



An Islamic Law Design In The Realm Of The National Legal Politics

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| ARTICLE INFO | ABSTRACT |
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| <p>Keywords : Islamic Law; National Legal Politics.</p> <p>How To Cite : Winardi. (2021). An Islamic Law Design In The Realm Of The National Legal Politics. Nagari Law Review, 4(2), 106-119.</p> <p>DOI : 10.25077/nalrev.v.4.i.2.p.106-119.2021</p> | <p><i>The political dynamics of the national law shows that the existence of the Islamic law has ups and downs following the existing social dynamic and political configuration. It needs serious efforts to dig up and socialize as many as possible noble values contained in the Islamic law. The ways to dig up the values, among others, are to understand philosophical aspects of the Islamic law as mirrored from the kulli (sharia law) serving as the basis of its thought, the goals of the Islamic law (maqashid al-syariat) including their wisdom (hikmah al-tasyri'), and also the concept of human beings according to Islam. The Islamic law as the source of values for rules of laws that will be made, is implemented using how the values of the laws are obtained and then poured down into the national law. The majority of Muslim and Islamic prominent leaders seem to consider that the implementation of the Islamic law may be accommodated without any formal legislation as Islamic law, but by merely integrating principles of the Islamic law into the national law. Such an integration into the national law is probably made especially under the framework of the national law development.</i></p> <p style="text-align: right;">©2021 NALREV. Faculty of Law Universitas Andalas</p> |

1. Introduction

Lately, the image of Islam has been leading to bad and negative labeling, especially due to the occurrence of the incidence on September 11, 2001. Islam is considered to be identical with violence and terrorism.

Amid the deterioration of the Image of Islam globally, there is an undeniable fact that the ummah of Islam in Indonesia occupies the greatest number of Muslim population in the world. Although Indonesia is not an Islamic country, but the majority of its population converts to Islam.

Another fact is that the ummah of Islam in Indonesia accepts democracy. Democracy is deemed to be compatible with Islam. Due to the acceptance and application of democracy, Indonesia not only become a country with the greatest number of Muslim population in the world, but also the third greatest democratic country after India and the United States of America.

Islam entered into Indonesia far before the Western people gripped their influence to the people in this archipelago, but historians have different opinions about the exact time of the arrival of Islam in Indonesia. Some believe that Islam came to this archipelago at the beginning of the 11th century, but others said that Islam arrived in the first time in Indonesia in the 13th century. This is certainly triggered by the obscurity of the early history of Islam in this country.

A historian Kuntowijoyo stated that Islam entered into Indonesia by an elastic way. The architecture of the first mosque in Indonesia is similar to local architectures, which are from the inheritance of

Hinduism. The condition is different from the Christians in Indonesia who built their churches using Western or Buddhist Architectures where Buddhism and also Hinduism entered into Indonesia by bringing stupas. As a result, Islam is more tolerant to local cultures, all cultural elements may be adopted in Islam.¹

In the legal dimension, however, a desire to adjust the Islamic law teaching to the people's social justice feelings always attracts great attention to Indonesian Muslims in their effort to practice the teaching of their Islamic laws. In this case, a study carried out by Ratno Lukito explained that the Islamic law in Indonesia has come to positivism matters understood as efforts to make Islamic teaching values in Indonesia unite integrally as part of the national legal system development through transformation of plurality values into the national law without sacrificing certain laws or values.

This present article tries to describe 2 (two) problems, first, the dynamics of the Islamic Law history in the political realm of the national law and second, the ideal and proper ideal position of the Islamic law in the scene of the national legal system.

2. Discussion

2.1 The Dynamics of the Islamic Laws and in the Politics of the National Laws

Islam² brought by the Prophet Muhammad SAW is the continuation and the development from Islam carried by previous prophets who performed alternately at the historical stage of humanity. No one knows the number of prophets sent by Allah. Their main task is to give a moral-spiritual direction to the power of the history of human beings with the basis of faith to the One Supreme God. The real and authentic source of Islam is Al Qur'an and sunnah of the Prophet.

