



## Islamic Legal and Constitutional Tolerance: A Normative Study of State–Sharia Interaction in Malaysia and Indonesia

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### Abstract

This study explores the dynamics of Islamic legal and constitutional tolerance in Malaysia and Indonesia by examining how Sharia law interacts with national legal systems within two democratic states with Muslim-majority populations. The research identifies a critical gap in understanding the normative implications of integrating Islamic law into modern constitutional frameworks, particularly regarding jurisdictional conflict, human rights, and legal harmonization. Employing a qualitative normative legal method, the study uses doctrinal, comparative, and theoretical approaches rooted in legal pluralism, constitutional tolerance, and *maqāṣid al-sharī'ah*. The findings reveal significant structural and interpretive differences between Malaysia's dual legal system and Indonesia's integrated but decentralized religious court system. Malaysia's constitutional recognition of Islam as the religion of the federation introduces complex jurisdictional disputes and limits judicial flexibility. In contrast, Indonesia's Pancasila-based secularism and the flexible application of the Compilation of Islamic Law (KHI) offer a more adaptable framework for religious legal integration. The study recommends a dialogical model of constitutional tolerance and contextual *ijtihad* to foster legal harmonization that upholds both Islamic values and universal human rights.

**Keywords:** Islamic Legal, Constitutional Tolerance, Malaysia, Indonesia, Sharia Law, *Maqāṣid al-sharī'ah*, Legal Harmonization

### Abstrak

Penelitian ini membahas dinamika hukum Islam dan toleransi konstitusional di Malaysia dan Indonesia, dengan menelaah bagaimana hukum Syariah berinteraksi dengan sistem hukum nasional dalam dua negara demokratis yang mayoritas penduduknya beragama Islam. Kajian ini mengidentifikasi kesenjangan penting dalam pemahaman implikasi normatif dari integrasi hukum Islam ke dalam kerangka konstitusional modern, khususnya terkait konflik yurisdiksi, hak asasi manusia, dan harmonisasi hukum. Dengan menggunakan metode penelitian hukum normatif kualitatif, studi ini menerapkan pendekatan doktrinal, komparatif, dan teoritis yang berlandaskan pada teori pluralisme hukum, toleransi konstitusional, dan *maqāṣid al-sharī'ah*. Temuan menunjukkan perbedaan struktural dan interpretatif yang signifikan

antara sistem hukum ganda di Malaysia dan sistem peradilan agama yang terintegrasi namun terdesentralisasi di Indonesia. Pengakuan konstitusional Malaysia terhadap Islam sebagai agama Persekutuan memunculkan sengketa yurisdiksi yang kompleks dan membatasi fleksibilitas yudisial. Sebaliknya, sekularisme berbasis Pancasila di Indonesia serta penerapan fleksibel Kompilasi Hukum Islam (KHI) menawarkan kerangka yang lebih adaptif bagi integrasi hukum keagamaan. Studi ini merekomendasikan model dialogis toleransi konstitusional dan ijtihad kontekstual untuk mendorong harmonisasi hukum yang menjunjung nilai-nilai Islam dan hak asasi manusia universal.

**Kata kunci:** Hukum Islam, Toleransi Konstitusional, Malaysia, Indonesia, Hukum Syariah, Maqāṣid al-sharī'ah, Harmonisasi Hukum

## Introduction

This report undertakes a normative analysis of Islamic legal pluralism within the constitutional frameworks of Malaysia and Indonesia. It examines how Islamic law, or Sharia, interacts with national legal systems, exploring the inherent complexities, points of friction, and potential for harmonious coexistence. The study focuses on these two Southeast Asian nations as compelling models of institutionalized legal pluralism within democratic and constitutional states.

Legal pluralism, understood as the simultaneous operation of multiple legal systems within a single jurisdiction, is a long-standing and prevalent characteristic of many societies globally, particularly in Muslim-majority contexts. This phenomenon challenges the conventional notion that the state holds a sole monopoly over law, a perspective increasingly regarded as an ideological construct rather than an accurate depiction of reality. Scholars such as Pospisil, Sally Falk Moore, and Griffiths have been instrumental in highlighting this multifaceted reality, asserting that state law represents only one among many normative orders that govern human conduct.<sup>1</sup> The institutionalization of Sharia courts and the formal recognition of Islamic legal instruments within state apparatuses in countries like Malaysia and Indonesia, even with defined jurisdictional limits, demonstrate a practical acceptance of this inherent pluralism. This moves beyond a "weak" or "juristic" legal pluralism, where alternative systems are merely acknowledged at the state's discretion, towards a

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<sup>1</sup> Universität Münster Islamwissenschaft Institut für Arabistik und, "Legal Pluralism in Muslim Context," accessed August 3, 2025, [https://www.uni-muenster.de/ArabistikIslam/Forschen/Legal\\_Pluralism.html](https://www.uni-muenster.de/ArabistikIslam/Forschen/Legal_Pluralism.html).

"strong" sociological legal pluralism that recognizes the independent normative force of non-state legal orders.<sup>2</sup>

Southeast Asia, home to around 42% of the world's Muslim population, presents a particularly rich and dynamic environment for the study of Islamic legal pluralism. The legal traditions in this region are inherently pluralistic, with Islamic law frequently coexisting alongside state law and customary law, often with formal state recognition.<sup>3</sup> The pioneering academic contributions of scholars like M.B. Hooker, Tim Lindsey, and Kerstin Steiner have been pivotal in meticulously documenting and analyzing the evolution of Islamic legal traditions and their manifestation within the state structures of Southeast Asia.<sup>4</sup>

Malaysia and Indonesia stand as prominent examples of institutionalized Islamic legal pluralism within democratic and constitutional governance structures [Query outline]. While both nations recognize Islamic law, primarily in personal and family matters, their constitutional approaches, the architecture of their jurisdictional systems, and the precise scope of Sharia enforcement exhibit notable differences [Query outline]. The presence of Sharia alongside civil law and customary norms inevitably raises fundamental questions concerning legal hierarchy, the practical application of tolerance, and the mechanisms for legal integration. This report aims to normatively analyze how the constitutional frameworks in Malaysia and Indonesia accommodate Islamic law and how these interactions influence religious freedom, social cohesion, and the trajectory of legal reform.

The enduring challenge to legal centralism in Muslim-majority states is a significant aspect of this study. The consistent emphasis in academic discourse on legal pluralism as a "dominant feature of most legal orders worldwide"<sup>5</sup> directly counters the idea of an exclusive state

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<sup>2</sup> Sherman A Jackson, "Legal Pluralism between Islam and the Nation-State: Romantic Medievalism or Pragmatic Modernity," *Fordham Int'l LJ* 30 (2006): 158.

<sup>3</sup> Lynette J. Chua et al., *The Asian Law and Society Reader*, 1st ed. (Cambridge University Press, 2023), <https://doi.org/10.1017/9781108864824>.

<sup>4</sup> Mitsuo Nakamura et al., *Islam & Civil Society in Southeast Asia*, vol. 23 (Institute of Southeast Asian Studies, 2001).

<sup>5</sup> Geoffrey Swenson, "Legal Pluralism in Theory and Practice," *International Studies Review* 20, no. 3 (2018): 438–62.

legal monopoly. In Muslim contexts, this challenge is particularly profound because Islamic law derives its authority from divine revelation, often conceptually and historically predating state-enacted law.<sup>6</sup> The institutionalization of Sharia courts and the recognition of Islamic legal instruments, such as the Compilation of Islamic Law (KHI), within the state apparatus in Malaysia and Indonesia, even with defined jurisdictional limits, represent a practical and institutionalized acceptance of this inherent pluralism. This goes beyond a "weak" or "juristic" legal pluralism, where alternative systems are only recognized to the extent the state allows<sup>7</sup>, towards a "strong" sociological legal pluralism that acknowledges the independent normative force of non-state legal orders. This implies that effective governance and legal reform in these contexts cannot operate under a purely centralist paradigm. Instead, they must actively engage with and navigate the complex, often contested, interactions between state and non-state legal systems. Understanding the "combative, competitive, cooperative, and complementary" archetypes of legal pluralism becomes crucial for assessing the current state and devising strategies for more constructive relationships, such as "harmonization" or "incorporation".<sup>8</sup>

The intricate coexistence of Sharia, civil law, and customary norms in Malaysia and Indonesia generates critical questions regarding legal hierarchy, the practical application of tolerance, and the mechanisms for legal integration [Query outline]. The central problem explored in this study revolves around understanding the operational dynamics of Islamic law within these plural legal systems. It seeks to ascertain the extent to which constitutional structures facilitate the coexistence—or, conversely, contribute to friction—between Sharia and state law [Query outline]. This necessitates a detailed examination of the constitutional recognition, the defined jurisdictional scope, and the practical enforcement mechanisms of Sharia in both national contexts.

