

Politics of Islamic Law in Indonesia: Indonesianization of Islamic Law

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Abstract: Indonesianization of Islamic law contains two tendencies; first, is the ideal of building Islamic law that characterizes Indonesia by freeing itself from Arab culture and making Indonesian custom as one of the sources of Islamic law. The peak is marked by the emergence of the concept of Jurisprudence of Indonesia. The second tendency is constitutional-oriented Indonesianness, which is to formulate Islamic law in the form of legislation through consensus (*Ijma`*) of Indonesian clerics. The author argues that such a process of Islamic law becomes a national law. Given Indonesia is a country with a population of *bhinneka* (Plurality). In this article the author analyzes with the theory of differentiation in unification that is paying attention to diversity (plurality), in the form of a codification of law that contains legal unification as well as legal differentiation. And in the process of enactment toward the Indonesianization of the law it is necessary to note the existence of the national guidance principles, namely: the law in Indonesia must guarantee the integration or the integrity of the nation, the law must be created democratically, the law must encourage the creation of social justice and must pay attention to the principles of humanity, principles of human rights, and the principle of equality before the law.

Keywords: *politic; Islamic law; Indonesianization*

Abstrak: Indonesianisasi hukum Islam mengandung dua kecenderungan; pertama, adalah cita-cita membangun hukum Islam yang berciri khas Indonesia dengan membebaskan diri dari budaya Arab dan menjadikan adat Indonesia sebagai salah satu sumber hukum Islam. Puncaknya ditandai dengan munculnya konsep fikih Indonesia. Kecenderungan kedua adalah keindonesiaan yang berorientasi konstitusional, yakni memformulasikan hukum Islam dalam bentuk peraturan perundang-undangan melalui konsensus (*Ijma`*) ulama Indonesia. Penulis berpendapat bahwa proses demikian menjadikan hukum Islam sebagai hukum nasional. Mengingat Indonesia adalah negara dengan penduduk yang plural. Dalam artikel ini penulis menganalisis dengan teori diferensiasi dalam unifikasi yaitu memperhatikan pluralitas, dalam bentuk satu kodifikasi hukum yang mengandung unifikasi hukum sekaligus diferensiasi hukum. Dalam proses pemberlakuan menuju Indonesianisasi hukum perlu diperhatikan adanya kaedah-kaedah penuntun nasional, yaitu: hukum di Indonesia harus menjamin integrasi bangsa, hukum harus

diciptakan secara demokratis, hukum harus mendorong terciptanya keadilan sosial, dan harus memperhatikan prinsip kemanusiaan, prinsip hak asasi manusia, dan prinsip persamaan di depan hukum.

Kata kunci: *politik; hukum Islam; Indonesianisasi*

Introduction

This topic is based on the assumption that Islamic law "Jurisprudence of Indonesia" is based on Indonesian personality according to Indonesian character and character by making effective independent judgement (*ijtihad*).¹ That means bridging between the pillars of religious scholars (*ulama*) and governmental leaders (*umara*), as well as connecting religion and state.² Thus Indonesian jurisprudence is a form of dyadic relationship between the approach of "Return to the Qur'an and as *the tradition of Prophet (Sunnah)*" Islamic jurisprudence (Fikih) and Indonesianization itself.³

The Indonesianization of Indonesian Islamic jurisprudence (Fikih) contains two trends; first, is the ideal of building Islamic law that characterizes Indonesia by freeing itself from Arab culture and making Indonesian custom as one of the sources of Islamic law. The peak is marked by the emergence of the Indonesia Jurisprudence concept. The second tendency is constitutional-oriented *Indonesianess*, namely formulating Islamic law in the form of legislation through unanimous agreement (*Ijma*) Indonesian scholars.⁴ Through such processes, then Islamic law tends greatly to be a national law.

To realize Islamic law into national law required two conditions, one of which: all ideas must be included in the frame of Indonesian law, without mentioning Islam. The law for majority

¹Mukti Ali, "Sambutan", in Nourouzzaman Shiddieqy, *Fikih Indonesia: Penggagas dan Gagasannya, Biografi, Perjuangan dan Pemikiran Teungku Muhammad Hasbi Ash-Shiddieqy* (Yogyakarta: Pustaka Pelajar, 1997), p. vii.

²*Ibid.*, page. iv.

³Yudian W. Asmin, *Usbul Fiqih versus Hermeneutika: Membaca Islam dari Kanada dan Amerika* (Yogyakarta: Nawesea Press, 2011), p. 28.

⁴Yudian W. Asmin, "Reorientation of Indonesian Fiqh," in Yudian W. Asmin (ed.), *Ke Arab Fikih Indonesia: Mengenang Jasa Prof. Dr. T.M. Hasbi ash-Shiddieqy* (Yogyakarta: Forum of Islamic Law Studies Faculty of Syari'ah IAIN Sunan Kalijaga, 1994), p. 37.

groups has the prospect of being enforced, with the aim always to be in order to strengthen the state based on *Pancasila*.⁵ Terminology *Indonesianization* of Islamic law is commonly used in Islamic legal literature in Indonesia as seen in the discussion of the Religious Judicature Law in Indonesia written by Mark Cammack.⁶

In the rule of law in Indonesia, the law will be enforceable if it has been established by a state institution such as parliament, on the contrary a law which has not been determined by a categorical state institution can not be called a law even though it is essentially called law.⁷ Therefore, efforts to fight for Islamic law become a positive one is part of *Indonesianization* of Islamic law. In other words, Indonesianization of Islamic law is the legislation or positivization of Islamic law through legal instruments as the Indonesian legal system that can be embryo of inclusivism and tolerance coupled with pluralism. Relation with the contribution of Islamic law to the development of national law should be formulated the concept of paradigm similarity in the effort of *Indonesianization* of Islamic law into Islamic law according to Indonesian law.

The Basic and Position of Islamic Law in Indonesia

The 1945 Constitution states that Indonesia is a legal state (*rechtsstaat*) not based on mere power (*machsstaat*). This implies that the law must play a very important and decisive role to realize the ideals of the Indonesian nation. It also indicates the importance of Islamic law politics in the Republic of Indonesia.

