



## Islamic Law Application at Asian Countries (Indonesia, Malaysia, Brunei Darussalam Cases)

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**ABSTRACT:** -Indonesia, Malaysia, and Brunei Darussalam communities had used to customary Law and Islamic law for settling law problem in community. Those three countries with Muslims as majority applies Islamic laws in context of *muamalat* (commercial/private law) context, whereas, customs laws in context of marriage, divorce, remarry, heirs, "*wakaf*" (voluntarily depositor), charity' and in kind as Islamic Laws domain, whereas, theft, robbery, scuffle, land dispute, inter community/rural area conflict and in kind as customary law. In Indonesia, Islam justice law had been separated from state law system. In Malaysia, the Islamic criminal law had became part of its national law system. Interesting case which Brunei Darussalam Sultanate had applied Islamic Laws and Malayo customs completely in accordance with the ideals of Sultan and such country people upon such right country.

**Keyword:** Islamic Law, *muamalat*, *Istinai'i*, Customary Law, *Mahkamah Syariat* (Islamic Penal).

### I. INTRODUCTION

Indonesia, Malaysia and Brunei Darussalam, three Malay countries that jointed in member of ASEAN. Even though separated by the border of territory by different national law system but do not separated by the border of culture and term of religion that be believed by the big part of its citizen. Culture of Malay and Islamic Religion are two main variable that reconcile these three countries become integral part from what be mentioned by the people as Nusantara territory of course it can be also jointed by Singapore, Thailand and Philippine<sup>47)</sup>. In there such three countries, that be mentioned first, we can analyze Islamic religion attend in the community of society as the "spirit" and culture of Malay grow as "cloth" for majority of its people. Meanwhile in the three countries that be mentioned later, the religion of Konghucu, Buddha and Catholic attend for its follower as the spirit and culture of Malay grow as "spirit" for majority of its population. Refer to the final data, the follower of Islamic in Indonesia about 90% of its population that have Malay culture about 90%. In Malaysia the follower of Islam about 60% with its population have a Malay Culture about also 60%<sup>37)</sup>. In Brunei Darussalam, the follower of Islam is about 99%, with its population who have Malay Culture is also about 99%<sup>12)</sup>. Refer to this factual condition, it is an obligation the law (Syariat) of Islam can become national law easily in such three countries. But in the fact, it is a contrary thing even Islam law do not become the main variable of application of law for these three countries. This article use philosophy-historical approach and analysis-descriptive approach also be done use sociology-juridical approach

### II. LAW OF ISLAMIC IN INDONESIA

After Indonesia nation have a good result in proclaiming this country independence proclamation text through the tongue of Bung Karno to all over the world in the morning - suddenly, in the afternoon of 17 August 1945, Bung Karno had a call from Nisyijima. The assistant of Admiral of Maeda, asked to Bung Hatta whereas did he want to receive a Kaigun officer (Navy of Japan) to convey "the importance news" for the nation of Indonesia? To answer this question, Bung Hatta stated his willingness, after that that officer of Japan to give a time in coming to meet him in order to convey the "important news" for Indonesia nation? To answer this question, Bung Hatta stated his willingness, after that the officer of Japan was invited in order to come to meet him in conveying "important news" that be waited by Bung Hatta. "The representative of Protestant and Catholic in state be mastered by the navy of Japan," here the officer begin to tell the news first, "fell not good to seven words that be written down in preamble (opening) of Constitution 1945. Recently they acknowledge whereas such phases do not bind them but only related to the Islamic religion people. But the planning of writing down that phase in situation of basic that become the core of constitution means doing "the

discrimination” to the group of minority. If this “discrimination” also be established, they more autonomy in the outside of Indonesia.<sup>10)</sup>

As to be known collectively, refer to this “important news”, tomorrow, on 18 August 1945 before the meeting of PPKI be opened, Bung Hatta ask some members of PPKI such as Ki Bagus Hadikusumo, Abdul Wahid Hasjim, Kasman Singodimejo and Teuku Hasan, discuss “important news” from the officer of Japan’s navy. In the discussion of the figures that be asked by Bung Hatta to discuss about “important news”, in the fact get the agreement whereas in order to reach the unity and oneness of nation, phase of written down seven word be felt to be obstacle by the representative by East Indonesia representative be changed by the phrase “Ketuhanan Yang Maha Esa”. That is its cause, in constitutional of 1945 that in the next time be validated on the same day, do not write down again seven word that to be a problem, namely “the obligation to enforce Sharia Law for adherents”.<sup>10)</sup>

By write-off the seven words in the preamble (opening) of constitution of 1945 that is in the next time become epicentrum of the fluctuation of Islamic religion in one side and Indonesia in other side. Dialectical of that relation running as long as to the momentum and dynamic of history that provide for it.

Must be acknowledged, the nation of Indonesia that consist of the tribe of nation to culture and religion that different, be added by the various of law that be leaved by the colonizer, do not the easy job. The national law development that will valid for all of citizen, it is an obligation in order to give the attention do not observe the religion and element of cultural for one of some classification of society. Because if that matter be done, it is a bog opportunity about the friction of social nationally.

Theoretically, can be stressed whereas if that matter is occurred, it is better like natural process that be done by society itself base on the needs of better future. Eventually, the condition of law target nationally that be hoped, it must be done step by step, planned, united, directed and always consider psycho-social, cultural and also theological of society.