This study pursues several key objectives:

- 1 To examine the constitutional recognition and limitations placed upon Islamic law in Malaysia and Indonesia [Query outline].

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<sup>6</sup> Islamwissenschaft, "Legal Pluralism in Muslim Context."

<sup>7</sup> Jackson, "Legal Pluralism between Islam and the Nation-State: Romantic Medievalism or Pragmatic Modernity."

<sup>8</sup> Swenson, "Legal Pluralism in Theory and Practice."

- 2 To analyze the normative implications arising from legal pluralism and the interaction between state and Sharia, with particular attention to principles of justice, public welfare (*maslahah*), and the protection of human rights.<sup>9</sup>
- 3 To assess the potential of constitutional tolerance as a viable framework for harmonizing Islamic and national laws, thereby fostering a more inclusive and responsive legal pluralism.<sup>10</sup>

## Methods

This section delineates the research approach employed in this study, emphasizing its qualitative, normative, and comparative nature, along with the theoretical lenses applied for analysis.

### Research Design: Qualitative Normative Legal Research

This study adopts a qualitative normative legal research design, integrating doctrinal and comparative methods [Query outline]. The normative dimension is paramount, as it enables an evaluation of how legal systems should ideally function to uphold principles of justice and social order, rather than merely describing their current operational state. This involves a critical assessment of existing legal frameworks against established principles of justice and the higher objectives of Islamic law.

### Sources and Materials: Primary Legal Texts and Academic Literature

The analysis draws upon a comprehensive range of sources and materials:

1. Primary Sources: Core national legal documents form the bedrock of this study. These include the Federal Constitution of Malaysia, the 1945 Constitution of Indonesia, and key statutes pertaining to Islamic law in both jurisdictions. Notable examples are Malaysia's Syariah Courts (Criminal Jurisdiction) Act 1965 and Indonesia's Compilation of Islamic Law (KHI).

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<sup>9</sup> Noor Syifa Amaliah Azizah and Shalihah Shalihah, "Maqasid Al-Shari'ah and Legal Pluralism: Normative Analysis of The Principle of Justice in A Multicultural Society," *Journal Of Islamic And Law Studies* 9, no. 2 (2025): 119–26.

<sup>10</sup> Swenson, "Legal Pluralism in Theory and Practice."

Additionally, landmark constitutional and court decisions from both countries, such as the *Indira Gandhi* case in Malaysia and judicial interpretations of the KHI in Indonesia<sup>11</sup>, provide crucial practical context.

2. Secondary Sources: The study extensively utilizes academic literature, journal articles, legal commentaries, and scholarly works focusing on legal pluralism, Islamic constitutionalism, and comparative law within Southeast Asia.<sup>12</sup> The comparative lens, focusing on Malaysia and Indonesia, is central to understanding their distinct models of state-Sharia interaction.<sup>13</sup>

### **Analytical Framework: Legal Pluralism, Constitutional Tolerance, and *Maqāṣid al-sharī'ah***

The analytical framework for this study integrates three key theoretical approaches:

1. Legal Pluralism Theory: This framework is employed to analyze the complex coexistence and interaction of multiple legal orders—specifically state law, Islamic law, and customary law—within the single jurisdictions of Malaysia and Indonesia.<sup>14</sup> It transcends a purely state-centric view to acknowledge the inherent autonomy and authority of non-state normative systems. The study considers various archetypes of state-non-state relationships, including combative, competitive, cooperative, and complementary dynamics, as well as strategies for influencing these relationships, such as bridging, harmonization, incorporation, subsidization, and repression.<sup>15</sup>
2. Constitutional Tolerance: This concept is central to the normative analysis, referring to the state's capacity to accommodate normative diversity within a unified legal system [Query outline]. It is explored as a principle that upholds national unity and constitutional order while simultaneously allowing for diverse religious beliefs and practices. This draws

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<sup>11</sup> Laurensia Sherlyn Tania Ika Prabowo et al., "Mandatory Testament for Heirs of Different Religions," *LEGAL BRIEF* 13, no. 1 (2024): 13–22.

<sup>12</sup> Islamwissenschaft, "Legal Pluralism in Muslim Context."

<sup>13</sup> Nakamura et al., *Islam & Civil Society in Southeast Asia*, vol. 23.

<sup>14</sup> Islamwissenschaft, "Legal Pluralism in Muslim Context."

<sup>15</sup> Swenson, "Legal Pluralism in Theory and Practice."

from Islamic principles of *tasāmuh* (tolerance) and the broader concept of religious freedom.<sup>16</sup> This framework assesses how constitutional values, such as legal certainty, social justice, and religious freedom, can be effectively integrated with Islamic legal principles.<sup>17</sup>

3. Normative Legal Reasoning (*Maqāṣid al-sharī‘ah*): The higher objectives and ideals of Islamic law, known as *maqāṣid al-sharī‘ah*, serve as a primary interpretive tool in this study. These objectives encompass the protection of religion (*hifzh al-din*), life (*hifzh al-nafs*), intellect (*hifzh al-aql*), lineage (*hifzh al-nasl*), and property (*hifzh al-mal*), alongside broader principles of justice (*‘adl*) and public welfare (*maslahah*).<sup>18</sup> This framework is vital for guiding an inclusive and responsive legal pluralism, particularly in addressing contemporary issues and balancing religious norms with universal human rights.<sup>19</sup>

The interplay of descriptive and normative legal pluralism is a key methodological consideration. The research design explicitly states a "qualitative normative legal research design" [Query outline]. While the academic discussions on legal pluralism<sup>20</sup> primarily describe the existence and interaction of multiple legal systems, the emphasis on "constitutional tolerance" and *maqāṣid al-sharī‘ah* elevates the analysis beyond mere description to a normative evaluation. This means the study does not simply document how legal pluralism operates in Malaysia and Indonesia, but critically assesses how it should operate to achieve optimal justice, social cohesion, and respect for human rights.

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<sup>16</sup> Burhanuddin S. et al., "The Fundamental Principles of Tolerance (Al-Tasāmuh) in Worship and Public Affairs under Islamic Perspective:," *Proceedings of the 1st International Conference on Recent Innovations*, SCITEPRESS - Science and Technology Publications, 2018, 1126–32, <https://doi.org/10.5220/0009923711261132>.

<sup>17</sup> Mustofa Mustofa et al., "Strengthening Zakat Regulation through the Siyāsah Māliyah Approach: A Constitutional and Legal Analysis of Indonesia and Malaysia," *JURIS (Jurnal Ilmiah Syariah)* 24, no. 1 (2025): 111, <https://doi.org/10.31958/juris.v24i1.14637>.

<sup>18</sup> Mohammad Hashim Kamali, *Maqasid Al-Shari‘ah, Ijtihad and Civilization Renewal*, vol. 20 (International Institute of Islamic Thought (IIIT), 2012).

<sup>19</sup> Azizah and Shalihah, "Maqasid Al-Shari‘ah and Legal Pluralism: Normative Analysis of The Principle of Justice in A Multicultural Society."

<sup>20</sup> Islamwissenschaft, "Legal Pluralism in Muslim Context."