As God's revelation brought out to the Prophet Muhammad, Al-Quran merely contains a little number of verses dealing with legal doctrine. There are merely about 80 and 500 legal verses that may be categorized as a legal code as understood in the western legal theories. Therefore, the presence of sunnah of the Prophet is needed to understand the messages of Al-Quran related to daily legal problems. It is the sunnah that the ummah of Islam gets rich information about the Prophet's words and deeds and his orders and consents of certain cases emerging among his comrades at that time. As a result, the essence of sunnah is the reflection of the Prophet's understanding of the dialectic of the holy text and the context of the history of human beings during his life. At that time, all legal problems encountered by Muslim society were brought to the Prophet to get solutions. In solving problems, the Prophet always based to the holy text. So, as the messenger of God, Muhammad also played his role as the problem solver of legal matters, especially in cases where Al-Quran does not give any responses, directly or indirectly to the problems emerging in the society. In this case, the Prophet's Islamic legal doctrine is also understood as the legislator (al-Syari') after Allah. The Prophet is believed to possess sacred characteristics functioning as a guarantee to legal decisions he made. Without these sacred characters, the doctrines obliging Moslem people to follow the Prophet's decisions in interpreting AL-Quran are impossible to formulate.

During the Prophet Muhammad era, the target of the propaganda area had not reached the Arabian Peninsula but the surrounding area. After the Prophet passed away, the leadership of the ummah of Islam (caliph) was continued by Abu Bakar as-Shiddiq, then Umar bin Khathab, Utsman bin Affan, and followed by Ali bin Abi Thalib as the four caliphs. The leadership of the four comrades is known as Khulafa' al-Rasyidin. However, at the end of their administration, a lot of slander and various

¹ Kuntowijoyo, 2017. *Dinamika Sejarah Umat Islam Indonesia*, Yogyakarta: Ircisod Published, pp. 15-16

² Attitude of surrender to God (generic meanings of Arabic word *Islam*) which is full of peacefulness (*salam*) because of good deeds to fellow human beings as the continuation of such sincere resignation is the base of salvation in the world and hereafter. See Nurcholis Madjid, 2000. *Islam, Doktrin dan Peradaban, Sebuah Telaah Kritis Tentang Masalah Keimanan, Kemanusiaan, dan Kemodernan*, Jakarta: Penerbit Yayasan Wakaf Paramadina, pp. 1- 8 ; also see M. Quraish Shihab, 2018. *Islam yang Saya Anut, Dasar-dasar Ajaran Islam*, Ciputat : Penerbit Lentera Hati, pp. 95-113

dynamics occurred, then the position of the caliph was handed over to Mua'wiyah. After the Khulafa' al-Rasyidin, the position and the meaning of the caliphate changed into a form of kingdom which was passed down from generation to generation.³

During the caliphate, a lot of conquests happened to various regions. Islam possessed a number of conquered countries and the Muslim people were multiplying up to the conquer to Sham occurring in 17 H. (Hijri year). In 20 H., Egypt that was considered as a country that had Greek and Roman cultural heritage could be conquered. In 21 H., Irak could be conquered up to Persia, then also up to the al-Sindi region, Bukhara to Samarkand. This also occurred to countries in Maghrib like Burqah, Tunis, Jazair, and Malakash. Andalusia was subdued in 93 H. and the Muslim people expanded their power from French region to the al-Liwar river. The vastness of Islamic territory at that time happened rapidly since there was no orientation of material power but on spiritual power, da'wah power and sincerity principles.

Indonesia is one of the areas where its population quickly believes in Islam, but historians have different opinions about the exact time when Islam entered into Indonesia. One group of historians insist that Islam had existed in this archipelago at the beginning of the 11th century, but others believed that it came to Indonesia in 13th century for the first time. This certainly is triggered by the obscurity of the early history of Islam in this archipelago.

In Indonesia, efforts to transform an Islamic law in the national discourse actually have been lasting for a long time. "Even it has been happening since the era of the great Islamic kingdom spreading to the entire archipelago. Nur al-Raniri for example, wrote a book with the title of *Sirat al-Mustaqim* in 1628, as the first legal work distributed to all places in the archipelago. Then it was approved by Sheikh Arsyad al-Banjari with the title of *sabil al-Muhtadin* (1779) and became the material law to solve cases among Muslim people in Banjar sultanate. The works of the Islamic laws, however, were still written using an classical fiqh system.⁴

Practices of transforming Islamic laws into the national discourse continued until the colonial era. Even at this era, Islamic laws for the first time in Indonesia introduced with and brought into the tradition of a modern nation-state law legislation. Therefore, *Compendium Freijer* (1760 M), *Mugarrar* (1750 M), *Cirebonasche Rechtboek* (1757-1760 M) and *Compendium Indlansche Wetten bijde van bone en Goa* were established. This Islamic laws were then provided with their legal bases in *Regeering Reglement* (RR) in 1855.