⁵See Akh. Minhaji, "Modern Trends in Islamic Law: Notes on J.N.D. Anderson's Life and Thought", in *al-Jami'ah*, Volume 39, Number 1, January-June 2001, p. 271-272.

⁶Mark Cammack, "Indonesia's 1989 Religious Judicature Act: Islamization of Indonesia or Indonesianization of Islam?" in Arskal Salim dan Azyumardi Azra (ed.), *Shari'ah and Politics in Modern Indonesia* (Singapore: Institute of Southeast Asian Studies, 2003), p. 96.

⁷Moh. Mahfud M.D., "Politik Hukum: Perbedaan Konsepsi Antara Hukum Barat Dan Hukum Islam", in *al-Jami'ah*, IAIN Sunan Kalijaga Yogyakarta, No. 63/VI/1999, p. 35.

Article II of the Transitional Rules of the 1945 Constitution states that "all State bodies and existing regulations are still in effect, as long as the new constitution has not been implemented according to this Constitution". This means that constitutionally Islamic law remains as it was before independence. Reimbursement or legal change is not easy and it requires justification for the continued validity of the law of colonial products even temporarily. The formulation of such clear justification gave the impetus for the Government of Indonesia to immediately make legal products in accordance with the 1945 Constitution and remove all legal products of colonial legacy, especially those that are inconsistent with the 1945 Constitution.⁸ At the same time the Government of Indonesia should carefully select the laws of colonial products if there is a legal product that is preserved as it is quite possible that the products of colonial law have universal value so that it will be retained in Indonesia. This constitutional basis becomes the task of the Indonesian nation through political law that is rooted in its own philosophy and culture, a task that is not light because it involves many dimensions.⁹

From a legal point of view, it should be realized that the Republic of Indonesia, proclaimed on 17 August 1945, was actually the "successor" of the Dutch East Indies, not the successors of Majapahit, Sriwijaya or the archipelago of the archipelago in the past. What is meant by existing regulations and still in effect in the provisions of Article II of the Transitional Rules of the 1945 Constitution, is nothing but the laws of the Dutch East Indies, not the regulations of Majapahit or Sriwijaya Kingdom, or other kingdoms. Nor is the continuation of Japanese military government regulations, as the last ruler before the formation of the Republic of Indonesia.¹⁰

According to Abdul Ghani Abdullah the existence and enactment of Islamic law in Indonesia has got its place

⁸Moh. Mahfud M.D., *Pergulatan Politik Hukum di Indonesia* (Yogyakarta: Gama Media, 1999), p. 32.

⁹*Ibid.*

¹⁰Yusril Ihza Mahendra, "Hukum Islam dan Pengaruhnya terhadap Hukum Nasional Indonesia", in a Seminar on Islamic Law in Southeast Asia by the Syari'ah Faculty of Syarif Hidayatullah State Islamic University, on December 5, 2005.

constitutionally based on three reasons. First, the philosophical reason. Islamic teaching is a view of life, moral ideals and ideals of Muslim majority in Indonesia, and has an important role for the creation of fundamental norms Pancasila state. Second, sociological reasons. The development of the history of Indonesian Islamic society shows that the legal ideals and legal awareness of Islamic teachings have a continuous level of actuality. And thirdly, the juridical reason as stated in Articles 24, 25 and 29 of the 1945 Constitution which provides a place for the validity of Islamic law in a formal juridical.¹¹

In other words that all laws applicable in Indonesia, refer to the plural co-existence, which leads to the philosophy of the nation of *'bhinneka tunggal ika'* and the foundation of Pancasila state. This is in contrast to the institutionalization and codification process of law in Egypt which goes beyond the principle of ground norm of Egyptian national legislation which affirms that all laws prevailing in Egypt remain inspired by Islam which is the basis of Egyptian society, although in many cases, it appears the secular.¹²

In general, the position of Islamic law in Indonesia is not only contained in Article 20 or 24 of the 1945 Constitution (in addition to other laws), but specifically listed also in Article 29 Paragraph (1) of the 1945 Constitution. In this article clearly stated that the state is based over the One Godhead. In the political development of national law, the position of Islamic law other than seen as mentioned above, is also seen in a number of other rules such as:

First in MPRS Stipulation Number II/MPRS/1960 which states that the improvement of marriage law and inheritance law should also consider religious factors. But until the beginning of the New Order government (March 27, 1968) - when MPRS Decree Number II /

¹¹Abdul Ghani Abdullah, "Peradilan Agama Pasca UU No.7/1989 dan Perkembangan Studi Hukum Islam di Indonesia", in *Mimbar Hukum*, Number 1, Year V (Jakarta: al-Hikmah & Ditbinpera Islam Depag RI, 1994), p. 94-106.

¹²Chuzaimah Batubara, M.A., Dissertation Review, Joko Mirwan Muslim, "Islamic Law and Social Change: A Comparative Study of The Institutionalization and Codification of Islamic Family Law in the Nation State Egypt and Indonesia (1990-1995)", in http://chuzaimahbb.multiply.com/journal/item/20/Hukum_Islam_di_Mesir_dan_Indonesia Retrieved June 10, 2011.

MPRS / 1960 no longer applied - none of the laws appeared in the field of marriage and inheritance even though the National Law Development Institution had prepared a Comprehensive Marriage Registration Bill, The Marriage Law Bill, and the Inheritance Law Bill.¹³

Second, the Guidelines of State Policy and the Five-Year Development Plan of Legal Affairs as explained by the Minister of Justice Ali Said, as the holder of legal political policy in the Republic of Indonesia at the opening of the National Civil Law Renovation Symposium in Yogyakarta on 21 December 1981. It was emphasized that in addition to customary law and Western law, Islamic law is also one component of the Indonesian legal system and became one of the raw materials of the establishment of Indonesian national law.¹⁴

Third, in Chapter IV.A.2. The 1999 National Guidelines of the State of the Republic of Indonesia, which is the product of the reform era, affirmed that the direction of national legal policy, outlined by customary law, religious law (in this case Islamic law) and Western law.