The "legal political" conception of legal pluralism, which focuses on state recognition of other legal systems<sup>21</sup>, is examined against the "bottom-up" view of law in everyday life and, crucially, against the normative ideals derived from *maqāṣid al-sharī'ah*. This dual approach allows for a robust critique of existing state-Sharia interactions. For instance, if a state's recognition or implementation of Sharia leads to outcomes that contradict the fundamental objectives of Islamic law (e.g., undermining minority rights, gender equality, or the protection of life), the normative framework provides a principled basis for suggesting reforms. The study highlights areas where the de facto legal pluralism falls short of de jure constitutional principles or the higher ethical aspirations of Islamic law.

## **Results and Discussion**

This section presents a comparative analysis of state-Sharia interaction in Malaysia and Indonesia, detailing their constitutional foundations, practical challenges arising from legal pluralism, and the normative implications for religious freedom, legal harmonization, and the rule of law.

### **Constitutional Foundations of Islamic Law in Malaysia and Indonesia**

The constitutional frameworks in Malaysia and Indonesia reflect distinct approaches to the integration and regulation of Islamic law, shaped by their historical trajectories and national ideologies.

#### **Malaysia: A Dual System with Constitutional Ambiguities**

Malaysia operates under a federal constitutional monarchy, where Islam holds a unique position. Article 3(1) of the Federal Constitution declares that "Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation".<sup>22</sup> This provision has been a continuous subject of debate, leading to ongoing discussions about the secular or theocratic nature of Malaysia's Constitution. Historically, the framers of the Constitution intended a secular state, with Article 3(1) specifically

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<sup>21</sup> Chua et al., *The Asian Law and Society Reader*.

<sup>22</sup> "Constitution of Malaysia 1957 - Part I," accessed August 3, 2025, <https://www.commonlii.org/my/legis/const/1957/1.html>.

designed not to infringe upon the civil and political liberties of non-Muslims or their freedom of worship. This interpretation was reinforced by the Supreme Court's landmark decision in *Che Omar bin Che Soh v Public Prosecutor* (1988), which interpreted "Islam" in Article 3(1) as referring primarily to rituals and ceremonies, rather than an all-encompassing system of life including jurisprudence and moral standards. This judicial stance, however, continues to be a point of contention for certain Islamic leaders who advocate for a broader application of Sharia.<sup>23</sup>

The Malaysian legal landscape is characterized by a dual court system, comprising federal civil courts and state-level Syariah courts.<sup>24</sup> Syariah courts are primarily established by individual state laws and possess limited jurisdiction exclusively over Muslims in matters relating to personal and family law, such as marriage, divorce, legitimacy, inheritance, and religious endowments, as well as certain religious observances.<sup>25</sup> The scope of criminal jurisdiction for Syariah courts is defined and limited by the federal Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355). This Act allows Syariah courts to deal with offenses against Islamic precepts committed by Muslims, but it imposes significant limitations on the penalties they can impose, setting a maximum of three years imprisonment, six strokes of the cane, and a RM5,000 fine. These penal powers are considerably lower than those of civil Magistrates. Crucially, Syariah courts are explicitly precluded from trying offenses already covered by federal law, such as treason, corruption, or murder.

A significant constitutional amendment in 1988, Article 121(1A), aimed to establish the independence of Syariah courts from civil courts in matters within their jurisdiction, creating a clear separation of powers.<sup>26</sup> However, this amendment has, in practice,

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<sup>23</sup> Fahri Azzat, *Article 3(1) of the Federal Constitution from 3 Dimensions - From the Bar Stool*, January 3, 2025, <https://fromthebarstool.life/2025/01/03/article-31-of-the-federal-constitution-from-3-dimensions/>.

<sup>24</sup> Shad Saleem Faruqi, *Legal Pluralism in Malaysia: Navigating the Civil and Shariah Systems*, no. 2025 (2025).

<sup>25</sup> *Wikipedia*, "Syariah Court," March 22, 2025, [https://en.wikipedia.org/w/index.php?title=Syariah\\_Court&oldid=1281784358](https://en.wikipedia.org/w/index.php?title=Syariah_Court&oldid=1281784358).

<sup>26</sup> Faruqi, *Legal Pluralism in Malaysia: Navigating the Civil and Shariah Systems*.

introduced ambiguities that have frequently led to complex jurisdictional conflicts.<sup>27</sup>

### **Indonesia: Pancasila-Based Pluralism with Decentralized Islamic Law**

Indonesia, in contrast to Malaysia, is constitutionally defined as a non-religious state, founded on the national ideology of Pancasila. The first tenet of Pancasila, "Belief in one supreme God," underpins the nation's spiritual foundation, but the state explicitly avoids a religious identity. Article, paragraphs (1) and (2) of the 1945 Constitution guarantees the freedom of religion and the right of all persons to worship according to their own religion or belief, providing robust assurance for both internal and external expressions of religious practice.<sup>28</sup> The state officially recognizes six major religions—Islam, Protestantism, Catholicism, Hinduism, Buddhism, and Confucianism—and ensures equal rights for their adherents, although unrecognized religious groups may encounter administrative challenges.<sup>29</sup>

Islamic law in Indonesia is primarily applied through the Compilation of Islamic Law (*Kompilasi Hukum Islam/KHI*), which was promulgated in 1991 via a Presidential Instruction (*Instruksi Presiden/INPRES*). The KHI encompasses provisions on marriage, inheritance, and religious endowments, serving as a main reference for the Religious Courts. Despite its hierarchical position as an INPRES, which means it is not formally included in the hierarchy of laws and regulations according to Law Number 12 of 2011 concerning the Establishment of Legislation, the KHI is widely recognized and consistently applied by judges in Religious Courts as a primary legal

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<sup>27</sup> "MALAYSIA Executive Summary The Constitution Protects Freedom of Religion," State.gov, n.d., <https://2009-2017.state.gov/documents/organization/192853.pdf>.

<sup>28</sup> Zainal Amin Ayub et al., "Freedom Of Religion And Belief Under Supreme Court Verdict Study Case On Supreme Court Decision Number 17/P/HUM/2021," *Jurnal Hukum Dan Peradilan* 12, no. 1 (2023): 1, <https://doi.org/10.25216/jhp.12.1.2023.1-28>.

<sup>29</sup> *Wikipedia*, "Freedom of religion in Indonesia," June 9, 2025, [https://en.wikipedia.org/w/index.php?title=Freedom\\_of\\_religion\\_in\\_Indonesia&oldid=1294680266](https://en.wikipedia.org/w/index.php?title=Freedom_of_religion_in_Indonesia&oldid=1294680266).

basis. It is considered a unique and significant development in Indonesian *fiqh*.<sup>30</sup>

Indonesia features a decentralized system of Religious Courts (*Pengadilan Agama*) operating at first and second levels.<sup>31</sup> These courts exclusively hear Islamic civil cases concerning Muslims, possessing specific competencies in areas such as marriage, divorce, wills, grants, *waqf*, *zakat*, and charity.<sup>32</sup> The Religious Courts function as an integral part of the broader Indonesian judicial body, alongside general courts, military courts, state administrative courts, and the Constitutional Court.<sup>33</sup>

The divergent constitutional architectures and their impact on Sharia integration are evident in these foundational differences. Malaysia's constitutional declaration of Islam as the "religion of the Federation"<sup>34</sup> stands in sharp contrast to Indonesia's Pancasila-based secular state, which, while recognizing "Belief in one supreme God," explicitly avoids being a religious state.<sup>35</sup> This fundamental difference in constitutional design dictates the mode and extent of Sharia integration. In Malaysia, the formal status of Islam creates a strong political and social impetus for Islamization, leading to a dual legal system where Sharia operates within defined, yet often contested, boundaries. The *Che Omar bin Che Soh* ruling<sup>36</sup> represents a judicial effort to maintain a secular constitutional interpretation despite the religious declaration. In Indonesia, the non-religious state identity,

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<sup>30</sup> Naskur Bilalu et al., "Compilation of Islamic Law as Judge's Consideration at a Religious Court in North Sulawesi, Indonesia," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 6, no. 2 (2022): 514, <https://doi.org/10.22373/sjhh.v6i2.12441>.