The situation then changed after the theory of *Receptie SnouckHurgronje* through Article 134 (2) *Indlansche Staatsregeling* (IS) in its new version in 1929 was applied. It is this theory that actually starts conflicts between Islamic laws vis a vis State Islamic laws are contrasted in such a way with customs so that the conflicts seem unsolved. But efforts to transform these Islamic laws are still conducted.

During the Dutch colonialism period, they intended the areas under their administration to make use of the Dutch laws, but it did not work. Therefore, they let original institutions in the society work as usual under the 1624 Jakarta Statute. In the statute, it is mentioned that inheritance for indigenous people who are Muslim people should adopt Islamic laws. Based on the stipulation, the government of VOC (*Vereenigde Oost Indische Compagnie*) asked D.W. Freijer to create *compendium* containing a

³ Up to now, it is still being debated why the Prophet Muhammad SAW did not expressly appointed who would replace him (caliph) after the Prophet passed away. Among the ummah of Islam, there are 3 ((three) schools of the relationship between Islam and state administration. The first school thinks that Islam is not merely a religion in the Western understanding, on the contrary, Islam is a perfect and complete religion that regulates various aspects of life including the state life. The second school holds that Islam is a religion under the Western understanding, which does not have any relationship with state affairs. The third school refuses an opinion that Islam is a greatly complete religion, but this school also rejects Islam as a religion under the Western term. This school insists that in Islam there is no state administration, but a set of ethical values for state life. See Munawir Sjadzali, 1993. *Islam dan Tata Negara: Ajaran, Sejarah dan Pemikiran*, Jakarta: Penerbit UI Press

⁴ Warkum Sumitro, 2016. *Hukum Islam Di Tengah Dinamika Sosial Politik di Indonesia*, Malang: Setara Press, pp. 9-31

marriage law and a Islamic inheritance law which is then known as *compendium freijer*. The position of these Islamic laws lasted for more than two centuries, when the VOC government ended, the Dutch colonial government really controlled the Indonesian archipelago. Their attitude changed to Islamic laws, namely all decisions made by headmen as Islamic legal experts (the original law of Java) should be approved by an instrument of government power.⁵

When the British controlled Indonesia (1911-1916), the British Governor General Thomas S. Raffles stated that Islamic laws were applied among the indigenous people. After the British returned Indonesia to the Dutch colonialism, Christianization was carried out since the Dutch thought that a religious exchange of the indigenous people into Christian occurred, it would give benefits to the Dutch government. Although the Dutch government opposed the condition, it turned out that the existence of Islamic laws in Indonesian society could not be omitted, as proved by regulations made by the Dutch government like Article 75 RR (*Regeeriizg Reglement*) and Article 78 verse 2 RR ordering the court to employ religious or laws/ the people's laws when problems among the indigenous people or those equalized with them occurred. It is realized on the basis of the material of the *Receptio in complex* theory stating that the law for the people/custom is their law and religion as proposed by Lodewijk Wilhem Christian van den Berg (1845-1925). But Christian Snouk Hurgronje and then Cornelis van Vollenhoven and Bertrand ter Haar, advisors to East Indies government (1857-1936) opposed to the *receptio in complex theory* by proposing *theorie Receptie* stating that Islamic laws were not the same with customary laws. As a result, Islamic laws when they are intended to be as a part of customary laws should be accepted first by the indigenous people.