Fourth, the National Long-Term Development Plan (RPJPN) 2005-2025, explained that the development of national law should take into account the legal awareness in society and the demand for the establishment of national law to fulfill sociological value that is in accordance with the cultural values prevailing in society. This implies that the formation of national law should refer to the laws that live in society. Islamic law is a law that lives in society and adhered by the majority of the state of Republic of Indonesia is also one component of the Indonesian legal system and become one of the raw materials of the formation of national law.

¹³Isma'il Sunny, "Kedudukan Hukum Islam dalam Sistem Ketatanegaraan Indonesia," in Amrullah Ahmad, *Dimensi Hukum Islam Dalam Sistem Hukum Nasional Mengenang 65 Th. Prof. Dr. Busthanul Arifin, S.H.* (Jakarta: Gema Insani Press, 1996), p. 135.

¹⁴Muhammad Zainal Abidin, *Kedudukan Hukum Islam dalam Negara Republik Indonesia*, <http://www.masbied.com/2010/06/04/kedudukan-hukum-islam-dalam-negara-republik-indonesia/>. Retrieved May 16, 2011.

By looking at the position of Islamic law from such a strongly political aspect, in practice we find the following: *first*, the role of Islamic law in filling the void of positive law. This is seen by the enactment of Islamic law for its adherents as a positive law by the government through the ratification of several laws and regulations.¹⁵ Based on that Islamic law has filled the legal vacuum for Muslims (*lex specialist*) in the areas of family law, inheritance law, charity and zakat. *Second*, the role of Islamic law contributes to the source of value towards national law making. The law applies to all Indonesian citizens (*lex generalis*). As a source of the value of the rule of law to be created, Islamic law is not limited to the field of civil law, but can also apply to other legal areas such as criminal law, constitutional law, state administrative law. For that reason, Islamic law really acts as a source of law.

The Root of Conflict of Positivization of Islamic Law

As part of human life everywhere, whenever and wherever they are not free from conflict, either on a personal, family or institutional scale, including legal institutions. Historically sowing the conflict in the problem of application of Islamic law (*Sharia*), either through political and constitutional channels or through physical struggle, and it has become part of the long history of the struggle of Muslims in this country. However, socio-political reality shows that such an idea never gets the support of the majority of the Indonesian population. By many observers this phenomenon is considered strange, because Indonesia is known as the country with the largest Muslim adherents in the world. The question we should ponder: how is it possible in a

¹⁵In the present fact there are several products of laws and regulations that formally and materially have a legal juridical content of Islamic law, namely (1) Law No. 1 of 1974 on Marriage, (2) PP No. 28 of 1977 regarding *Charity*, (3) Law No. 7 of 1989 on Religious Courts, (4) Law Number 7 of 1992 Law Number 10/1998 and Law Number 23/1999 on the National Banking System which permits the operation of Sharia Banks, (5) Presidential Instruction No. 1 of 1991 on the Compilation of Islamic Law, (6) Law No. 17/1999 on Hajj Implementation, and (7) Law No. 38/1999 on Charity *Zakah* Management.

Muslim-majority country the idea of enforcing Islamic law has never received a serious response.¹⁶

The political reality shows that Indonesia is constitutionally not an Islamic state but a Pancasila state. Therefore, it is not possible to formally institute the Islamic community (*ummah*) fully embody the Islamic principle of law especially in its official form.¹⁷

A country that embraces the democratic system, then everything must be formulated democratically, that is by seeing the will and aspirations of the wider community so that the legal products in accordance with the conscience of the people. The way the state wheel can not be removed from the frame of power, because in the state there are centers of power that always play its role in accordance with the task and authority that has been determined. But in practice each other often collide because the power that runs is closely related to the political power that is playing. Because the state, power, law and politics is a unity that is difficult to separate, because all the components are always playing in the implementation of state and government wheels.¹⁸ Therefore it is necessary to find the root of the conflict, that difference can also occur in the *positivization* of Islamic law.

The interesting and even unique issue of the *positivization* of Islamic law can not be separated from the discourse and debate about the concept of nationalism that also brings the idea of Islam as the basis of the state and other ideas that want the state and other laws that are also rooted in the life of the people of Indonesia.¹⁹ Based on

¹⁶Ahmad Faissal, *Rekonstruksi Syariat Islam: Kajian Tentang Pandangan Ulama Terhadap Gagasan Penegakkan Syari'at Islam oleh KPPSI di Sulawesi Selatan* (Yogyakarta: Dissertation of UIN Sunan Kalijaga Graduate Program, 2004), p. 2-3.

¹⁷Moh. Mahfud M.D., "Politik Hukum: Perbedaan konsepsi Antara Hukum Barat dan Hukum Islam", p. 43.

¹⁸Firdaus, "Politik Hukum di Indonesia (Kajian Dari Sudut Pandang Negara Hukum)", in *Journal of Islamic Law*, Volume 12, Number 10, September 2005, p. 49-50.

¹⁹Moh. Mahfud M.D., "Perjuangan dan Politik Hukum Islam di Indonesia" in Syamsul Anwar, *Antologi Pemikiran Hukum Islam di Indonesia antara Idealitas dan Realitas*, (Yogyakarta: Faculty of Shari'ah UIN Sunan Kalijaga, 2008), p. 60.

the historical record of the rise of Indonesian nationalism during this period is marked by the emergence of the struggle against the Dutch colonial movement to be free from the grip of the colonizer. In this struggle Islam has an important role in determining the existence of this country and the debate about whether an independent state will be Islamic or non-Islamic ideology can be followed in our national historical records.

First, in 1916, came the scene Jawi Hisworo, the political struggle between the struggle of non-Islamic ideology against Islam. At that time, a Javanese-language Jawi Hisworo newspaper contained insulting writings of the Prophet Muhammad by saying it as a drunkard and compactor which, of course, then raised the Muslims to defend his rights with the content of the idea that society needs to be regulated Islam, as prescribed through the Prophet Muhammad. This movement is vocally voiced among others by the *Sarekat Islam*. Faced with the reaction of Muslims like this in 1918 Jawi Hisworo supporters formed the Javanese National Committee. The committee denounced the *Sarekat Islam* group's movement in political life to fight for Indonesian independence. The group insists that politics and religion should be separated, while the *Sarekat Islam* group wants to link politics with religion (Islam).