In this spot the national law expert state whereas the national law development effort, ideally involve law development three dimensions collectively. These three dimension is related each other and have a correlation each other. The element in it is support each other so that able to form the law convergence credible and accountable. First, dimension of maintenance; second, dimension of reform, third, dimension of perfection.<sup>46)</sup>

The meaning in dimension of “maintenance” is to “maintain” the old one which is still good.” Meanwhile dimension of “reform” be meant as “to use more better new one thing”. The both dimension is as long as to the meaning of qaidah ushul, *Al-Muhafadhatu ‘ala al-qadimi shalih wa al akhdzu bi al al-jadid al-ashlah* – to maintain the old one which is still good and to use more better new one thing”.<sup>29)</sup>

There is dimension of “perfection” be meant as “serious attempt in order to do internal critical to law text in order that always relevant to the space and time of human being.” This idea is as long as to qaidah ushul, *Taghayyuru al ahkami hi taghayyairu al azmani wa al amkinah* – The changing of law depend on the changing of space and time.<sup>31)</sup> It means the perfection of law concept always involve the dimension of space and time that make a live and to be made alive by its society.

The factual law paradigm in a management of social is the continuing from the paradigm of law in the past, and paradigm of law in the future will more many be decided by the motive and perspective of law that be built in this time. The building of law in this time have been surely have a guidance in the reform of social and culture that be designed systematically and continue from time to time as long as to the needs of national development over all.

National law development in the country which have majority of its population have a Islamic religion such as Indonesia, element of religion become urgent in order to be paid the attention. Law development become more urgent if be connected to the objective needs of developing countries such as Indonesia. That matter because of the target of independence and development have been support such country always hold he re-management of their society both in politic, economic and social sector.

Process of society management changing for the modern country by the development have been force its population in order to implement soon the development in law sector as the requirement of enforcement and operate the operational of development itself. The enforcement and operate the aspect of law in a country will support soon other aspects in order to operate continually above the corridor of law that be built.

Ideally, the development in law sector is the attempts collectively hold the reform in characteristic and content from the rule of valid law after hat be directed maximally in order to establishment the more better new law. This is one of some ways in implementing the social changing that be needed in development of society.

If this nation want to cut open or learn the development of Islamic law in Indonesia, so that it is important that learning seriously can be done periodically base on step of time of Islamic law development significantly in crucial periods that be founded in law society. Islamic law development periodically can be divided into four crucial periods and to decide the development of Islamic law in Indonesia.

First, period before the governance of Dutch colony. Secondly period of Dutch government. Third period of Japan colonizer. Fourth, period of independent of Indonesia—between 1945-1974. Fifth period after 1974 to now.<sup>20)</sup>

The phase of term of time in such time be done base on the consideration whereas each of term of time not only have a nuance of changing but also have the real differential and also significant in application of Islamic law itself.

Islamic law material, specially be divided into two parts. Part one, discuss about praying matter and second part discuss *muamallah* matter. Islamic law material have a relation to the sector of praying that have detail characteristic, meanwhile the Islamic law material that have a relation to *muamalah* sector have global characteristic.<sup>31)</sup> So that the best way that can be operated is to attempt science sector about the transformation of Islamic law norms in national law.

Islamic law is the law that be built base on the understanding of human being on the nash of Al Qur'an and Al Sunnah in order to regulate the life of human being that valid universally - relevant in every *zamân* (time) and *makân* (space) of human being.<sup>4)</sup> The universality of this Islamic law as the direct continuity from the function of Islam as universal religion namely its tenet substances do not be limited by the space and time of human being beside valid for all of Islamic people in whatever, whenever and whatever about the nation.<sup>21)</sup>

The description to Islamic Law word be founded through more density description namely "*al-khitbah Allah* (Law of Allah) that regulate the life of every Moslem in all of its aspect." From this definition looked whereas that Islamic religion drew near to the mean of Islamic Law.<sup>31)</sup>

In Al Quran and *Al sunnah*, the terminology of *al-hukm al-Islam* cannot be founded. Al Qur'an and Al Sunnah use the terminology of *al-syari'ah*, that in its description and then make the terminology of *al-fiqh*. In this spot we state, "Islamic law is a set of law norm of Islamic as religion, that come from divine revelation of Allah, Sunnah Rasul of Allah and its *ijtihad* of ulama and uli al amri."<sup>31)</sup>

Al Quran as the first source of Islamic law in it contain of tenets in the sector of civil law, trade law, crime law, management of country law, procedural law, labor law, economic law, social law and international law. The regulation of law that be contained in such Al Quran be completed by *Sunnah Rasul* and be developed by *ijtihad of ulama*, the decree of government and *ijtihad* of judge in jurisprudence.<sup>31)</sup>

As the logical effect from the characteristic of universality of Islamic law is its law regulation there is be targeted special for the Islamic people, also there is targeted to non Moslem specially.<sup>4)</sup> This specialty be meant in order that the Islamic law principal that want to be enforcement, it must always take a honor and regard to the element of law that be enforced by other religion. Islamic principal do not have the compulsion in doing the religion regulation and for you your religion and for me my religion.<sup>41)</sup>

National law is the law that be built by a country for be validated all over for the citizen in a decided nation or country. In Indonesia, national law that be meant is valid law over all for every citizen. This law refer to the principal value that be written down in Pancasila and constitution 1945.<sup>23)</sup> The experts try to formulate national law as the law that be built by Indonesia nation, after Indonesia independent and valid for the citizen of Republic of Indonesia as the substitution of colony law.<sup>35)</sup>