<sup>31</sup> *Wikipedia*, "Judiciary of Indonesia," June 2, 2025, [https://en.wikipedia.org/w/index.php?title=Judiciary\\_of\\_Indonesia&oldid=1293527775](https://en.wikipedia.org/w/index.php?title=Judiciary_of_Indonesia&oldid=1293527775).

<sup>32</sup> FHukum CMSMaster, "Religious Court Procedure Law," *Fakultas Hukum Universitas Pattimura*, November 7, 2016, <https://fh.unpatti.ac.id/en/religious-court-procedural-law/>.

<sup>33</sup> Hanim Hamzah et al., "Legal Systems in Indonesia: Overview," *A w*, 2021.

<sup>34</sup> "Constitution of Malaysia 1957 - Part I."

<sup>35</sup> Ayub et al., "Freedom Of Religion And Belief Under Supreme Court Verdict Study Case On Supreme Court Decision Number 17/P/HUM/2021."

<sup>36</sup> Azzat, *Article 3(1) of the Federal Constitution from 3 Dimensions - From the Bar Stool*.

coupled with the constitutional guarantee of religious freedom<sup>37</sup>, allows for the recognition and application of Islamic law through instruments like the KHI, but without the same inherent tension of a state religious identity. This divergence leads to distinct challenges and opportunities. Malaysia's approach, while acknowledging religious diversity, often grapples with jurisdictional conflicts and concerns over minority rights due to the perceived supremacy of Islam.<sup>38</sup> Indonesia's framework, while facing its own issues regarding "deviant" sects and blasphemy laws<sup>39</sup>, potentially offers greater flexibility for legal pluralism and adaptation of religious law within a broader human rights framework, as it is not bound by a state religious identity.

Furthermore, the ambiguous formal status of Islamic legal instruments and its practical authority present another notable distinction. In Malaysia, the Syariah Courts (Criminal Jurisdiction) Act 1965 20 is a federal law that explicitly limits the criminal jurisdiction of Sharia courts. This signifies clear legislative control over the scope of Islamic law. While proposals for hudud implementation have been introduced at the state level—most notably in Kelantan and Terengganu—they have not been implemented due to federal constitutional constraints and the jurisdictional limits imposed by the Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355). Thus, any substantial expansion of Syariah criminal law would still necessitate complex constitutional and federal legislative amendments.<sup>40</sup> In Indonesia, the KHI's flexible status as an INPRES, while potentially making it less susceptible to direct judicial review as a formal law, allows for judicial discretion and adaptation, enabling judges to use *ijtihad* to fill legal gaps. This suggests that Indonesia's system, despite its formal ambiguities, might be more adaptable to evolving social needs through judicial interpretation, whereas Malaysia's system

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<sup>37</sup> Ayub et al., "Freedom Of Religion And Belief Under Supreme Court Verdict Study Case On Supreme Court Decision Number 17/P/HUM/2021."

<sup>38</sup> "MALAYSIA Executive Summary The Constitution Protects Freedom of Religion."

<sup>39</sup> Ayub et al., "Freedom Of Religion And Belief Under Supreme Court Verdict Study Case On Supreme Court Decision Number 17/P/HUM/2021."

<sup>40</sup> Bilalu et al., "Compilation of Islamic Law as Judge's Consideration at a Religious Court in North Sulawesi, Indonesia."

requires more rigid legislative and constitutional changes for significant shifts in Sharia application.<sup>41</sup>

Table 1: Comparative Constitutional and Legal Frameworks of Islamic Law in Malaysia and Indonesia

Feature	Malaysia	Indonesia
Constitutional Basis for Religion/Sharia	Article 3(1) Federal Constitution (Islam as religion of Federation, others practiced in peace/harmony)	Pancasila (Belief in one supreme God) & Article (Freedom of religion)
Nature of State	Constitutionally secular but strong Islamic identity	Non-religious but protects and guarantees religious freedom
Court System Structure	Dual (Federal Civil Courts & State Syariah Courts)	Integrated system under the Supreme Court (Mahkamah Agung), comprising General, Religious, Military, and State Administrative Courts, alongside the Constitutional Court (Mahkamah Konstitusi) as an independent body for constitutional review.
Jurisdiction of Religious Courts	Personal & Family Law, limited criminal jurisdiction over Muslims only	Islamic Civil Cases over Muslims only (marriage, inheritance, <i>waqf</i> , etc.)

<sup>41</sup> Mohamad Ismail Bin Mohamad Yunus, “The Conceptualization of Legal Harmonization Approach in Malaysia,” *Fiat Justisia: Jurnal Ilmu Hukum* 17, no. 1 (2023): 45–74, <https://doi.org/10.25041/fiatjustisia.v17no1.2508>.

Key Islamic Legal Instrument(s)	Syariah Courts (Criminal Jurisdiction) Act 1965, State Islamic Enactments	Compilation of Islamic Law (KHI)
Formal Legal Status of Islamic Instruments	Federal Act/State Enactments (formally legislated)	Presidential Instruction (INPRES) (not formal law in hierarchy)

### **Legal Pluralism in Practice: Jurisdiction, Conflict, and Integration**

The theoretical frameworks of legal pluralism manifest in practical challenges within both Malaysia and Indonesia, particularly concerning jurisdictional overlaps, the nature of disputes, and the mechanisms employed for their resolution.

#### **Overlapping Jurisdictions between Civil and Religious Courts**

Both Malaysia and Indonesia frequently encounter complex issues arising from the overlapping jurisdictions between their secular and religious court systems.<sup>42</sup> This often leads to intricate disputes, especially in sensitive areas such as religious conversion, inheritance, marriage, and questions of religious identity.<sup>43</sup>

In Malaysia, the constitutional amendment of Article 121(1A) in 1988 was intended to grant Syariah courts independence within their defined purview by stating that civil courts "shall have no jurisdiction in respect to any matter within the jurisdiction of the Shariah courts".<sup>44</sup> However, this amendment has, in practice, introduced significant ambiguities and heightened jurisdictional conflicts, particularly when cases involve non-Muslims or fundamental constitutional rights. The evolving contestation of jurisdictional supremacy in Malaysia is a critical dynamic. The 1988 amendment to Article 121(1A) of the Federal Constitution<sup>45</sup> was a legislative act intended to grant Syariah courts independence from civil courts. However, the *Indira Gandhi* Federal Court ruling explicitly re-asserted the civil courts' "exclusive jurisdiction to review the administrative actions of public authorities" and their inherent power of judicial review as "an essential feature of

<sup>42</sup> Faruqi, *Legal Pluralism in Malaysia: Navigating the Civil and Shariah Systems*.

<sup>43</sup> Prabowo et al., "Mandatory Testament for Heirs of Different Religions."

<sup>44</sup> Faruqi, *Legal Pluralism in Malaysia: Navigating the Civil and Shariah Systems*.

<sup>45</sup> Faruqi, *Legal Pluralism in Malaysia: Navigating the Civil and Shariah Systems*.

the basic structure of the constitution".<sup>46</sup> This indicates that despite legislative attempts to create parity or exclusivity for Syariah courts, the civil courts, as guardians of the fundamental constitutional structure, retain ultimate authority in matters of constitutional interpretation and judicial review, especially when fundamental liberties and non-Muslim interests are at stake. This dynamic suggests that Malaysia's dual legal system is not one of equal, parallel jurisdictions but rather one where the civil courts maintain a supervisory role over constitutional matters, even those touching on Islamic law. This reinforces the principle of constitutional supremacy and underscores the challenges of fully integrating Sharia within a federal, secular-leaning framework without impinging on universal rights.

In Indonesia, while the Religious Courts have specific competencies exclusively for Muslims in civil matters<sup>47</sup>, the application of the KHI, being a Presidential Instruction, can still lead to legal questions when it intersects with general civil law, particularly in cases involving individuals of different religious affiliations or where national laws provide alternative frameworks.<sup>48</sup>

### **Disputes over Conversion, Inheritance, Marriage, and Religious Identity**

- a. Religious Conversion: A prominent and often contentious area in Malaysia involves cases of unilateral religious conversion of minors, where the jurisdiction between civil and Syariah courts has been historically disputed.<sup>49</sup> These cases frequently trigger fundamental questions about parental rights and religious freedom, particularly when one parent converts to Islam and seeks to convert the children without the other parent's consent.