Second, the Polemics between Soekarno and Natsir²⁰ about Islam and the State. This polemic begins from the writings of Sukarno in the *Panji* of Islam under the title Slavery of Understanding Islam. This paper was originally intended to respond to the writings of K.H. Mas Mansur entitled Noting the Youth Movement in the *Adil* and *Panji Islam* Magazines. Sukarno's writings contained a sharp criticism of Islamic orthodoxy which he said needed to be corrected with his insights. Sukarno invited the Islamic thought and thought to be always renewed and not maintained in a conservative manner because Islamic laws can always adapt to the culture and development of

²⁰The polemic between these two figures also occurred in the postwar period only the object of policy to seize Irian Barat. They differ from the thought of political strategy even though it has the same effect, namely the end of the ideological problem between the Nationalist and Islam. See A. Syafii Maarif, *Islam dan Politik di Indonesia pada Masa Demokrasi Terpimpin (1959-1965)* (Yogyakarta: IAIN Sunan Kalijaga Press, 1988), p. 73-77.

circumstances and can match the progress. In addition, Sukarno also alludes to the state's relationship with religion, namely for the good that both religion and state should be separated as to which was put forward by Kemal Atatürk in 1928. Soekarno's later writings were addressed by Natsir under the pseudonym Muchlis in *Al-Manar* and *Panji Islam* magazines with the title *Perskot* by throwing his astonishment at Sukarno who glorified Kemal Atatürk that separated the country from religion, and why did Soekarno reject the unity of state and religion by reason of not there is unanimous agreement (*ijmak*). So, in his writings Natsir reverse the logic of Sukarno about *ijmak* by asking, if there is no *ijmak* about the unity of state and religion, then is there *ijmak* about the necessity of separating between religion and state. Therefore, Sukarno's views must be rejected because there is no *ijmak*.²¹

The polemic of these two figures became the forerunner to the development of subsequent thoughts concerning religious and state relations in the debates when formulating the basis of state in political institutions such as Agency for Investigation of Indonesian Independence Preparedness Enterprises (BPUPKI), Preparatory Committee for Indonesian Independence (PPKI), Constituent Assembly and even the People's Consultative Assembly categorized at the level of ideological-empirical ideological debate.²²

Third, the formal debate on the Preparatory Committee for Preparatory of Indonesian Independence (BPUPKI) established in April 1945 as well as in the Committee for the Preparation of Indonesian Independence (PPKI), an agency established to declare independence, transferred power, ratified the constitution, and established a government for Indonesia if will be independent.²³ This is where the climax of the contradictions becomes clearer when the process of forming the foundation of the Republic of Indonesia. Such

²¹Moh. Mahfud M.D., "Perjuangan dan Politik Hukum Islam di Indonesia...", p. 63-64. See Diliar Noer, *Gerakan Modern Islam di Indonesia 1900-1942* (Jakarta: LP3ES, 1996), p. 296.

²²Abdul Halim, *Politik Hukum Islam di Indonesia Kajian Posisi Hukum Islam dalam Politik Hukum Pemerintah Orde Baru dan Era Reformasi* (Jakarta: Badan Litbang dan Diklat Departemen Agama RI, 2008), p. 113.

²³*Ibid.*, p. 66.

controversies, in addition to those already existed before the Japanese came, were in fact the maxim of *the divide et impera* process by Japan to strengthen its position.²⁴ In other words, the tension between Islamic and nationalist groups became clear when the Japanese established The Committee of *Preparation for Indonesia Independence* (BPUPKI) and its sessions when discussing the basis of the State, with a form of collaboration with several Indonesian groups. At that time the Indonesian nation at least can be grouped into three kinds of groups namely the nationalist elite, aristocrat (*priyayi*) elite, and the elite of Islam. In carrying out its collaboration, these three groups are accommodated alternately,²⁵ so since then the political relations of Islam and the state occurred suspiciously suspicious of which gave birth to antagonistic relations.²⁶

At the 2nd plenary session on 10-16 July 1945 an agreement was reached on the basis of the state and the constitution of the Jakarta Charter and the 1945 Constitution. The Jakarta Charter as outlined in the draft of the Preamble accommodates Islam as the basis of a special state for Muslims, which is incorporated in the first principle with the phrase Deity with the obligation to run the Islamic Sharia for its adherents (*Ketuhanan dengan kewajiban menjalankan syariat Islam bagi pemeluknya*). Regardless of its content that is not debated, the compilers of the Preamble to the Jakarta Charter are described by the two sources of the book differently. According to Yamin, the Jakarta Charter was prepared by the Nine Committee appointed by BPUPKI at the hearing on June 1, 1945,²⁷ but according to AB Kusuma it was argued that in fact the Nine Committee was never formed by BPUPKI, but was formed spontaneously and not procedurally by Sukarno due to the

²⁴Harry J. Benda, *Bulan Sabit dan Matahari Terbit Islam Indonesia pada Masa Pedudukan Jepang*, Daniel Dhakidae (translate), (Jakarta: Pustaka Jaya, 1980), p. 185.

²⁵*Ibid.*, p. 209 and 243.

²⁶*Hubungan Antagonistik* is a pattern of relationships that are related to the heatemonik between Islam and the government. It can be seen in M. Syafi'i Anwar, *Pemikiran dan Aksi Islam Indonesia: Sebuah Kajian Politik tentang Cendekiawan Muslim Orde Baru*, (Jakarta: Paramadina, 1995), p. 9.