This theory, after Indonesia gained its independence, was greatly opposed by Hazairin, a student of Bertrand Ter Haar, since this theory was developed in order to hinder the development of the Islamic Laws in Indonesia for the interest of the colonialist. Therefore this *theorie Receptie* called the devils' theory by Hazairin, should be abolished from Indonesia since it is not in line with the state philosophy of Pancasila (Five Basic Principles) and the 1945 Constitution giving prominence to the One Supreme God/Religion.⁶

The implementation of sharia through state power triggered bitter and long debates in the modern Indonesia. The history of debates on sharia in the modern Indonesia had become an arena of struggle for Muslim people to give a proper position for the sharia in a non-or even - anti Islamic regime. During the early times of independence, Islamic elites fight with all power to include a phrase in the 1945 Constitution Preamble that obliges the population believing in Islam to practice their religious duties forever. It is known as the Jakarta Charter covering seven words, which are believed to be able to give a constitutional basis for the application of sharia in Indonesia. The effort was unsuccessful because of strong resistance from among non-Muslim people or secular nationalist's circles, who were also muslim in majority.

A real act made by the New Order government to degrade the values and position of Islamic laws in Indonesia was the birth of the "Nasakom" ideology uniting Nationalism, Religion, Communism ideology. The act was really illogical, because as a monotheistic religion, It is impossible to unite

⁵ seeYusdani, "Hukum Islam dan Isu-isu Kontemporer", *Jurnal Hukum Republica* Vol. 2 No. 4, 2003, pp. 220- 223

⁶ Friedrich Carl Von Savigny in his famous book "*Von Beruf Unserer Zeit Fur Gesetzgebung und Rechtswissenschaft*", "Concerning With the Tasks of Our Era for Legislators and Legal Studies", where it is stated among others that : "*Das Recht wird nicht gemacht, est ist und wird mit dem Volke*" (the law is not created, but it grows and develops together with the society). The opinion proposed by Von Savigny is based on the fact that in the world, there are various types of nations where each nation has a Volkgeistjiwa of the people. This soul is different according to either time and place. The reflection of the existence of a different soul may be seen in different cultures found in a nation. According to Von Savigny, it is illogical if there is a law that is universally prevailed at all times. A law is greatly dependent or comes from the soul of the people and what becomes the content of the law is determined by the association of human life from time to time (history).

Islam with communism. As a result, the act was greatly reacted by Islamic leaders at that time so it could not be developed and in a short time, this ideology itself was buried.⁷

The development of Islamic laws in Indonesia encountered a very grim situation during the Old Order period especially in Java. But, a unique development occurred in Aceh. Due to the close relationship between the Aceh people and the Islamic laws, from the result of the compromise between Aceh and Jakarta, on May 26, 1959, Aceh province was recognized as a special administrative area of government. Such recognition was pronounced by the Minister of Domestic Affairs Hardi based on the decision made by the Prime Minister, Djuanda. The decision is intended to be a warranty for the advancement of security and development in Aceh region and as the encouragement for the realization of the autonomy in the field of religion, customs and education.

Debates on the Jakarta Charter or the application of sharia among believers were continued in the Konstituante meeting in 1959. However, it seemed that they stopped discussing the issue when President Soekarno made a decree on July 5, 1959 stating that the Jakarta Charter had inspired to the torso of the 1945 Constitution and formed a unity with the 1945 Constitution. Henceforth, the Jakarta Charter should not be explicitly stated. But, the debates on the Jakarta Charter had not been completely realized. After the Soekarno era, exactly at the beginning of the New Order, the debates continued when Islamic parties once again asked the government to revive the Jakarta Charter as an integral part of the 1945 Constitution Preamble. This effort was not successful since the military forbade the issue to be discussed in the 1966-1967 MPR (People's Consultative Assembly) meetings.⁸

Ratno Lukito stated that the continuity or the emergence of the Religious Court was caused by the politics of law adopted by the New Order government, which at last erased all elements existing in the colonial laws. It is believed that the State integration - during the post long colonialism era - could be attained through a legal system unification. On the contrary, haphazard legal diversity and pluralism even would lead to conflicts. Then differences may be perceived as conflicts, this may not be permitted. To prevent conflicts, a legal system unification for all citizens should be made.

The same case may also be found in the legalization of laws of the Compilation of Islamic Laws (KHI). The Compilation of Islamic Laws is the best example where the government tried to unite and codify different fiqh materials. Ahmad Imam Mawardi (2003) stated that the Compilation of Islamic Laws is "one of the vehicles used by the government to unite and codify Islamic laws". Although muslim citizens were allowed to apply Islamic laws in accordance with their faith and school of thought, the government tried to unite and diversify expressions and practices (applications) of Islamic laws for all citizens believing in Islam.⁹

The dynamics of the Islamic thoughts in the national discourse in Indonesia gained its momentum around 1970s when the Law No. 1/ 1974 1/1974 on Marriage and the Law No. 7/1989 regarding Religious Court emerged successively. Its peak momentum is the birth of the Compilation of Islamic Laws in 1991 that by some people were considered as a national consensus. Up to now, even the Law on Islamic Banking and the Law on Alms have been legislated.