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<sup>46</sup> "Federal Court Judgment on Indira Gandhi Case | The Malaysian Insight," accessed August 3, 2025, <https://www.themalaysianinsight.com/s/34948>.

<sup>47</sup> {Citation}

<sup>48</sup> Prabowo et al., "Mandatory Testament for Heirs of Different Religions."

<sup>49</sup> Alizeh Ahmad, "Malaysian Custody Cases of Children Unilaterally Converted to Islam: Indira Gandhi Mutho v. Pathmanathan Krishnan (2016)," *Islamic Law Blog*, February 8, 2018, <https://islamiclaw.blog/2018/02/08/malaysian-custody-cases-of-children-unilaterally-converted-to-islam-indira-gandhi-mutho-v-pathmanathan-krishnan-2016/>.

- b. Inheritance: In Indonesia, the KHI (Article 171(c)) stipulates that an heir must be Muslim, which creates complexities for interfaith families. This provision has led to adaptive judicial interpretations, notably the Supreme Court's rulings on *wasiat wajibah* (mandatory bequest), to accommodate non-Muslim family members, ensuring they receive a share despite the religious difference.<sup>50</sup>
- c. Marriage and Divorce: Both countries face ongoing challenges related to marital disputes, child custody, and maintenance. These issues are further complicated by religious conversion, interfaith marriages, or differing interpretations of religious law. In Indonesia, for instance, mediation is a primary mechanism for resolving marital conflicts in Religious Courts.<sup>51</sup>

#### Mechanisms for Resolving Conflicts and Harmonizing Interpretations

- a. Judicial Precedent and Interpretation: Rulings from the highest appellate courts are crucial in defining jurisdictional boundaries, clarifying legal ambiguities, and harmonizing interpretations between different legal systems. These decisions set precedents that guide lower courts.
- b. Legislative Amendments: Both federal and state legislatures frequently consider and enact amendments to existing laws to clarify jurisdictional lines or align legal provisions with evolving societal needs or constitutional interpretations.<sup>52</sup> This is a continuous process of legal adaptation.
- c. Alternative Dispute Resolution (ADR): In Indonesia, mediation is a statutorily mandated and increasingly significant mechanism for resolving civil disputes, including those heard in Religious Courts.<sup>53</sup> Arbitration is also utilized for civil and business disputes,

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<sup>50</sup> Prabowo et al., "Mandatory Testament for Heirs of Different Religions."

<sup>51</sup> Ahmad, "Malaysian Custody Cases of Children Unilaterally Converted to Islam."

<sup>52</sup> Yunus, "The Conceptualization of Legal Harmonization Approach in Malaysia."

<sup>53</sup> Saiful Majid et al., "Effectiveness of Dispute Resolution in Religious Courts Through Mediation by Non-Judge Mediators Within Banten," *Jurnal Hukum Dan Peradilan* 13, no. 2 (2024): 251, <https://doi.org/10.25216/jhp.13.2.2024.251-274>.

offering an alternative to protracted litigation and promoting more amicable resolutions.<sup>54</sup>

- d. Inter-agency Collaboration and Policy Directives: There is an implicit need for greater collaboration and consistent policy directives between secular and religious legal authorities to address systemic inconsistencies and ensure a more coherent legal landscape.<sup>55</sup> This involves bridging institutional divides to foster a more unified approach to legal administration.

### **Case Studies of Landmark Constitutional or Court Rulings** **Malaysia: The *Indira Gandhi* Case (Unilateral Conversion and Jurisdictional Supremacy)**

The *Indira Gandhi Mutho v. Pathmanathan Krishnan* case (2016) vividly illustrates the complex issues arising from unilateral religious conversions of children and the jurisdictional conflicts between civil and Syariah courts in Malaysia's dual legal system.<sup>56</sup>

Background: *Indira Gandhi*, a Hindu woman, was embroiled in a legal custody battle with her estranged husband, Pathmanathan Krishnan. Krishnan converted to Islam in 2009 and, without his wife's knowledge, unilaterally converted their three minor children to Islam. He subsequently obtained a custody order from the Syariah High Court. This action initiated a protracted legal battle concerning the validity of the conversions and the jurisdictional competence of the civil and Syariah courts.

Civil High Court (2013): Initially, the civil Federal High Court ruled that the children's conversion certificates to Islam should be declared null and void. The court found that Krishnan had not converted the children in accordance with the Administration of the Religion of Islam (Perak) Enactment 2004, specifically noting that the children were not present before the converting authority and did not utter the

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<sup>54</sup> Efa Laela Fakhriah and Anita Afriana, "Cross Border of Jurisdiction between Arbitration and District Court in Business Dispute Settlement under the Indonesian Legal System," *Fiat Justisia: Jurnal Ilmu Hukum* 17, no. 3 (2023): 293–304, <https://doi.org/10.25041/fiatjustisia.v17no3.3175>.

<sup>55</sup> Imma Purnama Sari et al., "A Culturally Adaptive Model of Rehabilitative Justice across Secular and Islamic Approach," *DIKTUM: Jurnal Syariah Dan Hukum* 23, no. 2 (2025): 232–48, <https://doi.org/10.35905/diktum.v23i2.13131>.

<sup>56</sup> Ahmad, "Malaysian Custody Cases of Children Unilaterally Converted to Islam."

affirmation of faith. The court asserted its jurisdiction on the grounds that Gandhi, as a non-Muslim, had no standing in Syariah courts. It further reasoned that Syariah courts, being creatures of state law, lacked the power to decide on constitutional matters; only superior civil courts, established by the Federal Constitution, possessed such authority. The court also invoked the children's constitutional rights under the Fundamental Liberties provisions and the Guardianship of Infants Act 1961 (GIA).<sup>57</sup>

Civil Court of Appeals (2015): Krishnan successfully appealed this decision. The Civil Court of Appeals overturned the High Court's ruling, holding that the validity of the conversion fell exclusively under the Syariah Court's jurisdiction per Section<sup>58</sup> of the Administration of the Religion of Islam (Perak) Enactment 2004. The appellate court also interpreted "parent" in Article 12(4) of the Federal Constitution (which states that the religion of a minor shall be decided by "his parent or guardian") as meaning only one parent, directly contradicting the High Court's implicit requirement for both parents' agreement.<sup>59</sup>

Federal Court (2018): In a landmark and highly anticipated ruling, the Federal Court firmly established the civil High Court's exclusive jurisdiction for judicial review of administrative actions, including those of the Registrar of Muallafs. It explicitly clarified that Syariah courts are not conferred with inherent judicial review powers. Crucially, the court ruled that a purposive reading of Article 12(4) of the Federal Constitution, alongside Sections 5 and 11 of the GIA, requires the consent of both parents (if both are living) for the religious conversion of a minor child. The conversion certificates were consequently declared void due to non-compliance with statutory requirements and constitutional provisions. This decision significantly reinforced the supremacy of the Federal Constitution and the civil courts' fundamental role in upholding its basic structure, particularly in interfaith disputes.<sup>60</sup>

Implications: The *Indira Gandhi* case vividly exposed the "grey areas" and "competing jurisdictions" within Malaysia's dual legal

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<sup>57</sup> Ahmad, "Malaysian Custody Cases of Children Unilaterally Converted to Islam."

<sup>58</sup> Fakhriah and Afriana, "Cross Border of Jurisdiction between Arbitration and District Court in Business Dispute Settlement under the Indonesian Legal System."

<sup>59</sup> Ahmad, "Malaysian Custody Cases of Children Unilaterally Converted to Islam."