²⁷Moh. Mahfud M.D., "Perjuangan dan Politik Hukum Islam di Indonesia....", p. 66.

development of a heated World War II situation at that time. The opinion of AB Kusuma is based on the content of Bung Karno's speech himself who apologized to the session of BPUPKI for having collected 9 persons unprocedural to arrange the draft of the Preamble of the Constitution which by Ir. Soekarno was given the title "Preamble", by Yamin being named "The Jakarta Charter" and by Dr. Ir. Sukiman is called "Gentlemen's Agreements" because it is not yet a decision of BPUPKI.²⁸

The seizure of political influence between the two camps, namely Islam and nationalist look tight as seen in the debates in the sessions in BPUPKI. The Islamic group declared that Indonesia would have to become an Islamic or Islamic state into a state ideology. The nationalist group proposed the establishment of a national unity state. In the subsequent development of Islamic groups broke into two, namely the camp that still want to ideally with the ideals of the Islamic state and the stronghold that is accommodative. While the Nationalist group split into two as well, namely secular nationalists and religious nationalists. This accommodationist Islamic group that is now shared with religious nationalists seeks to fight for Islam not from its label but substantial.²⁹ This debate is a never-ending polemic since BPUPKI / PPKI in 1945, the Old Order period, the New Order period and even up to the Reform Order of this theme reappear through the debate of article 29 of the 1945 Constitution which rolled on the Annual Session of MPR. Two factions of the Islamic parties, the United Development Party (F-PPP) and the Star Faction Fraction (F-UN) in their general view insisted to re-enter the Jakarta Charter in the 1945 Constitution, especially article 29. They affirmed by adding seven such words in the Jakarta Charter does not mean the establishment of an Islamic state.³⁰

²⁸MR. AB. Kusuma, *Lahirnya Undang-Undang Dasar 1945* (Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2004), p. 21.

²⁹Ratno Lukito, *Hukum Islam dan Realitas Sosial* (Yogyakarta: Fakultas Syari'ah UIN Sunan Kalijaga, 2008), p. 61.

³⁰Arskal Salim and Azyumardi Azra, 'Introduction The State and Shari'a in the Perspective of Indonesian Legal Politics,' in Arskal Salim and Azyumardi Azra (ed.), *Shari'a and Politics in Modern Indonesia* (Singapore: Institute of Southeast Asian Studies, 2003), p. 1.

Indonesianization of Islamic Law

The journey of Islamic law in the national legal system is inseparable from the legal politics developed parallel with history of the development of Islam in the archipelago. The Indonesianization of Islamic law in the form of legislation (*Takhrīj al-Aḥkām fī al-Naṣ al-Qānūnī*) is a product of interaction among Islamic political elites (ulama, public figures, religious officials and Muslim intellectuals) with the ruling elite among politicians and state officials. For example, the enactment of Law No.1.³¹ The procedure of political decision-making at the legislative and executive levels in terms of Islamic legal legislation (legal drafting) would refer to the legal politics held by state collective power agencies.

Such power is also mentioned in Article 20 Paragraph (4) The President passes a draft of law which has been mutually agreed to become law and Article 21 paragraph (2) If the draft, although approved by the House of Representatives, is not authorized by the President, the draft was not to be brought forward in the House of Representatives trial at that time.³²

Nevertheless, both from internal and external Islamic societies obstacles often arise. This is influenced by legal politics (*receptie theory*)³³ of the Dutch colonial government created by C. Snouck Hurgronje and constitutional political reality must also be understood that our country is not an Islamic state but a Pancasila state and Indonesian society is a pluralistic society faced with ethnic, religious, and geographical configuration, pluralistic theory that plural societies will be able to build a solid and stable socio-political system when they are able to build common value.³⁴ Relating to the political and

³¹Amak F.Z., *Proses Undang-undang Perkawinan* (Bandung: Al-Ma'arif. 1976), p. 35-48.

³²The amended of Constitution of the Republic of Indonesia 1945.

³³Reception theory can be crippled with *Ijtihad jama'i* or consensus if implemented with good cooperation. See Yudian Wahyudi, *Ushul Fikih*, p. 44.

³⁴Pudjo Suharso, "Pluralisme Bangsa Menuju Indonesia Baru," in Khamami Zada-Idy Muzayyad (Ed.), *Wacana Politik Hukum dan Demokrasi Indonesia* (Yogyakarta: Student Senate of Syari'ah Faculty IAIN Sunan Kalijaga with Pustaka Pelajar, 1999), p. 147.

constitutional realities, there arose various thoughts or views on issues of positivization or legislation of Islamic law as follows:

1. Formalistic-Legalistic Theory

Islamic Law (Sharia) application of Islam must be through state institutions and shariat through the constitution should be attempted to maintain the substance of religion in order to be properly executed. Therefore, it must formally be fought for, how the sharia of Islam is included in the constitution, then followed by other laws.

This idea of striving for the establishment of Islamic Shariah for a Muslim is a must. It must be a belief that there will be no glory except with Islam; there is no Islam except by sharia; and there is no *sharia* except with state (*daulah*). *Hizb al-Tahrir* is a group keen to shout the need for Islamization through state ideology as one of the prerequisites for the establishment of Islamic law in the jurisdiction of Indonesia.³⁵

2. Structuralistic Theory

Structuralist thinking in the application of Islamic Sharia in Indonesia emphasizes the transformation in the social and political order in order to be Islamic through a structural approach. The structural approach requires a political approach, lobbying or through the socialization of Islamic ideas, then an input to public policy. For the proponents of this theory, the transformation of Islamic values through Islamic propagation (*da'wah*) activities becomes important and must cover all dimensions of human life. In other words, political, economic, social, cultural, scientific, and other activities must be a means of realizing Islamic values. So the formulation and implementation of Islamic social system including legislation of Islamic law in the Indonesian legal system must be in accordance with

³⁵Hizbut Tahrir Indonesia, *Menegakkan Syariah Islam* (Jakarta: HTI, 2002), p. v. See 1. M. Syafi'i Anwar, "Syafii Maarif, Bung Hatta, and Deformalisasi Syariat", Abd. Rohim Ghazali & Saleh Partaonan Daulay (ed.), *Muhammadiyah dan Politik Islam Inklusif: 70 Tahun Ahmad Syafii Maarif* (Jakarta: Maarif Institute for Culture and Humanity, 2005), p. 42. 2. Bismar Siregar, 'Hukum Islam Sebagai Institusi Keagamaan', in Tjun Surjaman (ed.), *Hukum Islam di Indonesia Pemikiran dan Praktek* (Bandung: Penerbit PT Remaja Rosdakarya, 1991), p. 33. 3. See H.A.R. Gibb, *The Modern Trends in Islam*, (Chicago: The University of Chicago Press, 1950), p. 88.