National development of Indonesia, as be known collectively always be done step by step and continually. Can be mentioned, the formulation that be written down through Broad Outlines of State Policy 1999 that born from the reform era, we get some basic references about the direction of such national law policy namely.<sup>15)</sup> First, to develop law culture in all society level in order to be created the consciousness and the obedience of law in the frame of supreme of law and the its enforcement of law country. Second, to manage national law system entirely and united by acknowledging and regarding law of religion and law of custom and also to make a new thing of the laws of colony heritage and national law which is discriminative including injustice of gender and no adjustment by the claim of reform through program of legislation. Third, to enforce law consistently for more insurance the law enforcement, the condition and the correctness of law supremacy and also to honor human right to continue the ratification of international convention mainly that related to human right as suitable to the needs and the purpose of nation in form of laws. Fourth, to increase the integrity of moral and professional of apparatus of law enforcement including National Police of Republic of Indonesia to grow the belief of society by increasing the welfare of supporting of media and infrastructure of law, education and effective controlling. Fifth, to realize the autonomy justice institution that free from the influence of government and whatever party. Sixth, to develop laws regulation that support economic activity in facing free trade era without make a doubt the national purpose. Seventh, To hold justice process rapidly, easily, cheap and transparent and also free of corruption, collusion and nepotism by still keep upholding the justice principle and correctness principle. Eighth, to increase the understanding and consciousness and also to increase the protection, regarding and enforcement of human right in all over human life. Ninth, to settle various process of justice to the abuse of law and human right that is not handled yet completely.

To refer to the principles that be written down in Broad Outlines of State Policy 1999, so the development of national law is targeted to all citizen without observe to religion that be followed. Because of

that the religions that be followed by all citizen of Indonesia is *samawi* religions.<sup>41)</sup> Islam as majority religion of Indonesia people contains the laws that manage the relation human being to other human being in the society life. Because of that in national law development, IslamLaw is very important element to be paid the attention.<sup>46)</sup> The history of development and the existence of Indonesia both as community and as country, law as management that growth in society also accompanies the process of Indonesia nation history. About the history of validation of Islamic law in Indonesia can be looked from two periods namely (a) period of the receiving of Islamic law completely; (b) period of the receiving of Islamic law by custom law.<sup>23)</sup>

Period of the receiving of Islamic law completely, be mentioned by *reception in complex* period. Meanwhile period of the receiving of Islamic law by custom law be mentioned by *receptie* theory.<sup>42)</sup> Reception in complex theory is a period where Islamic law be validated completely for Islamic people. Since the existence of Islamic Kingdom in Indonesia the governments of colony make the validation of Islam law for Islam people specially for marriage law and heritage law hat in the next time be mention as familiarity law.<sup>21)</sup>

The Islamic law as the constitutional that be referred and be obeyed by the majority of population and society of Indonesia is the law that have been life in the society and it is a part of doctrine and the belief of Islam that exist in the life of national law and it is material in guidance and its development. To read the history of law track in Indonesia, point out whereas the presence of Islamic law in national law is the fighting of existence. Theories of existence formulate the existence of Indonesia national law both written and oral. Is in various fields of the life of law and practice of law in the community of Indonesia society. Theory of existence in its related to Islamic law is theory that describe about the existence of Islamic law in Indonesia national law, namely (1) Any, in the meaning as the integral part from Indonesia national law ; (2) Any, in the meaning of its autonomy that be acknowledged, (3) Any, in the meaning of national law and IslamicLaw norm that have a function as the filtering of national law material in Indonesia; (4) Any, in the meaning as main material and main element.<sup>50)</sup>

Law development be directed to the realization of national law system that serve on the national necessity, by arranging of law material starting, entirely that have a source from Pancasila and Constitution of 1945. Because of that it is important to be stressed here whereas the arrangement of national legislation program, including the effort of colonial heritage laws regulation substitution to laws regulation that have a source from Pancasila and constitution of 1945 is the smart is the smart way in process of national law realization that to be a soul by the national spirit and the Indonesia nation religion ship specially Islamic values.

The thinking will be occurred the reform of that national law, in the fact a manifestation from the willingness in releasing from non-democratic life method, fascistic and repressive. That thinking is the fighting of dialectica from the strength of non-satisfaction by colonial heritage law system that is not accompany by Indonesia culture social values.<sup>3)</sup>

The step by step reform be estimated not the solution in solving the historical problem in national law radical must be done in order that able to answer the claim of changing that more suitable to the norms of social and cultural of Indonesia. The reform through constitution mechanism in parliament still be estimated do not give the guarantee of radical reform existence recently.

The usage of Pancasila as history interpretation paradigm, it is better supported by objective data and fact that is occurred in the society of Indonesia. Looked clearly whereas imperialism of Europe have three main purpose namely, Gospel, gold, and glory.<sup>30) 18) 43) 13) 28) 38) 1) 11) 25)</sup> The fighting of Indonesia nation as the reaction of it have three main purpose also namely Islam as the substitution of Christian, Indonesia as the substitution of Dutch, and Independence as the substitution of the colony.<sup>30) 18)</sup>

This concept is engraved in this nation history by the values of nation fighting that to be crystalized in consensus of Jakarta Charter as the spot of culmination that animate all of the realization of main idea of Independence proclamation 17 august 1945. This matter point out whereas Islamic law have been had the historical root that so far get into the soul of this nation.