<sup>60</sup> "Federal Court Judgment on Indira Gandhi Case | The Malaysian Insight."

system. It highlighted critical issues concerning the unilateral conversion of minors, women's rights in custody battles, and the protection of minority rights in a Muslim-majority state.<sup>61</sup> The Federal Court's judgment was a pivotal re-assertion of civil court supremacy in matters of constitutional interpretation and fundamental liberties, especially where non-Muslims are involved, providing a crucial check against potential overreach by religious authorities.<sup>62</sup> This ruling suggests that while the 1988 amendment to Article 121(1A) aimed to grant Syariah courts independence, the civil courts, as guardians of the fundamental constitutional structure, retain ultimate authority in matters of constitutional interpretation and judicial review, particularly when fundamental liberties and non-Muslim interests are at stake. This reinforces the principle of constitutional supremacy and underscores the challenges of fully integrating Sharia within a federal, secular-leaning framework without impinging on universal rights.

### **Indonesia: Judicial Review of KHI (Legal Status and Application)**

The Compilation of Islamic Law (KHI) was promulgated as a Presidential Instruction (INPRES) in 1991. Its status as an INPRES means it is not formally included in the hierarchy of laws and regulations as per Law No. 12 of 2011 concerning the Establishment of Legislation.<sup>63</sup>

**Susceptibility to Judicial Review:** While the available information does not explicitly state whether the KHI is susceptible to direct judicial review as a formal "law," Indonesia operates a dual judicial review system where the Supreme Court reviews regulations under the law, and the Constitutional Court reviews laws against the Constitution.<sup>64</sup> Given KHI's status as an INPRES, it might fall under the Supreme Court's purview for review of regulations, or its norms could be challenged indirectly through case law. The information

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<sup>61</sup> Ahmad, "Malaysian Custody Cases of Children Unilaterally Converted to Islam."

<sup>62</sup> "Federal Court Judgment on Indira Gandhi Case | The Malaysian Insight."

<sup>63</sup> Bilalu et al., "Compilation of Islamic Law as Judge's Consideration at a Religious Court in North Sulawesi, Indonesia."

<sup>64</sup> Airlangga Gama Shakti et al., "The Integration of Judicial Review in Indonesia," *Syah Kuala Law Journal* 6, no. 3 (2023): 212–27, <https://doi.org/10.24815/sklj.v6i3.26940>.

highlights that the Supreme Court recognizes KHI as a source of law and provides guidance on its interpretation.

**Practical Application:** Despite its informal legal status, the KHI serves as the primary reference for Religious Court judges in Indonesia, who consistently apply its provisions in Islamic civil cases. Judges are also empowered to use *ijtihad* (independent reasoning) when the KHI or other legislation is silent on a particular matter.<sup>65</sup> This indicates a strong practical acceptance and application within the religious judiciary, reflecting a pragmatic approach to legal development.

**Case of *Wasiat wajibah* (Mandatory Bequest):** A significant development demonstrating the adaptive application of KHI is the Supreme Court's interpretation regarding *wasiat wajibah* for non-Muslim heirs. While Article 171(c) of the KHI states that an heir must be Muslim, the Supreme Court has flexibly interpreted this to allow non-Muslim family members, particularly adopted children or adoptive parents, to receive a mandatory bequest.<sup>66</sup> This unique legal finding is explicitly based on the principle of *maslahat* (public interest), aiming to address socio-cultural diversity and ensure fairness that conventional Islamic jurisprudence might not fully accommodate.

**Implications:** The KHI's unique legal status and its adaptive judicial interpretations reflect Indonesia's pragmatic approach to integrating Islamic law within its pluralistic framework. This flexibility, particularly demonstrated through the *wasiat wajibah* case, allows for judicial reasoning informed by normative Islamic principles like *maslahat* to bridge traditional Islamic law with modern societal realities and human rights considerations.<sup>67</sup> This contrasts with Malaysia's more rigid constitutional and legislative framework, suggesting a greater capacity for internal legal evolution in Indonesia. The KHI's flexible status as an INPRES, while potentially making it less susceptible to direct judicial review as a formal law, allows for judicial discretion and

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<sup>65</sup> Bilalu et al., "Compilation of Islamic Law as Judge's Consideration at a Religious Court in North Sulawesi, Indonesia."

<sup>66</sup> Prabowo et al., "Mandatory Testament for Heirs of Different Religions."

<sup>67</sup> Achmad Roziqi et al., "The Legal Reasoning Of The Compilation Of Islamic Law In Indonesia On Mandatory Bequests (A Study of the Dialectics of Islamic Law and Socio-Cultural Context)," *International Journal of Research Publication and Reviews* 6, no. 3 (2025): 6472–79, <https://doi.org/10.55248/gengpi.6.0325.12104>.

adaptation, enabling judges to use *ijtihad* to fill legal gaps.<sup>68</sup> This suggests that Indonesia's system, despite its formal ambiguities, might be more adaptable to evolving social needs through judicial interpretation, whereas Malaysia's system requires more rigid legislative and constitutional changes for significant shifts in Sharia application.

### **Normative Implications: Sharia, Democracy, and the Rule of Law**

The interaction between Sharia and state law in Malaysia and Indonesia carries profound normative implications for the principles of democracy, the rule of law, and the protection of individual and minority rights.

### **Islamic Law as a Source of Moral and Legal Authority, Yet Constitutionally Limited**

In both Malaysia and Indonesia, Islamic law serves as a vital source of moral and legal authority for their respective Muslim-majority populations.<sup>69</sup> Its principles are deeply embedded in the societal fabric and inform personal and family life. However, its application is distinctly limited by constitutional frameworks. In Malaysia, despite Islam being the "religion of the Federation"<sup>70</sup>, the interpretation of this provision has historically been narrow, restricting Sharia's scope primarily to personal law and minor criminal offenses for Muslims.<sup>71</sup> The civil courts retain supremacy in constitutional interpretation and judicial review, acting as a check on the expansion of Sharia jurisdiction.<sup>72</sup> In Indonesia, Islamic law, through the KHI, is applied in religious courts for civil matters concerning Muslims, but it operates within a secular state founded on Pancasila, which prioritizes religious freedom for all citizens.<sup>73</sup> This constitutional limitation ensures that

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<sup>68</sup> Bilalu et al., "Compilation of Islamic Law as Judge's Consideration at a Religious Court in North Sulawesi, Indonesia."

<sup>69</sup> Prabowo et al., "Mandatory Testament for Heirs of Different Religions."

<sup>70</sup> "Constitution of Malaysia 1957 - Part I."

<sup>71</sup> Azzat, *Article 3(1) of the Federal Constitution from 3 Dimensions - From the Bar Stool*.

<sup>72</sup> "Federal Court Judgment on Indira Gandhi Case | The Malaysian Insight."

<sup>73</sup> Ayub et al., "Freedom Of Religion And Belief Under Supreme Court Verdict Study Case On Supreme Court Decision Number 17/P/HUM/2021."

while Islamic law is recognized, it does not supersede the fundamental principles of the national legal system or the rights of non-Muslims.

### **The Role of the State in Defining the Boundaries of Religion and Law**

The state in both countries plays a crucial role in defining the boundaries between religious and secular law. This involves legislative action, judicial interpretation, and administrative policies. In Malaysia, the federal parliament, through acts like the Syariah Courts (Criminal Jurisdiction) Act 1965, sets the limits of Sharia courts' penal powers.<sup>74</sup> The judiciary, particularly the Federal Court, has demonstrated its role in upholding constitutional supremacy and limiting the reach of religious courts, as seen in the *Indira Gandhi* case.<sup>75</sup> In Indonesia, the state's role is manifested through the promulgation of instruments like the KHI as a Presidential Instruction, providing a framework for Islamic law while maintaining its position within a broader, pluralistic legal system.<sup>76</sup> The Ministry of Religious Affairs also plays a significant role in coordinating religious affairs.<sup>24</sup> The state's efforts to define these boundaries are often a delicate balancing act, navigating societal demands for religious adherence with constitutional commitments to pluralism and human rights.

