The inclusion of the influence of English law in the administration of the states of Malaya and the expansion of its colonies, has eroded Islamic law and Malay customs which were the basic laws before their arrival. The development of English law can be seen through three separate territories namely the Straits Settlements, Non – Associated Malay States .

<sup>24</sup> Jelani Harun, "Kajian Naskhah Undang – Undang Adat Melayu Di London," *Sari (ATMA)* 26 (2008): 127 – 48.

<sup>25</sup> Suria Fadhillah Md Pauzi, Azniza Ahmad Zaini, and Mohd Azmi Nias Ahmad, "Undang – Undang Sembilan Puluh Sembilan: Warisan Persuratan Melayu Negeri Perak," *Konferensi Akademik KONAKA*, 2015, 87 – 93.

<sup>26</sup> Musa Awang, "Di Manakah Kita Dalam Pemantapan Pentadbiran Keadilan Jenayah Syariah?," *Kanun: Jurnal Undang-Undang Malaysia* 27, no. 1 (2015): 55 – 84.

<sup>27</sup> Mohd Norhusairi Mat Hussin and Mohd Hafiz Jamaludin, "Harta Sepencarian vs Harta Perkahwinan Dalam Perundangan Sivil: Satu Sorotan Ringkas," *Albasirah Journal* 6, no. 1 (2016): 79 – 96.

<sup>28</sup> Kamaruddin M Said, *500 Tahun Melayu Menghadapi Cabaran* (Cerdik Publications Sdn Bhd, 2004).

### a) *Straits Settlements*

For the Straits Settlements, the eroding of Islamic law was carried out by the English colonists openly, that is, through the enforcement of English law through the First Charter of Justice (1807), the Second Charter of Justice (1826), and the Third Charter of Justice (1855). The charter explicitly declared the adoption of English law in the British-dominated state. As a result, the previously applicable enforcement of Islamic law, especially in Melaka, was marginalised and replaced by English law.<sup>29</sup>

The evidence can be seen in the case of *In the Goods of Abdulah*. In this case, the issue that arises is: can a Muslim who died in Penang give his entire property by way of a will? According to Islamic law, a person can only testament with not more than 1/3 of his property. Yet the court stuck with the decision in the *Rodyk and Ors vs. Williamson and Others* cases using English law: the will was valid. The court's decision has indirectly recognised English law, even though it contradicts Islamic law.<sup>30</sup>

In the second case, *Fatimah & Others vs. Logan & Others*, a Muslim man died in Penang and left a will. The issue is what laws should be used to verify the validity of the will. Lawyers for the plaintiffs have argued that Islamic law should apply. The Court upheld the decision that since English law has become a local law in Penang, the applicable law is English law.<sup>31</sup>

Based on the examples in the above cases, we can tell that although English Law is a foreign law, it has been unconsciously adopted in Malaya..

### b) *Federated Malay States*

The agreement between the British and the Malay rulers in the Federated Malay states of Perak, Selangor, Pahang and Negeri Sembilan which required them to accept the English Resident was a turning point to the abolition of the King's power and Islamic law. The segregation of Islamic law is carried out by separating religious affairs from other matters of life. Through the Resident system, the sultan is required to receive the advice of the Resident in all matters except in matters of Islamic religious affairs and Malay customs. The notion of Islam has been narrowed by focusing only on matters of worship, marriage, inheritance, and some matters that fall under the category of personal law. While criminal matters, state administration, taxation, and others are under the jurisdiction of English law, which refers to common law and equity as well as related statutes, This has led to the long-running implementation of Islamic law being eroded by the way the British introduced English law to replace Islamic law.<sup>32</sup>

### c) *Non-Associated Malay States*

The same effect was felt by the Unfederated Malay States, four of which were under the auspices of Siam before being surrendered to the British after the 1909 Bangkok Agreement. The states are Kedah, Perlis, Kelantan, and Terengganu. While Johor is located in the south of the peninsula. All five states were also forced by the British to accept the English Penasijhat.<sup>33</sup>

## Customs Law Enforcement In Malaysia

In the context of Malay customs, there are many practises and ceremonies that are still practised in everyday life. However, not all such traditional practises and values have legal force. There are certain customary principles, such as sepeencarian property, which is said to be derived from the custom of perpatih, accepted and implemented in civil and sharia courts in resolving property disputes between divorced spouses. The same goes for the principle of buying and selling land among the Malays. Customary

<sup>29</sup> Awang, "Di Manakah Kita Dalam Pemantapan Pentadbiran Keadilan Jenayah Syariah?"