Beside the opportunity of psychological as be stated above, also Islamic law have some obstacles and problems mainly that related to its integration to the national law namely: First, the heterogenic thing of nation, it is better to be remembered whereas the country of Indonesia have very wide territory, each of them have social and culture condition separately so that it is not easy in closing them each other But the effort of integration of socio cultural aspect of this nation element into the national law system must be preceded by the process of separation in the fields that be done the reunification relevantly. Secondly, method of law education. During this time the lesson of law science that be taught to university or academy student is trichotomy among west law, Islamic law and custom law. Relate to the Indonesia society that is heterogenic relatively and its territory is wide enough, so that it cause the finding out of corner stone among the element of such law. Third, lack of academic student in Islam law sector. The lack in development of centers of Islamic learning because of: (a) historically the center of learning which do not regard to Islam law ; (b) The learning of Islamic law those which were first develop in the fact do not give the place for the learning of religion science, (c) the development of obedience quality for Islamic people that is weak, mainly the belief of Islamic and its moral that difficult to be controlled so that make he condition of decreasing of moral quality in implementation



of law; (d) still be adopted the policy of Dutch politic law that have political interest itself, such as: (1) Islamic people may not obey t its law, (2) do not autonomic completely in The court of religion in case of civil except the law of family, € there are so many problem that be faced by Islam people meanwhile there is not law statement that able to summarize in one laws that can be received by all Islamic society element.

They are the problems that be faced by Indonesia Islamic people today, when this people want become syari'at Islam as the entrance in doing the doctrine of Islam as the application of the first item (sila) of Pancasila "the Oneness God"<sup>5) 32) 22) 2) 27)</sup>.

### III. SYARIAT ISLAM IN MALAYSIA

Different to Indonesia, in the fact, every state have Syariat Islam (Islamic family laws) separately. In the past Islamic family laws in Malaysia<sup>45)</sup> do not fulfill because of each state have the laws itself. Meanwhile in decade of 1990 ever be tried one attempt serious from the kingdom party in order to hold Islamic family laws that is uniform which will be applied in all over the state in Malaysia. Unfortunately after draft of laws have been ready and approved by the Board of kings after that be applied to every state in order to be established as the laws, in the fact in some state such as Kelantan and Kedah, have been made draft of laws in their state itself make the target in order to unify such laws is not reached.<sup>45)</sup> Meanwhile, final development point out whereas the authorized institution of Laws adjustment of History Civil under The matters of Islam under monitoring of prime Minister position have been learn all of the act and *enakmen* of Islam Family Laws and to proclaim the willingness of reform of such laws in order that more closer and unifier between one state to other state. Can be mentioned whereas all of states in Malaysia today have been agree and receive the draft of laws adjustment of Islamic Family that be made by such authorized institution. Nowadays the laws of Islamic family for the states in Malaysia have been reach unification completely.<sup>45)</sup> Beside that the special steps have been taken in order to follow up some good willingness to make sure The Civil grand may not intervene in the problem of Islamic law specially in the case like engagement and the right of children maintenance. Can be mentioned whereas all states in Malaysia have been revise and pass the implementation of Islamic Family Laws by making some reforms in decided aspects. This step be made by the purpose to become marriage, registration, divorce, reconciliation, nafqah, hadanah, and other cases hat related to the life of Islamic family in the states of Malaysia in order that more impressive.<sup>45)</sup>

The laws of Islamic family in Malaysia have been formulate systematically in form of some parts as follows: the beginning, the marriage, the registration of marriage, covenant marriage, the dissolution of marriage, the income of wife, the maintenance of children, punishment and soon These matters want to be built by the nation of Malaysia in order to fulfill the needs of Islam law by modern method. Because of that, as be known, the target of Islam in order that the justice to be enforced and injustice to be deleted in the community of Islamic family. Institution of judge must play the important role in implementing such purpose. Without the existence of the institution of judge which have authoritative, the justice will not can be enforced and the injustice cannot be eradicated even it only will more powerful widely.<sup>45)</sup>

Islam claim in order that they fulfill the tied requirement before and the time of hold the position that involve the decision of this board. Islam also want the laws be decided and be implemented well, fair and wise under monitoring of syariat Islam. It needs the existence of procedural laws. It is better this laws be made seriously in order to make easy in making the laws of Islam in order that can be implemented as suitable to the needs and challenge of era that be faced by the nation of Malaysia. By the glory of Syariat Islam so that the society and nation of Malaysia able in fulfilling the willingness and the purpose of justice in deciding the case through syariat Islam. If it runs, the institutions of Islamic judge in Malaysia have been successful in giving the correct decision and punishment and fair for its people.<sup>45)</sup>

Today, through the hard working, the expert of Malaysia it is very clear whereas the implementation of Syariat Islam in Malaysia get the impressive in order to be followed because it have been appear dramatically in the grand or board or Syariah of Malaysia, an attempt in making the reform of comprehensive laws and also systematically, the unification of Grand of Syariah, to decide the maximum punishment, the increasing syariah laws quality, autonomic field of syariah grand, the separation of syariah grand from board of syariah, judge and its feasibility and the under bow of grand syariah.<sup>45)</sup>

The unification of Grand of syariah in the starting rate, the influence of British in this country, in making Grand syariah or the Grand Qadi is in one Country Judge system. This condition is more clearer like be looked in *courrts ordinance* 1946. Meanwhile the autonomic sector that be given to The Grand of Qadi only about he cases that related to Islamic religion, specially the marriage problem and divorce thing. The Qadis and naibs of Qadi in that time was inaugurated by Sultan. Meanwhile the letter of affirmation that be signed collectively by the authorized Sultan Resident. Their position have been neglected and do not be given the acknowledgement in feasible level It is also like the position of building of Grand Syariah and is supporting details.<sup>45)</sup>