Pancasila and the 1945 Constitution, as the late Mohammad Roem, that the aspirations of Islamic law can be fully accommodated in the state of the Republic of Indonesia based on Pancasila and the 1945 Constitution.³⁶

3. Cultural Theory.

The cultural approach emphasizes the transformation in social behavior in order to be Islamic. This approach only requires the socialization and internalization of Islamic Sharia by Muslims themselves, without direct support from political authorities and state institutions. Proponents of this cultural approach want to make Islam a source of ethics and morals; as a source of inspiration and motivation in the life of the nation even as a complementary factor in the formation of social structure.

According to this theory that not all Islamic teachings are legislated by the state. Many state laws are applied purely in moral guidance that is implemented in the full awareness of society. Therefore, this theory rejects the efforts of Islamic sharia, the formalization of Islam and this can be seen from how this theory understands Islam in relation to social, economic, political, and cultural issues. Islam has values that are universal, which must be agreed upon by all its people. But in its implementation in the social history space, whether it is related to social, economic, political, and cultural mass, Islam can be different between in one area and another. That is because there is a process of reconciliation between Islamic values and local strengths.³⁷ Its glory will even be seen as its development can take place without the support of the state. For this reason, it seems more likely to make the Shariat of Islamic Law as a moral injunction than as a legalistic-formalistic order.³⁸

4. Substantialistic-Applicative Theory

Its application is left to the Muslims themselves; whether it should be based on state authority or be structural, cultural,

³⁶M. Amin Rais, *Cakrawala Islam Antara Cita Dan Fakta* (Bandung: Mizan, 1987), p. 56-57.

³⁷See A. Rahmat Rosyadi dan H.M. Rais Ahmad, *Formalisasi Syari'at Islam Dalam Perspektif Tata Hukum Indonesia* (Jakarta: Ghalia Indonesia, 2004), p. 27-28.

³⁸*Ibid.*

substantial, individual, or collective. Has become a discourse on how to make Islamic law as a supporter of development within the framework of the Pancasila legal system. Although in practice no longer play a full and comprehensive role, Islamic law still has a great meaning to the lives of its adherents. At least there are three factors that cause Islamic law still has a big role in the life of the nation, that is: (1) Islamic law has participated in creating values that govern the lives of Muslims, at least establish what should be considered good and bad; what the orders, suggestions, suggestions, and religious prohibitions are. (2) many judicial and jurisprudential decisions of Islamic law have been absorbed into the prevailing positive law. (3) the existence of a group that still has the theocratic aspirations among Muslims from various countries so that the application of Islamic law in full is still a slogan of struggle that still has considerable appeal.³⁹

Based on the reality of positivization demands of Islamic law in Indonesia must be accepted scientifically and in the process of democratization, not indoctrination. This strategy is different from the concept of *receptie* in the past that is not familiar with strategic and democratic efforts so that its manifestation becomes indoctrination against Islamic law. Positivization with democratic corridors of true values can work well.⁴⁰

Apart from the various ideas above, that legalization of Islamic law into the national legal system aims to meet the wants and legal needs of Muslims. And what about the plural society of Indonesia? The diversity of Indonesian society is caused by the condition of the homeland and the nation itself. Pluralism can not be avoided because of differences in religion, ethnicity and geography.⁴¹ According to Alamsyah Ratuprawiranegara that plurality of Indonesian nation can be removed except the religion differences. Therefore, according to Mukti Ali Pancasila experience and the principle of Unity in Diversity (*Bhinneka Tunggal Ika*) in religious life is

³⁹Juhaya S. Praja, "Pengantar", in Tjun Surjaman (ed.), *Hukum Islam Di Indonesia Pemikiran Dan Praktek* (Bandung: PT Remaja Rosdakarya, 1991), p. xv.

⁴⁰A. Qodri Azizy, *Eklektisisme Hukum Nasional: Kompetisi antara Hukum Islam dan Hukum Umum* (Yogyakarta: Gama Media, 2002), p. xvii.

⁴¹Ichtijanto, *Perkawinan Campuran Dalam Negara Republik Indonesia*, (Jakarta: Badan Litbang Agama dan Diklat Keagamaan Kementerian Agama RI, 2003), p. 41.

the embryo of appearing the principle of *agree in disagreement*. This principle applies also in the life of the law.⁴²

Responding to the above issues before arriving at the point of going in the positivization of Islamic law as Rifyal Ka'bah describes the category of Islamic law is very broad into two categories namely some Islamic law that requires state power and some Islamic law that does not require state power in enforcement depending on the situation and conditions of the political configuration.⁴³ Given that Indonesian society is multipluralistic, it is necessary to focus on methodological attempts to domesticate legal traditions derived from Islamic teachings and to practice them by integrating the law into the wider Indonesian legal corpus. One of the best ways to do so in a multipluralist society is to combine Islamic legal values with other legal traditions (*West and Adat*). This effort requires early acceptance among Indonesian Muslims that there is no authoritative norm in Indonesian society that states the virtue of Islamic law vis-à-vis other laws but there must always be good agreement to unify the principles of Islamic law with the principles of legal law another.⁴⁴ Being inevitably understand the culture, and the traditions and politics that exist in all parts of the country meet with Islamic law in harmony to formulate and apply Islamic law in Indonesia.

The encounter of Islamic law with other laws in Indonesia that is harmonious can not be separated from the progress of education and understanding of Islamic law of Indonesian Muslim society itself, that is making efforts to find common ground or trying to accommodate the legal culture of society. In addition, there must be awareness to perform hermeneutical reconstruction of Islamic law

⁴²*Ibid.*, p. 40

⁴³Rifyal Ka'bah, *Hukum Islam di Indonesia* (Jakarta: Universitas Yarsi, 1999), p. 59, 85. See Jazuni, *Legislasi Hukum Islam di Indonesia* (Bandung: Citra Aditya Bakti, 2005), p. 353.