### **The Tension Between Majority-Muslim Identity and the Protection of Minority Rights**

A significant normative challenge in both Malaysia and Indonesia is the tension between the majority-Muslim identity and the constitutional imperative to protect minority rights. In Malaysia, the formal status of Islam and the definition of ethnic Malays as Muslim on national identity cards can lead to concerns about discrimination against religious minorities and limitations on their religious expression. Jurisdictional disputes, particularly concerning conversion out of Islam, highlight the lack of adequate protection for individuals seeking to change their religion and the expansion of Syariah courts' scope into areas affecting non-Muslims. The criminalization of apostasy in some

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<sup>74</sup> Faruqi, *Legal Pluralism in Malaysia: Navigating the Civil and Shariah Systems*.

<sup>75</sup> "Federal Court Judgment on Indira Gandhi Case | The Malaysian Insight."

<sup>76</sup> Bilalu et al., "Compilation of Islamic Law as Judge's Consideration at a Religious Court in North Sulawesi, Indonesia."

states, despite contradicting federal law, further exemplifies this tension.<sup>77</sup>

In Indonesia, while the constitution guarantees religious freedom for all<sup>78</sup>, minority religions sometimes face discrimination, both socially and legally. Blasphemy laws are criticized for being used to target minority religious groups or "deviant" sects, and there are documented cases of attacks on places of worship.<sup>79</sup> The implementation of Sharia criminal law in Aceh, while aimed at protecting public welfare, has also raised concerns about human rights, particularly regarding physical punishments like caning.<sup>80</sup> These challenges underscore the need for a robust framework of constitutional tolerance that not only acknowledges diversity but actively safeguards the rights of all citizens, irrespective of their religious affiliation.

### **How *Maqāṣid al-sharī'ah* Can Guide a More Inclusive and Responsive Legal Pluralism**

*Maqāṣid al-sharī'ah*, the higher objectives of Islamic law, offer a powerful normative framework for guiding a more inclusive and responsive legal pluralism.<sup>81</sup> These objectives, which include the protection of religion, life, intellect, lineage, and property, along with broader principles of justice and public welfare (*maslahah*), transcend literal textual interpretations and focus on the underlying wisdom and purpose of Islamic injunctions.<sup>82</sup>

In Indonesia, the application of *maqāṣid al-sharī'ah* is increasingly being utilized by contemporary scholars to contextualize *fiqh* and reconcile religious norms with human rights, pluralism, and local customs. This approach emphasizes *ijtihad* (independent

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<sup>77</sup> "MALAYSIA Executive Summary The Constitution Protects Freedom of Religion."

<sup>78</sup> Ayub et al., "Freedom Of Religion And Belief Under Supreme Court Verdict Study Case On Supreme Court Decision Number 17/P/HUM/2021."

<sup>79</sup> *Wikipedia*, "Freedom of religion in Indonesia."

<sup>80</sup> Muhammad Arafat and Asmuni, "Implementation of Maqashid Al-Syariah in Islamic Criminal Law in Muslim Countries: A Comparative Study in Saudi Arabia, Iran, Malaysia, and Indonesia," *AL-SULTHANIYAH* 14, no. 1 (2025): 45–68, <https://doi.org/10.37567/al-sulthaniyah.v14i1.3577>.

<sup>81</sup> Azizah and Shalihah, "Maqasid Al-Shari'ah and Legal Pluralism: Normative Analysis of The Principle of Justice in A Multicultural Society."

<sup>82</sup> Kamali, *Maqasid Al-Shari'ah, Ijtihad and Civilization Renewal*, vol. 20.

reasoning) as a tool for legal dynamism, enabling the legal system to address modern socio-legal issues such as women's rights, religious plurality, and legal reform.<sup>83</sup> For example, the judicial interpretation of *wasiat wajibah* in Indonesia, which allows non-Muslim heirs to inherit, is explicitly rooted in the principle of *maslahat*, demonstrating how *maqāṣid* can inform adaptive legal solutions that promote fairness and social cohesion in a diverse society.<sup>84</sup> The use of *maqāṣid al-sharī'ah* provides a perspective grounded in the protection and welfare of all individuals, regardless of origin, race, or social status, which is crucial for addressing issues like minority rights.<sup>85</sup>

In Malaysia, while the concept of *maqāṣid* is recognized, its application in legal pluralism faces challenges due to the dual legal system and the emphasis on textual fidelity in some interpretations. However, there is potential for *maqāṣid al-sharī'ah* to strengthen and enhance pluralism and human rights in Malaysia's multi-ethnic and multi-religious environment.<sup>86</sup> By focusing on the universal values embedded in Islamic law, such as justice, compassion, and tolerance<sup>87</sup>, *maqāṣid al-sharī'ah* can serve as a bridge, fostering dialogue and promoting legal reforms that uphold Islamic principles while ensuring equitable treatment for all citizens. This approach encourages a context-sensitive reform of Islamic law and a methodological renewal in *fiqh*, strengthening dialogue between different legal systems and ensuring that religious values, human rights, and social justice can coexist harmoniously.<sup>88</sup>

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<sup>83</sup> Loso Judijanto et al., "Reinterpreting Islamic Jurisprudence in the Context of Modern Indonesia: A Comparative Study of Traditional and Contemporary Approaches," *Islamic Studies in the World* 2, no. 2 (2025): 52–60.

<sup>84</sup> Roziqi et al., "The Legal Reasoning Of The Compilation Of Islamic Law In Indonesia On Mandatory Bequests (A Study of the Dialectics of Islamic Law and Socio-Cultural Context)."

<sup>85</sup> Muktashim Billah et al., "Islamic Law Perspectives and Social Experiences on Stigma toward Disabled People in Indonesia," *Frontiers in Sociology* 10 (2025): 1479243.

<sup>86</sup> Kamali, *Maqasid Al-Shari'ah, Ijtihad and Civilization Renewal*, vol. 20.

<sup>87</sup> Billah et al., "Islamic Law Perspectives and Social Experiences on Stigma toward Disabled People in Indonesia."

<sup>88</sup> Azizah and Shalihah, "Maqasid Al-Shari'ah and Legal Pluralism: Normative Analysis of The Principle of Justice in A Multicultural Society."

## **Towards a Framework of Constitutional Tolerance**

The journey towards harmonizing Islamic and national laws in Malaysia and Indonesia necessitates a robust framework of constitutional tolerance. This framework acknowledges the inherent diversity of normative orders within a state while upholding its fundamental unity and constitutional principles.

### **Constitutional Tolerance as a Principle that Upholds Unity While Allowing Normative Diversity**

Constitutional tolerance is a principle that enables the state to maintain its unity and constitutional order while accommodating a diversity of normative systems, including Islamic law, civil law, and customary law.<sup>89</sup> This concept goes beyond mere coexistence; it implies a deliberate choice of non-interference in practices that may differ from the state's dominant legal norms, provided they do not fundamentally undermine constitutional principles or human rights.<sup>90</sup> In the context of Malaysia and Indonesia, this means upholding the supremacy of the constitution while allowing for the application of Islamic law in matters pertinent to Muslims, as long as it aligns with broader constitutional values such as legal certainty, social justice, and religious freedom.<sup>91</sup> The objective is to foster harmonious relationships in societies characterized by active participation and mutual contributions from all members, regardless of their religious beliefs.

### **The Potential of Dialogical Legal Interpretation (*Fiqh al-Wāqī'*, Contextual *Ijtihad*)**

Achieving constitutional tolerance and effective legal harmonization requires dynamic and dialogical approaches to legal interpretation. *Fiqh al-Wāqī'* (jurisprudence of reality) and contextual *ijtihad* (independent reasoning) are crucial in this regard. These approaches emphasize the need to understand and apply Islamic legal

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<sup>89</sup> Swenson, "Legal Pluralism in Theory and Practice."

<sup>90</sup> S. et al., "The Fundamental Principles of Tolerance (Al-Tasāmuh) in Worship and Public Affairs under Islamic Perspective."