Nowadays, the unification of grand syariah base on The Institutional of Unification that give the authority to the states in order to operate The Islamic Laws that be classified as Personal Laws base on the willingness of Jawal Kesembilan Seberai (2) item (1). Even in autonomic sector of Grand Syariah be given only Personal laws, it followed also by the decided categories through act and institutional regulation.<sup>45)</sup>

The problem that appear in Malaysia today is there is two law system of judge method. First, The Grand of Civil that the sector of authority in all over Malaysia territory. Unification of sector of autonomy and the promotion of the judges be decided to them by The kingdom of Unification. Secondly, The grand of syariah which is lack and its unification base on the authority that be given to the states by the level and sector of authority through Jawal kesembilan, Senai (2), item (1) and *Enakmen* of states by level and sector of authority that more lower be compared to the grand of Civil and be followed by the partitions of institutional and act to the sector of its authority. Because of that, the existence of this grand syariah do not make satisfaction forever if it became eternal in exist status. The intellectual of Malaysia state whereas the era is coming for us in re-thinking the possibility of implementation of the authority of this judge method be unified under the same guidance.<sup>45)</sup>

Authority Sector of Grand Syariah. Before the arrival of colonizer, Authority Sector of Grand Syariah is wide and entirely about Islam laws that be implemented in Malaysia nowadays. In that time, Islamic Laws was constitution and principal of country.<sup>45)</sup> By the arrival of colonizer so the progressive of Islamic laws have been limited (*dihad: Malaysia*) be narrowed its authority. Today in Malaysia be gotten Authority Sector of Grand Syariah only about Family and personnel Laws for the Islamic religion people. It means whereas may not involve non Islamic religion people in implementing that Islamic laws. Civil Authority Sector of Grand Syariah may be concluded as follows: (a) engagement, marriage, divorce, to cancel the marriage or divorce or separation of judge method; (b) to give the asset or claim for asset that appear that such case in the separation above; (c) income the people under the burden child, the maintenance of childhood or the guardian of childhood; (d) the giving income, charity or donation; (e) other case that be given the authority of implementer to him by whatever from the written laws.<sup>45)</sup>

The limitation of punishment maximally. There is some newest development in enforcing the reform of Grand Syariah after be given more wider of authority sector be compared by authority sector in the past, even this authority sector do not fulfill completely yet about the general willingness of Syariah Islam which is in Grand Syariah. Meanwhile, through this final development we can give positive appreciation to the good willingness from the authorized party (read: the government of Malaysia) for giving its positive contribution to the application of Syariah Islam in Malaysia country.

The attempt in increasing Islamic Laws. By such *Pindaan*, so that it is clear whereas we understand about authority sector of Grand Syariah have been increased its level (to be leveled): Malaysia) step by step) so that get the feasible level in the country which is majority of its population have Islamic Religion. So that the following step will be taken soon in order that such *pindaan* be used correctly. By such purpose so some states have been take the impressive steps namely:<sup>45)</sup>

**a)** To implement Kanun Jinayah Syariah that more Kemas (tidy) and berasingan (differential) which is not part of laws of Pentadbiran Hukum Syara' among the states that have been implement such kanun such as Kelantan, Kedah, Serawak and Malaka. There is also a state that have been graduate it but do not have a strong power such as Sabah. Even though there are still the states which is not take a strong decision to in realizing this tidy and different Kanun Jinayah, meanwhile the regulation like that have been waited in presentation. Even be understood also whereas the is most important Kanun Jinayah Syariah is blessing for Malaysia Moslem People

**b)** To implement the laws of different, density and tidy Islamic Description will become Law of Syara' as the final reference. Among of the states that have been had the laws of Islamic description like above are Kelantan, kedah Pahang, Serawak and Malaka. There are the states that have been graduate but do not do the power like Sabah. But there are the states which are not make the strong decision to this way but be understood also whereas this laws of Islamic religion is important in making strong the authority sector of Grand syariah in *kes* (regulation of Civil and Jinayah that have been increased its level

**c)** To implement the laws if Acara Jinayah that good management (Kemas: Malaysia), density and different will become law of syara as the final reference. Among the states that have been had the laws of Acara Jinayah Islam are Kelantan, Kedah, Pahang, Serawak, Malaka and Selangor. There are also the states that have been graduate it but do not have strong power such as Negeri Sembilan and sabah. In the fact there is still the state which do not take strong action in this way. It have been understood the autonomy sector of Grand syariah in *kes-kes* (regulations) Jinayah Syariah have been also increased its level. To pay the attention this matter of course The law of Jinayah Syariah is important to be presented