<sup>30</sup> Mohamed and Sulong, "Perubahan Bentuk Amalan Wasiat Masyarakat Melayu: Kesan Kedatangan Islam."

<sup>31</sup> Mohamed and Sulong.

<sup>32</sup> Awang, "Di Manakah Kita Dalam Pemantapan Pentadbiran Keadilan Jenayah Syariah?"

<sup>33</sup> Mohamad Muzammil Mohamad Noor, *Guru Melayu Dan Politik Di Kedah (1940-1960)* (The University of Malaya Press, n.d.).

law is also recognised as one of the sources of law in Malaysia. It belongs to the category of unwritten legislation. In Malaysia, it is known as Malay customs.<sup>34</sup>

#### a) *Customs Law in the Malaysian Constitution*

Although the position of the custom as a source of law is not as important as other sources, there are certain provisions in the constitution that indirectly lift the dignity of the custom. Although the position of the custom as a source of law is not as important as other sources, there are certain provisions in the constitution that indirectly lift the dignity of the custom.<sup>35</sup> They are;

##### 1) *Sovereignty of the Malay Rulers*

Article 181(1) of the Federal Constitution stipulates that the sovereignty, prerogative, power, and jurisdiction of the Malay Rulers as before Merdeka Day remain preserved and unaffected unless limited by the provisions of the Federal Constitution. 'Before the day of independence' means the sovereignty, prerogative, and jurisdiction of these Malay Rulers since the beginning of the Sultanate in Malay land. While Article 71 (1) provides for the Federal Constitution's guarantee on the right of the King of a State to inherit and hold, enjoy, and exercise the constitutional rights and privileges of the King of the State in accordance with the Constitution of their respective states, the prerogative of the Malay Rulers to this day is still based on the Malay customs and principles of Islamic teachings, which should be implemented in accordance with the provisions of the Federal Constitution.

##### 2) *Malay customs*

Article 160(2) also mentions Malay customs as one of the defining characteristics of a person's turmoil. The provision states, among other things, that "Malay means a person who professes Islam, commonly speaking Malay, according to Malay customs...". In the meantime, the position of Malay customs was strengthened by associating it with the position of the rulers. The Eighth Schedule of the Federal Constitution stipulates that rulers may exercise their discretion in matters such as carrying out "any duties as the head of the Islamic Religion or on Malay customs... appoint persons who hold the rank, title, glory, and greatness of the Malay customs and set duties in respect thereof as well as make rules on the royal halls and palaces".

#### b) *Customs Law in Islamic Family Law*

##### 1) *Sepencarian Property*

In essence, this practice is part of the culture of the archipelago community although in terms of its terms it is different. The Javanese community refers to it as *gantangan* (the property of the perspective), in Bali *druwe gabro*, in Sunda *guna – kaya*, in Madura *ghuna – ghana*, in South Sulawesi (Bugis and Makassar) of *cakkara goods* and in Malaysia there is a term of company property in Perak, the Sarawak Malay community calls it a search, while the Muslim community of Melanau calls it theft and in the Perpatih community calls it a search for *bini men* but more commonly called property *sepencarian*.

The debate over property has never been debated in any classical Islamic fiqh book. If examined in the Islamic legal system in the middle eastern countries, there is not a single statute or law that speaks of this question. However, with the socio – cultural uniqueness of the Muslim community of the archipelago, they have managed to establish a property law that successfully resolves property disputes due to divorce where the settlement is binding on the parties in dispute. The custom and *uruf* in this property is associated with *al – adah al – muhakkamah* and is categorized as a reason to

<sup>34</sup> Aziah and Awal, "Pengenalan Kepada Sistem Perundangan Di Malaysia."