Reformation Era

After the New Order regime failed as marked by the reformation era, the issue of the stipulation of Islamic sharia also stucked to the surface. Two Islamic political parties, namely the Crescent Star Party (PBB) and the Development Unity Party (PPP) initiated to brought up the issue of sharia in the parliament in 1999 through the re-enactment of the Jakarta Charter. Although such a movement did

⁷ See Ahmad Syafii Maarif, 1996. *Islam dan Politik, Teori Belah Bambu Masa Demokrasi Terpimpin (1959-1965)*, Jakarta: Penerbit Gema Insani Press

⁸ Warkum Sumitro, *Hukum*. Op. Cit., pp. 89-93

⁹ see Abdul Gani Abdullah, 1994. *Pengantar Kompilasi Hukum Islam dalam Tata Hukum Indonesia*, Jakarta: Gema Insani Press

not succeed, but almost similar movements also happened in areas such as in South Sulawesi, West Sumatra, West Java and Banten.

For supporters of the application of sharia, the reason they present is that in general they believe that sharia is one of the rules that become solutions for all problems of the ummah. It is in line with a statement made by Ismail Yusanto that "It is merely Islamic sharia that is able to answer problems that have convoluted this country either in the economic, social, political, cultural and educational fields, after the capitalism and socialism ideologies failed to fulfill expectations".¹⁰

For sharia application fighters, a campaign for gaining supports from local people was not a form of disobedience to the state. Movements to mobilize power to the success of the sharia application, as stated by Abdul Azis Kahar Muzakkar, an important actor in campaigning the Islamic sharia in South Sulawesi, in their opinion, had implemented a democratic mechanism. Some activists in NGOs suspect that the Darul Islam ideology has revived behind the emergence of the local regulations of sharia in South Sulawesi and East Java. But some think that the motivation is political and economic pragmatism among the local elites.¹¹

Meanwhile, more moderate supporters of Islamic sharia see that Islamic laws which are in accordance with the politics of law during the reformation era, are closely related to values of Islamic teachings struggled amidst the plurality of the national law. Uniting perception of Islamic values with legal plurality of laws will be easily accepted by other groups due to its universal characteristics: upholding justice, enacting laws, building democracy, protecting human rights, establishing togetherness, maintaining security and the like, so that it is these values that will enter into the national legal system. In the context of an Indonesian state, what is important is to struggle an Islamic society that is in line with substantive values in Islam (honest, trustworthy, democratic, just, respecting human rights, preserving nature and the like). The state serves as a regulator to facilitate all potency growing in Indonesia without any discrimination to certain religions or teachings.¹²

Table 1:

Characteristic of the Implementation of the Islamic Sharia in the National Laws

| No. | Field/Problem Regulated | Form of Regulations |
|-----|---|--|
| 1 | Family law (marriage, divorce, and inheritance) | <ul style="list-style-type: none"> - Law No. 1 Year 1974 on Marriage - Law No. 7 Year 1974 on Religious Court - Presidential Instruction No. 1 Year 1991 on Compilation of Islamic Laws |
| 2 | Economic and financial laws | <ul style="list-style-type: none"> - Law No. 7 year 1992 on Banking amended by Law no. 10 year 1998. |

¹⁰ Ismail Yusanto, 2003. "Selamatkan Indonesia dengan Syariah" dalam Burhanuddin (editor), 2003. *Syariah Islam: Pandangan Muslim Liberal*, Jakarta: JIL dan The Asia Foundation, p. 146

¹¹ M. Zaki Mubarak dan IIm Halimatusa'diyah (editor), 2014. *Politik Syariat Islam : Ideologi dan Pragmatisme*, Jakarta : LP3ES, pp. 53-58