<sup>91</sup> Mustofa et al., "Strengthening Zakat Regulation through the Siyāsah Māliyah Approach."

principles in light of contemporary socio-cultural contexts, addressing modern challenges that classical texts may not explicitly cover.<sup>92</sup>

In Indonesia, there is a growing trend among contemporary scholars to contextualize *fiqh* by embracing *maqāṣid al-sharī'ah* and employing *ijtihad* as tools for legal dynamism. This allows for the reconciliation of religious norms with human rights, pluralism, and local customs. For instance, the Supreme Court's flexible interpretation of *wasiat wajibah* in the KHI to include non-Muslim heirs, based on the principle of *maslahat* (public interest), exemplifies contextual *ijtihad* in action, adapting Islamic law to serve contemporary societal needs and ensure fairness in diverse family structures. This approach encourages a critical and rational reading of religious texts, emphasizing their context and objectives, rather than a rigid, literal understanding.

In Malaysia, while the legal system is more constrained by explicit constitutional provisions and legislative acts, the concept of legal harmonization still involves aligning man-made laws with Islamic principles where they do not contradict. This requires a willingness to recognize and adopt elements from modern secular traditions that align with Islamic values, moving towards an "Islam-friendly approach" to constitutional interpretation.<sup>93</sup> The integration of *siyāsah māliyah* (Islamic fiscal policy) with constitutional values in *zakat* regulation, for example, demonstrates how Islamic legal principles can be harmonized with state mandates through normative legal analysis.<sup>94</sup>

### **Recommending Adaptive Models for Legal Harmonization that Uphold Islamic Principles and Constitutional Order**

To foster greater harmony and effectiveness in legal pluralism, adaptive models for legal harmonization are necessary. These models should strive to uphold both Islamic principles and the constitutional order.

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<sup>92</sup> Judijanto et al., "Reinterpreting Islamic Jurisprudence in the Context of Modern Indonesia: A Comparative Study of Traditional and Contemporary Approaches."

<sup>93</sup> Ahmad Dzulkarnaen et al., "Islamic Thought Progressive Radical Reform: An Analytical Study of Tariq Ramadan's Concept of Ijtihad," *Jurnal Cendekia Media Komunikasi Penelitian Dan Pengembangan Pendidikan Islam* 17, no. 01 (2025): 201–15, <https://doi.org/10.37850/cendekia.v17i01.974>.

Yunus, "The Conceptualization of Legal Harmonization Approach in Malaysia."

<sup>94</sup> Mustofa et al., "Strengthening Zakat Regulation through the Siyāsah Māliyah Approach."

1. Context-Sensitive Reform of Islamic Law: Legal reform should be guided by a deep understanding of the local socio-political and cultural context. This means moving beyond static interpretations and embracing a dynamic approach to *fiqh* that allows for adaptation to contemporary realities.<sup>95</sup> The aim is to ensure that Islamic law remains relevant and just in addressing modern issues, such as gender equality, environmental concerns, and economic disparities, by focusing on the underlying *maqāṣid*.<sup>96</sup>
2. Strengthening Interfaith and Inter-Legal System Dialogue: Fostering continuous dialogue between different legal systems and religious communities is crucial. This includes structured engagement between civil and Syariah legal scholars, policymakers, and civil society organizations to identify areas of convergence and divergence, and to collaboratively develop solutions that respect diverse normative frameworks. Initiatives promoting cross-cultural religious literacy can help mitigate intolerance and foster understanding.<sup>97</sup>
3. Judicial Training and Education: Investing in education and training for judicial actors in both civil and religious courts is vital to enhance their understanding of legal pluralism, constitutional principles, and the objectives of Islamic law.<sup>98</sup> This would equip judges to navigate complex jurisdictional conflicts with greater nuance and to apply principles of *maqāṣid al-sharī'ah* in their interpretations, promoting justice and public welfare.
4. Legislative Clarity and Consistency: Policymakers should strive for greater clarity and consistency in legislation, particularly concerning jurisdictional boundaries and the scope of religious

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<sup>95</sup> Judijanto et al., "Reinterpreting Islamic Jurisprudence in the Context of Modern Indonesia: A Comparative Study of Traditional and Contemporary Approaches."

<sup>96</sup> Azizah and Shalihah, "Maqasid Al-Shari'ah and Legal Pluralism: Normative Analysis of The Principle of Justice in A Multicultural Society."

<sup>97</sup> "Indonesia's Religious Freedom Landscape," *Talk About: Law and Religion*, February 19, 2025, <https://talkabout.iclrs.org/2025/02/19/indonesias-religious-freedom-landscape/>.

<sup>98</sup> Purnama Sari et al., "A Culturally Adaptive Model of Rehabilitative Justice across Secular and Islamic Approach."

law.<sup>99</sup> This involves enumerating religious offenses that do not trespass on federal matters in Malaysia and ensuring that presidential instructions like the KHI are well-integrated into the broader legal framework in Indonesia. Amendments should aim to remove ambiguities that lead to conflict, such as those related to unilateral conversions or interfaith inheritance.<sup>100</sup>

5. Embedding Human Rights and Ethical Commitments: Legal reform strategies, particularly in Muslim-majority and legally hybrid societies, should explicitly embed both secular human rights and religious ethical commitments. This ensures that while Islamic principles are upheld, they are also interpreted and applied in a manner consistent with internationally recognized human rights standards, promoting equity, welfare, and social security for all individuals.<sup>101</sup> For instance, incorporating *maslahah* as a guiding concept in judicial decision-making can better align justice and public benefit.

These adaptive models aim to construct an Islamic jurisprudence that upholds divine guidance while engaging human experience—rooted in tradition, relevant to the present, and oriented toward a future where legal pluralism contributes to social cohesion and justice.<sup>102</sup>

## Conclusion

Malaysia and Indonesia stand as two distinctive and dynamic models of Islamic legal pluralism, each shaped profoundly by their unique constitutional structures and historical trajectories. While Malaysia tends to institutionalize Sharia within more strictly defined jurisdictional bounds, often leading to pronounced tensions and jurisdictional conflicts with the civil legal system, Indonesia offers a more integrative yet decentralized model, where Islamic law is applied

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<sup>99</sup> Yunus, “The Conceptualization of Legal Harmonization Approach in Malaysia.”

<sup>100</sup> “Federal Court Judgment on Indira Gandhi Case | The Malaysian Insight.”

<sup>101</sup> Billah et al., “Islamic Law Perspectives and Social Experiences on Stigma toward Disabled People in Indonesia.”

<sup>102</sup> Judijanto et al., “Reinterpreting Islamic Jurisprudence in the Context of Modern Indonesia: A Comparative Study of Traditional and Contemporary Approaches.”

primarily in civil matters for Muslims, often with adaptive judicial interpretations.

Both countries consistently face challenges in balancing legal authority, religious values, and fundamental constitutional rights. Malaysia's experience, particularly highlighted by the *Indira Gandhi* case, demonstrates the ongoing contestation over jurisdictional supremacy and the critical role of civil courts in upholding constitutional principles and protecting minority rights in interfaith disputes. Indonesia's approach, characterized by the flexible application of the Compilation of Islamic Law (KHI) and judicial interpretations guided by *maslahat*, illustrates a capacity for internal legal evolution that bridges traditional Islamic jurisprudence with modern societal realities.

A framework of constitutional tolerance, informed by normative Islamic values and the theoretical insights of legal pluralism, offers a constructive path forward. This framework emphasizes upholding national unity and constitutional order while actively accommodating normative diversity. The potential for dialogical legal interpretation, through approaches like *Fiqh al-Wāqi'* and contextual *ijtihad*, is crucial for developing adaptive legal models. These approaches allow for a dynamic reinterpretation of Islamic law that aligns with its higher objectives (*maqāṣid al-sharī'ah*), such as justice, public welfare, and the protection of human rights, ensuring its continued relevance and ethical application in contemporary pluralistic societies. Ultimately, fostering greater inter-system harmony and ensuring equitable treatment for all citizens in both Malaysia and Indonesia will depend on continuous legislative clarity, robust judicial interpretation, and sustained inter-community dialogue, all guided by principles of constitutional tolerance and the universal values inherent in Islamic law.

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