⁴⁴Ratno Lukito, *Tradisi Hukum Indonesia* (Yogyakarta: Teras, 2008), First Edition, p. 135-139 and see Abdullah An-Naim, *Dekonstruksi Syari'ah: Wacana Kebebasan Sipil, Hak Asasi Manusia dan Hubungan Internasional dalam Islam* (Yogyakarta: LKiS, 1994), p. 63-80.

so as to see `truth` not only sourced from the sacred but also from the profane.⁴⁵

To see Islamic law in the legal political order in Indonesia, there are several important elements that are interconnected namely:

1. The constitutional basis, namely Pancasila and operationalized structurally in the 1945 Constitution.
2. Implemented these norms in the form of national legal politics directed to changes in the rule of law to administer the rule of law.
3. The change of society, the natural and eternal character of a society, changes, both its structure and its cultural patterns.
4. The amendment of the law is done nationally, deliberately, planned, and futures, concretely formulated in the national development plan in the field of law. And this is related to various factors of change and continuity of Islamic law.
5. The change is the result of interaction of various elements and the potential of a pluralistic society, namely the elite, to realize the norms in the life of society, nation and state.

These five elements have variations of functional relations (symmetric), asymmetric relationships, and reciprocal relationships).⁴⁶

The legislation process is a combination of national legal politics and legal culture (awareness of community law). These two elements are related to one another. The adjustment of direction and purpose between the two is a determinant factor for the effectiveness of a legislation to achieve an aspirational legal substance in accordance with the wishes and character of society, traditions and the atmosphere of religious life existing in the community. Therefore the legislation process should take into account the principles of humanity, human rights principles, and the principle of equality before the law).⁴⁷ In addition the above principles need to place the

⁴⁵Ratno Lukito, *Tradisi Hukum Indonesia*, p. 145-148. See Abdullah Ahmad An-Naim, *Islam dan Negara Sekuler: Menegosiasikan Masa Depan Syari'ah*, (Bandung: Mizan, 2007), p. 27.

⁴⁶Abdul Halim, *Peradilan Agama dalam Politik Hukum di Indonesia*, p. 17.

⁴⁷Aden Rosadi, *Tentang Legislasi dan Politik Hukum di Indonesia*, Paper presented at the National Seminar of STAIN Jurai Siwo Metro, May 31, 2016.

state and society in the political dynamics that are not mutually conflictive, compromistic, and can share a role in the process of legal formation (legisprudence criticism).⁴⁸ The politics of Islamic law cannot be separated from the model of Islamic relations with the state power agency.

Law is a political product, and legal politics tends to describe the influence of politics on law or the influence of the political system on legal development. As stated by Soekarno, the first President of the Republic of Indonesia, legal and policy products will be Islamic when most of the members of the House of Representatives come from political parties based on Islam or people who have Islamic missions, then parliamentary decisions will be colored by the values of Islamic teachings.⁴⁹

A necessity that Indonesianization of Islamic law with legal legislation is to move towards codification and legal unification in Indonesia against the pluralism of the Indonesian nation with various ethnicities, both socio-cultural and political fields, ethics and religion.⁵⁰ That is why the tension between the Islamic legal system, *Adat* and *the West* is inevitable, and this has happened since the colonial occupation of Indonesia. Such law tribulation often leads to horizontal and vertical conflicts.⁵¹

Disharmony is the result of a national law development policy that transplants 'alien' laws in various ways to a society that actually has its own laws. The foreign word in this case can be interpreted in two senses, on the one hand 'foreign' can be sourced from the colonial law applied in the colonies, and on the other hand the 'foreign' law is a national law that becomes the product of the unification and modernization of the law , both of which directly or

⁴⁸*Ibid.*

⁴⁹Soekarno, *Di Bawah Bendera Revolusi*, (Djakarta: Panitia Penerbit Di Bawah Bendera Revolusi, 1964), I: 407.

⁵⁰A. Qodri Azizy, *Hukum Nasional: Eklektisisme Hukum Islam dan Hukum Umum* (Jakarta: Teraju, 2004), p. 50

⁵¹See the marriage of legislation process Draft of Law on Marriage and now become Law No. 1 Year 1974 About Marriage.

indirectly exclude the diversity of people's laws or elements of the legal system that exist outside the legal system of the state.⁵²

Furthermore, in the framework of Indonesianisation of Islamic law toward the positivization of the law, it is necessary to note the existence of the national guidance⁵³, namely:

First the law in Indonesia must guarantee the integration or unity of the nation and therefore there should be no discriminatory law based on primordial ties, national law must maintain the integrity of the nation and state both territorially and ideologically. Second, the law must be created democratically and nomocratically based on the wisdom of wisdom. The making must absorb and involve the aspirations of the people and be done in ways that are legally or procedurally fair. And not enough with democratization but must be adapted to the underlying philosophy. Third, the law must encourage the creation of social justice which, among other things, is characterized by the existence of special protection by the state against weak groups of society so as not to be allowed to compete freely but never balanced with a small group of strong parts of society. Fourth, there can be no public law (binding on communities with various primordial ties) based on certain religious teachings because the Five Principles (Pancasila) law state requires a law that ensures the tolerance of a civilized religion. Through the above guidance, the above national legal system or Pancasila legal system that is characterized by Prismatic (that the legal system is a combination of two systems that are contradictory but it can take the positive aspects).

In addition, the effort of Islamic law issuance towards the development of a harmonious national law between the existing legal system in Indonesia into the laws and regulations imposed by the state is very closely with the three legal components namely: Substantive law (substance rule of the law), legislation, a valid

⁵²Mokhammad Najih, Paper provided for Conference on "Religion, Law, and Social Stability" Brigham Young University, Provo, Utah US, 1-4 Oktober 2016.

⁵³Moh. Mahfud M.D., 'Perjuangan dan Politik Hukum Islam di Indonesia', p. 72.

invitation which has binding powers and serves as a guide for law enforcement officials; The structure of the law, the legal apparatus and the system of law enforcement; The legal culture is a general cultural emphasis, habits, opinions, ways of acting and thinking, which direct social forces in society. is the soul or spirit that moves the law as a social system that has special character and techniques in its assessment.

On that basis, as an effort to *Indonesiate* of Islamic law based on historical records there are three models or patterns of legislation, namely: first unification, meaning a law for all groups is a step of uniform law or the unification of a law to apply to all nations in a region of the country certain as national law in that country both differentiation, meaning that each group has its own laws; the third differentiation in unification means that there is one substantive law then each group has its own laws or regulations.