<sup>35</sup> Khadijah Mohd Khambali and Mohd Herzali Mohd Haled, "Toleransi Beragama Dan Amalannya Di Malaysia: Rujukan Kepada Artikel 11 Perlembagaan Persekutuan Malaysia," *Jurnal Usuluddin* 27 (2008): 81 – 92.

be ruling. The basis of the acceptance of property as a law is through three main thrusts which are to overcome difficulties, maintain the public's well – being and uphold justice.

The enforcement of the law of this property is provided in all states of Malaysia. For example, Section 122 of the Selangor Islamic Family Law Enactment 2003 empowers the Court to order the distribution of property to a divorced spouse and the death of one of the spouses.

## 2) Breaking the promise of marriage

Claims for damages against a man or woman for failing to promise to marry are also a matter of customary law. The Islamic Administrative Law of the states in Malaysia has clearly provided for women's rights in this case. For example referring to the Selangor Islamic Family Law Enactment 2003, Section 15 provides that if a person has been verbally or in writing either alone or through an intermediate and subsequently refuses to marry him, then the defaulting party shall be liable to return the grant of engagement, if any, or its value and pay any money which has been spent in good faith by or the other party to make preparation for the marriage and so may be claimed by action in court.<sup>36</sup>

This Section 15 provides that a woman has the right to claim all her gifts during the engagement if the breach of the promise to marry is made by the man and the woman may also claim any compensation for the breach of the promise to marry by action in Court. Therefore women who intend to obtain their rights such as claiming compensation for marriage preparation compensation can do so by applying in the State Syariah Court.<sup>37</sup>In surah al–Maidah, verse 1, Allah SWT says: "O you who believe! Keep all the promises." In this verse, Allah forbids humans to break their promises whether in writing, words or deeds. In this context Allah forbids any party to break off engagement with their respective spouses unless there is an inevitable reason. Although engagement is only a promise to have a marriage, the breaking of this unwarranted promise is considered a heinous act hated by Allah SWT. In surah al–Saff verse 3 Allah SWT says "It is a great hatred in the sight of Allah that you say something that you do not do".

## c) Customs Law in Islamic Jinayah Law

Among the customary laws in Islamic jinayah law in Malaysia is related to the offence of a third person in marriage. The meaning of the third person includes dark lovers, parents, in–laws, family and anyone who puts domestic peace at risk.

The act of severing the relationship between husband and wife is not only punishable in the world according to the laws of the world, but it is considered to commit great vices and until it is cursed by Allah SWT. It is they who are cursed by Allah, and made deaf, and blinded to their sights.

The Selangor Syariah Criminal Enactment (1995) provides for the third person under the offence of various parts V.

1. Section 32 persuades the escape of a married woman,
2. Section 33 prevents married couples from living as husband and wife, and
3. Section 34 incites a husband or wife to divorce or neglect an obligation.

## CONCLUSION

From the above discussion, this study found at once that it answered the formulation of the problem as follows: *First*, customary law exerts a significant influence on the formation of laws in Malaysia, as evidenced by the development of laws in

<sup>36</sup> Nur Anis Nabilla Muhamad and Nurbazla Ismail, "Pelaksanaan Undang Di Mahkamah Syariah Melibatkan Orang Ketiga Dalam Rumah tangga Implementation of Laws In Shari'a Court Involves Third Person In Household," 2019.

<sup>37</sup> Noorhameza Binti Abdul Khalid, "Pertimbangan Hakim Mahkamah Rendah Syariah Selangor Dalam Perkara Putusan Ikatan Pertunangan" (UIN Ar–Raniry, 2020); Uswatul Fikriyah, "Engagement Cancellation and Its Legal Implication In Malaysia (Woman's Rights Perspective)," *Jurisdictie: Jurnal Hukum Dan Syariah* 6, no. 2 (2015): 98–116.

Malaysia through two main phases. The first phase was before the British occupation, in which the country adopted Islamic law mixed with customary law. While the second phase was after the British occupation. Unlike the Portuguese and Dutch colonists, the British certainly had a clear intention to replace Islamic law with their own laws in the entire administration of the state, except for matters relating to self-law and the Islamic religion. *Second*, the global situation in Malaysia does not cause any weakening of the development of Islamic law through sanctions, so the link between Islamic law and customs law is mingling and increasingly strengthening, specifically in certain areas, such as Malaysia's customary constitutional system, Islamic family law, and Islamic jinayah law.

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