**d)** To implement The official law of regulated Mal Islam (regular, systematic), density and different that become laws of Syara' as the final guidance. Among the states that have been had Official Law of Mal islam are: Kelantan, Kedah, Pahang, Serawak, Malaka and Selangor, Negeri S Sembilan that have been become it as only principle. There are also the states that have been graduate it but do not have strong power in implementing

it such as Sabah. Even still have other states which do not take the enforcement action to this way. It can be understood, authority sector of Grand Syariah in *kes-kes* (regulation, mal (asset) that be put to it are standing (balance) to authority sector of Civil Grand. In observing this matter, of course official of Mal Islam is important to be presented soon

e) Topresent the functional of Peguam Syarie that more kemas (regulated) in order to make sure *peguam-peguam* (laws) that become the representative of its sub guam, factually the feasible person and authorized one know the law of Syara' in depth, know the authorized laws by grand Syariah and good high attitude. Among the states that had been have this functional are Kedah, Kelantan, Selangor, Johor, trenggano and Pahang. Factually there is less of unity and harmonization in the community of states that had been had the functional of that Peguam syarie. This action is impressive and do the way of method in implementing it is the most valuable matter. It is correct whereas it is important the presentation of functional of feasible *peguam* Syarie in enforcing the justice. The assignment in order to present the functional of *peguam Syarie* is the officer of Grand syariah itself. This is the most valuable task that must be burdened by respect attitude

One impressive progression in the acknowledgement of the law of Syara' in Malaysia is there is Islam Family Laws that more systematical, accompany to the guidance of Syara and as long as the condition of era. Even though there is the differentiation in some *seksyen* (article) among the Islam family laws from one state to other state. But in general, its principal is the same and the effort to the way of method of unity is always true be done. The laws of Islamic family that have been get a victory in order to minimize the polygamy and divorcement, so that to make a narrow thing about the rude attitude of a man in doing polygamy. It get a victory in guarantee the right of woman and children who always become the victim if the divorcement is occurred before this.<sup>45)</sup>

Mosque and its management under responsibility of the officer of Hal Ehwal Agama. Here there is regulation and laws about the guidance, maintenance and management of Mosque, The grand syariah have been given authority sector in order to discuss and to punish the punishment for the person who can be put about the laws. Factually in the community of the expert of Islamic law of Malaysia. It means whereas the task and authority sector of grand syariah will more wider and challenging.

The separation of grand syariah from the board. Factually authority sector of Grand syariah from sector of Mal and Jinayah have been increased but still have the state which are do not take the impressive action in order to separate Grand Syariah from The board. By validation of separation of Grand of Syariah. From the board, so the authorization and the freedom of court of law will can be made sure about its realization. Beside that it will increase the level of image of grand syariah as the institution of implementation (pentadbiran ) the justice of Islam that be regarded and have an authority.<sup>45)</sup>

Structure of Grand Syariah Some states have been implement the revision of Grand syariah structure by implementing three rates of grand (law court ) namely low law of court of syariah, high law of court of Syariah, mahkamah Ulang (Re Law of Court). Even structure of this new Grand Syariah is more better that before, but in the long term of time it only make the problem and will not hold out in long time because system of three rates of Grand Syariah for every state will make us need so many judges of syariah and possible for judge of syarie for mahkamah Ulang.<sup>45)</sup> If we make the journey to Grands of Syariah in Malaysia entirely we will get the structures of Grand Syariah that amazing and there is no feasibility that to become as Grand Syariah. For example can be mentioned the structure of Grand syariah in the territory of Unification, Kuala Lumpur Lumpur look so amazing and make it proud. It located in the building of Sultan Sulaiman by all of the easiness that be needed by a grand or law of court.

In the past the requirement for someone in order to be promoted become Qadi do not so tied. Sometimes the graduate of ushuluddin and Arabic language from middle east University be promoted become qadi. But this case have been solved. Recently they be promoted become Qadi or judge have been participate in Islamic judge method Pentadbiran and laws diploma course from Universitas islam Antar Bangsa, Malaysia. Is one good step and also better to be continued. It means whereas skim perkhidmatan syariah employee have been equal to skim perkhidmatan Malaysia judge Method laws.

The sub institution of Grand syariah touched whereas it is important be implemented all of easy access that ideal for the grand of court. Beside that may be said the sub institution of Grand syariah is not enough, even there is also in some states its condition be assessed well such as The territory of unification. The lack of sub institution and the employee of Grand syariah from The majlis and the officer of hal Ehwal of Islamic religion is the high problem. Nowadays, in the fact this problem have been able to be solved well by the government of Malaysia as suitable to the needs.<sup>45)</sup>

Malaysia have been open the way for implementation of Syariat islam comprehensively, both Islamic civil law (muamalat, private law) and Islamic civil law (Jinayat, public law). A good alternative for the nation and society of Malaysia even for the case of Indonesia it still become the long target for the thinker and its society. The figure of Islam in Malaysia by the spirit and high ambition take the good progressive step in this

strategically alternative, it apply the crime of Islam in various country in order to give the enforcement of laws for Islam society. A monumental step that still difficult to be imitated in Indonesia and the group of countries in ASEAN.

#### **IV. SYARIAT ISLAM IN BRUNEI DARUSSALAM**

Before the arrival of colonizer of England by the intervene directly on the power of judge method, after that to force the laws and their law system be received, Brunei Darussalam have ben have the authorized and independent law system.<sup>40)</sup>The laws that be implemented and valid in Brunei Darussalam is the laws and Islamic law system. Islamic law system is the Islamic laws that be kanun by the Brunei Kanun law, even there is a little bit about influence of custom and resam of Brunei. That Islamic laws is valid in the written form accompany to the custom of resam (the habitual) and the law of syara.