The unification model of Islamic law as an integral part of national law becomes the material of Indonesian national law. The differentiation model as a part of its independence recognized and enforced by national law and given status as a national law, the example of a facultative law means that the rule of law is merely complementary, disagreeable and dispositive and legitimative law means that the law regulates procedural and operational ethics, not imperative means that a priori legal rules must be obeyed, binding and compelling. While the model of differentiation in unification means one substantive law further each group there is law or own organic regulations.⁵⁴

So, to implement it most important that Islamic law is able to compete with other legal systems to animate and underlie for the building of national law. According to Padmo Wahjono as quoted by Alamsjah Ratu Prawiranegara, to realize Islamic law into national law required two conditions. First courage. Without courage, all ideas will not work. Second, all ideas must be included in the frame of Pancasila. Through Pancasila that, without the need to mention too much Islam, the majority law has the prospect of being enforced. For

⁵⁴Kamsi, *Pemikiran Hukum Islam dan Peradilan Agama di Indonesia* (Yogyakarta: Cakrawala Media, 2007), p.81.

obviously, the first principle of Pancasila, Belief in the One Supreme, is none other than monotheism. So, what is needed is a person who is both clever at the same time as a politician. And our theme must always be in order to strengthen the State based on Pancasila.⁵⁵

The above opinion is in line with the opinion that to re-actualize Islamic law required three conditions that must be met:

1. There is a high level of openness and education from the Muslim community.
2. There is courage among Muslims to take unconventional choices of choice pairs (between revelation and reason: between unity and diversity, between idealism and rationalism, between stability and change).
3. Understanding the socio-cultural and political factors behind the birth of a particular *fiqh* product, in order to understand the particularism of the product of legal thought. Thus, if elsewhere or at other times found different elements of particularism, then the product of legal thought must necessarily be changed. Thus, the dynamics of Islamic law can continue to be maintained and developed.⁵⁶ As explained by Annaim that it is unethical if the word of God (religion) is made a state constitution because religion is the right of individuals who have the same freedom in this matter. If forced to become a state constitution without accommodating other parties there will be conflict.⁵⁷

Some Islamic laws are included in the pattern of relations between Islamic law and national law⁵⁸ meaning “Islamic law” which is *indonesianized* into positive law that is:

⁵⁵Alamsjah Ratu Prawiranegara, “Strategi Perjuangan Umat Islam di Bidang Hukum,” in Amrullah Ahmad et.al., *Dimensi Hukum Islam Dalam Sistem Hukum Nasional Mengenang 65 Th. Prof. Dr. Busthanul Arifin, S.H.*, p. 244.

⁵⁶H.M. Atho Mudzhar, *Membaca Gelombang Ijtihad: Antara Tradisi dan Liberasi* (Yogyakarta: Titian Ilahi Press, 1998), p. 97-102.

⁵⁷Abdullah Ahmad An-Naim, *Islam dan Negara Sekuler: Menegosiasikan Masa Depan Syari’ah*, p. 27.

⁵⁸Ichtjanto S.A, ‘Prospek Peradilan Agama Sebagai Peradilan Negara dalam Sistem Politik Hukum di Indonesia’, in Amrullah Ahmad et.al., *Dimensi Hukum Islam*

- a. Islamic law is only for Muslims:
- 1) Religious Courts are regulated in Law No. 7 of 1989 jo Law No. 3 of 2006 and Law No.50 of 2009 contain the principle of Islamic Personality;
 - 2) Hajj is regulated in Law No. 17 of 1999 in conjunction with Law No. 13 of 2008;
 - 3) 3) Management of Zakat is regulated in Law No. 38 of 1999 jo No. 23 of 2011 Law No. 38 of 1999; Waqf is regulated in Law No. 41 of 2004;
 - 4) Islamic Banking is regulated in Law No. 21 of 2008;
 - 5) Compilation of Islamic Law (KHI) regulated in Presidential Instruction No. 1 of 1991 in conjunction with the Minister of Religion Decree No.154 of 1991, is a way to make arrangements in the field of marriage and the field of inheritance for Muslims.
- b. Islamic law is included in general national law which requires special implementation:
- 1) Marriage is regulated in law. No. 1 of 1974 concerning, along with implementing regulations, namely PP. No. 9 of 1975. Then PP No. 45 of 1990 concerning Divorce Procedures for Civil Servants;
 - 2) The juvenile justice system is regulated in law. No. 11 of 2012;
 - 3) Domestic Crimes (Domestic Violence), Law No.32 of 2004, substantially requires the protection of those who are within the scope of the family to get protection both from the personal aspect, and from the public aspect;
 - 4) Aceh Government is regulated by Law No. 11 of 2006, judicial institutions specifically in the Province of Nangroe Aceh Darussalam (NAD) as part of the national justice system are carried out by the Syar'iyah Court.

Dalam Sistem Hukum Nasional Mengenang 65 Th. Prof. Dr. Busthanul Arifin, S.H., p. 183. And Ichtijanto S.A., Perkawinan Campuran Dalam Negara Republik Indonesia p. 37.

- c. Islamic law is included in national legislation and applies to every citizen of the Republic of Indonesia, for example Health is regulated in Law No. 23 of 1990

Conclusion

Law is a political product. Therefore, legal politics tends to describe the political influence of law or the influence of the political system on legal development. Politics of Islamic law is the policy of enforcement of Islamic law as one of the living laws in society, by considering the aspect of diversity (plurality). In the process of enforcement toward the positivization of the law, it is necessary to note the existence of the national guidance. The legislation process is a combination of national legal politics and legal culture. Both of these elements are related to each other. The adjustment of direction and purpose between the two is a determinant factor for the effectiveness of a legislation to achieve an aspirational legal substance in accordance with the wishes and character of society, traditions and the atmosphere of religious life existing in the community. Therefore, the legislation process should take into account the principles of humanity, human rights, and equality before the law.

Positivization of Islamic law is part of the Indonesianization of Islamic law, namely legislation through legal instruments in the Indonesian legal system so that the relationship between the law is no longer dyadic, that is between *fikih* and tradition (Indonesia) only, but also must be triadic by presenting a “third world”, namely Indonesian positive law which can give rise to inclusiveness and pluralist-accompanied tolerance with differentiation in unification.

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