In his notice when the visiting of British ship to Brunei mention some thieves who have been get the victory in stealing some kind of goods including a golden watch and a gun barrel of the British war ship, that anchored in the river of Brunei Darussalam. In its meeting by the Majesti of sultan Brunei Darussalam, W.H. Teacher have been tell in ironic occurrence to the Majesty of Sultan Brunei. The Majesty looks angry highly event Hough do not talk whatever thing when listening such claim. Some days latest after W.H. teacher go to the port, the stolen goods have been returned to him by The Majesty of Sultan Brunei Darussalam followed by a letter that contain whereas the three thieves that involved in such occurrence, all of them have been catches and have been punish of cutting of hand.<sup>51)</sup>

The Sultanate of Brunei Darussalam have a interpretation system of laws and the judge method as suitable with the condition in that time. It also controlled by four wazir and some ceteria and minister. Each of them with its sector of power that special except the treasurer and temenggung that be given the authority 'am (general) for handling all the kes and the indictment that appear in the Community of people of Brunei and its native speakers. For the other figures, the sector of authority that be given to them are the sector of power that be made base on the kind of *Kes* ( regulation) and the classification that e judged like that be noted in the old drafts, the sector of power the prince in gadong only refer to their regulations that referred to the King. In involved the people of king and the golden skill and silver person and so on. The sector of power of Harbor Master are to regulate the foreigner arrival in the country of Brunei Darussalam. In order to be understood whereas the sector of power of Syah bandar base on the sector of power in the era of sultan Syah Syaiful Rizal governance, whereas in that time, his sector of power be classified as the one of some wazir, meanwhile the prince of Maharaja rela be given the authority in order to make sure the laws of *resam* (habitual) and Kanun be operated in making sure kanun and this resam be obeyed, he is given the power in giving heavy punishment for its abuser.

The rich person in Gedong Seri Lela from the level of Minister, be given the power in order to discuss the regulation that have a relation to the domestic people. But, it is important to be noted also the judges only have a task in the center of government in the territories that so far from the center of government, so this task to be represented to them who to be promoted in order to intending the create a tribute in such territory.<sup>52)</sup> In the content of agreement of 1856, British is given the power in order to control the regulations that appear from the friction in the community of British people or that occurred among the people of British with foreign people in the country of Sultan Brunei Darussalam. In the rate, even the British judge be given the power in this sector but they are not given the complete authority in operating the tasks of implementation of justice and judge method. The judge of British kingdom operate their task of judge method always discuss something of regulation that be followed or be accompanied by the judge of sultanate of Brunei Darussalam,. The punishments that be punished also base on the appropriate laws, by the requirements, the punishment that be punished to the British people, it is better, not more severe than usual be punished in the laws of British king some for the same mistake.<sup>34)</sup>

Base on the setting of historical like that so that can be illustrated about the time f development of Islamic syariat in Brunei Darussalam. it is more completed as suitable by up and down of the power of the sultanate of Brunei in the way of British Kingdom. dynamic of Islamic syariat implementation in Brunei Darussalam can be illustrated as follows: First, the direct intervene British. The target and ambition of British in intervene directly to distribute in laws and the enforcement the justice in the community of judge method of sultanate Brunei Darussalam. This intervene only success be done when the system of placement of British president formally in the sultanate Brunei Darussalam when 1906. It is as the *Natidjah* (the decree from the additional agreements in 1905 and 1906.

In order to make sure the purpose above can be reached perfectly, British get the important step, as be done to its other colonies countries namely: (1) through the decree of British or special be trained by British, in order to punish the punishment base on the British laws, refer to *common law* And the *functional of equity*. Also additional by the existence” The principle of bounded first (2) Through the law, whereas the advisor of British obligate to be received including some British laws from India have been brought to the countries that be colonized or be protected by British such as Malaysia, Serawak, Sabah and Brunei. These



countries be powered highly as the laws for these countries, such as the laws of contract, the information and Jinayah, (3) The growth (the unification) The majlis mesyuarat (read, discussion) in these countries. This Majlis Mesyuarat have an authority in order to make the laws that created by human being. In general the laws that be made and be passed by the "majlis musyawarah" in these countries are base on British laws oriented.<sup>40)</sup> The grand Qadi that be unified British only be corrected in regulating and implementing the constitution that have a relation with the marriage cases, divorce, praying ( special) only. This grand also only be given the power in order to punish the punishment which is its fine not more than ten ringgit and the prison is not more than only fourteen months. From the factual condition above, it is clear highly whereas the sector of authority of Grand Qadi and Grand civil Jinayah that have been valid in the Sultanate Brunei Darussalam that have been narrowed its power by British in he regulation of Grand Qadi only have authority sector about the family laws (*personal law*) In the regulation of Civil Jinayah only have authority sector in order to punish the fine punishment not more than the fine about ten ringgit and the prison about not more than fourteen days.<sup>40)</sup>

As have been described above whereas before there is an intervene of England, Brunei have the laws that come from and have a principal of Islamic way. All of process of justice and system of its law enforcement base on the system and regulation of Islamic. Brunei in that time do not know dualism of justice system as have been happened in era British colony. The realization of two law systems of laws: Civil and syara' and two system of justice enforcement through grand civil and syariah, make the Brunei in dilemma of its law establishment. But now Brunei is fighting in order to realize law system that is one and do not know dualism namely civil grand in one side face to the syariah grand in other side.

In the case of civil, grand of Qadi have the authority sector in the cases as follows (1) the engagement, marriage, divorce, to make a dismissal of marriage or the divorce in following the decree of grand. (2) The giving or claim of asset that appear from the case above, (3) the income of people who under the burden, valid child, the maintaining childhood, (4) the claim of the divorce as setter the distribution of asset because of divorce, (5) the decision of heritage asset, (6) the heritage or the giving of death person who is the follower of Moslem when want to die, (7) The giving of "inter-vivos" or the settlement that be made by Islamic person without the payment of money in cash or without the payment by the goods which the same value as such cash money, (8) wake ornazar, (9) other case that be given the authority to him by the written laws. Act of *majlis* require in order that all of involved party in this conflict, if want to be settled in Grand of Qadi, it is better the Islamic follower.<sup>40)</sup>

We look whereas the authority sector of Grand of qadi in the regulation of civil is too narrow, do not out of that be mentioned as "Laws of family" such as : marry, divorce, reconciliation, and the cases that be issued from both of them. Meanwhile according to Moslem, authority sector of Grand of Qadi is far from that and entirely from that. Even involve the parties which is not Islamic religion follower. To pay the attention what have been described above, it can be seen the grand of Qadi have the power in order to decide the heritage asset case, but only have authority sector in order to decide someone has or has not a right in order to receive the heritage asset. After that decide how level of part for such person. This guidance do not clearly yet so that it is an opportunity in order to be misunderstood. Because the authority sector of grand of Qadi do not convey about the decision and the settlement condition about the cases of heritage asset.<sup>40)</sup>

Brunei Darussalam need one of norm that become the guidance for the peguam - peguam who presenting grand of Qadi. This norm may be named "Norm of peguam syariah" in order to make sure peguam - peguam who represent their "anak guaman" in grand of Qadi is correct highly for the person who is suitable and have an authority in knowing syara' law in depth method. They also know law that be implemented by the grand of syariah and have good personality. It is not meant that person can be received become an advocate or solicitor automatically become peguam syariah. On the other hand a peguam syariah may not become an advocate or solicitor. The thinker of Brunei Darussalam realize, it is a time in order to hold the program systematically a structure in order to create peguam of syariah in the country of Brunei. Of course, the implementation and enforcement of law in Brunei through out of Grand of Qadi can be increased about its quality gradually and have a regular and planned program.<sup>40)</sup>

Above all, grand Qadi need the excellent management as suitable to the need of grand. In such structure all of the needs and the equipment that is suitable to the task and its role in the center of community. The high value institution must be done by high value and special, so that the doers of task who occupy the building have the self-confidence and high responsibility to the institution that shade it. By the building that have the facility that feasible and have a good quality, it is possible for the judge and the implementer of task the other judge method can create the achievement of job that more amazing. By this step, we have been become the grand of Qadi as the high value of grand, have a best position and authorized in handling the cases that have a relation to the need of the finder of justice in Islamic community Brunei Darussalam.<sup>40)</sup>

## V. CLOSING

The development of application of Islamic syariah in Indonesia, Malaysia and Brunei Darussalam, in the fact do not involved from the setting of historical, the various of culture and religion the supplying of human

resource and budget and the role of colonizer in invalidating of its law system into the law system of its country colony, is decided the track of Islamic syariat in three Malay countries.

In Indonesia, before the arrival of Dutch the society of Indonesia have been familiarity in using Islamic syariat and custom law in settling the law case that appear in the center of community. The syariat Islamic present in the activity of muamalat (private law), meanwhile the custom law present in the activity of Jinayah (public law). Marry, marriage, predivorce, reconciliation, heritage, donation, charity, the death and the same kind of it, become the application sector of syariat Islam, meanwhile the affairs of stealing, fighting, murdering, case of land, the conflict between village, and the same kind of it, become the application sector of custom law. But, after the arrival of Dutch, the syariat Islam get the decrease in its application, because a part of its application be handled by Dutch law, custom law even still operate, but a big part of its application territory be taken over by the law of Dutch. After independent, Indonesia begin to manage again about its law system that more fulfill the justice affairs of Islamic society. System of Islamic justice in Dutch era is separated from system of country law, handling the problem of Islamic civil (muamalat) such as it have been mentioned above about the application of Islamic crime (Jinayah). It is not yet accommodated in national law system of Indonesia even have been many discourses from the Islamic intellectual in order that entering the Islamic crime as the part of national law product. But, up to now that discourse is not realized yet as wanted by the Indonesian Islamic Society.

Almost same condition be faced by Malaysia. This neighborhood country face up and down in applying syariat Islam such as that faced by Indonesia before the arrival of British, the Malaysia society, only know one law system that be built from two basic elements namely that have a source from syariat Islamic and the custom of Malay. After British colonize Malaysia all of its law system be changed by British law system. After get the independent the Malaysia society began to make about its law system back to the era before the arrival of British Colony. Today Malaysia use Syariat Islam and Malay custom as the main pillar in managing its national law system even. Malaysia is one step more progress than Indonesia, whereas Malaysia have been validation about jinayah that tent to become Malaysia national law system.

Meanwhile the application of Islamic syariat in Brunei is same as to Malaysia and Indonesia. But, what happened in Brunei is same as in Malaysia. It is possible, beside have same the colonizer by British, also because of the various of culture and the religion in the small relatively so that it is possible about the Islamic syariat is more easier be absorbed into national law. As Indonesia and Malaysia in that fact the Brunei of Law system before the arrival of British colony, do not know about dualism of syaria' law system and civil law system. Beside that but the Brunei law system that have a principle of Islamic syariat and Malay custom. After that the colony make it become the Qadi law system in one side, civil law system. After independent, sultan make the announcement in returning to the law system before the arrival of British and become the sole law system by the name "Mahkamah Kesultanan Brunei Darussalam".

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