¹² M. Shohibul Itmam, 2013. "Hukum Islam dalam Pergumulan Politik Hukum Nasional Era Reformasi" Artikel dalam *Jurnal Al-Tahrir*, Vol. 13, No. 2 November 2013: 273-296

| | | |
|---|---|---|
| | | <ul style="list-style-type: none"> - Law No. 38 year 1999 on Alms Management .. - Law No. 41 year 2004 regarding Waqf |
| 3 | Criminal Law | Sharia-nuanced Local regulations in some areas (prostitution, prostitution, liquor, whip) |
| 4 | Religious ritual practices | Law No. 17 year 1999 on Hajj Management |
| 5 | Religious symbols (wearing of veils, muslim dresses, being good ta reading Al-Qur'an) | Sharia-nuanced local regulation in some areas(muslim dresses, being good at reading Al Qur'an, and so on) |

Table 2:
Some Sharia Local Regulations in Some Areas¹³

| No. | Area | Number and Type Legal Product | Object of Regulation |
|-----|-------------------------|--|--|
| 1 | Garut (West Java) | Regent's Circular Letter in 2000 | Wearing Veils for Local Government Staffs |
| 2 | Cianjur (West Java) | Circular Letter No. 025/3643/org | Suggestion of Wearing work uniform (men/women) during work day |
| 3 | Cianjur (West Java) | Regent's Circular Letter No./2717/ASSDA.I/9/2001 | Regarding Movement of Apparatus with Good Character and Society full of love |
| 4 | Tasikmalaya (West Java) | Regent's Circular Letter No 451/SE/04/Sos/2001 | On Improving the Quality of Faith and Piety. This letter contains advices to wear uniforms covering the intimate parts of human body to students of Elementary School, Junior High School, Senior High School/Vocational High School, Educational Institutions Courses, and Higher Education with Islamic basis. |

¹³ Ibid

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|----|----------------------------|--|---|
| 5 | Pandeglang (Banten) | Regents' Decision Letter No. 25 year 2002 | On the Implementation of Work Days and femal muslim work clothes |
| 6 | Pandeglang (Banten) | Regents' Decision Letter No. 09 year 2004 | On Uniform for Elementary School, Junior High School and Senior High School Students leading to the movement of wearing veils |
| 7 | Bulukumba (South Sulawesi) | Local Regulation No. 6 Year 2003 | Regarding Being Good at Reading Al-Quran for students and candidates of bride and groom |
| 8 | Bulukumba (South Sulawesi) | Local Regulation No. 04 Year 2003 | On Clothes for Male and Female Moslems |
| 9 | Bulukumba (South Sulawesi) | Local Regulation No. 6 Year 2005 | |
| 10 | Maros (South Sulawesi) | Regents' Circular Letter dated on October 21, 2002 | On Wearing Veils for Government Staffs, closing activities during the adzan, adding lesson hours for Islamic religion, and wearing baju koko (shirt without collar) and skull cap for the staffs each Friday. |
| 11 | Maros (South Sulawesi) | Local Regulation No. 16 Year 2005 | Muslim Clothes |
| 12 | Maros (South Sulawesi) | Local Regulation No. 15 Year 2005 | Regarding Reading-Writing Al-Qur'an requiring each student from Elementary to Senior High schools to take the Al-Qur'an test before grade promotion. They are stated to have grade promotion if they are able to read Al-Qur'an and each staff can be promoted into higher positions or ranks if they can read Al Qur'an. |
| 13 | Enrekang (South Sulawesi) | Local Regulation No. 6 Year 2005 | On Muslim Clothes |
| 14 | Gowa (South Sulawesi) | Local Regulation of Gowa regency No. 7 year 2003 | On Eradication of Illiterate of AL-Qur'an at the basic level as requirement for graduating from Elementary School and being accepted at further education level. |

2.2 Existence and Ideal Position of Islamic Laws in the Politics of National Laws

Masykuri Abdillah stated that the existence of Islamic Laws in Indonesia has two forms, namely, first, as formal laws delegated as positive laws for the ummah of Islam in Indonesia, and second, as normative laws consciously implemented by the ummah of Islam. The first form is carried out using a structural approach, whereas the second one through a cultural approach. The first form may be found in regulations as presented in the table above which are directly aimed at regulating the implementation of Islamic teachings for their believers.¹⁴

Then, how is the ideal position of the Islamic Laws in the life of state nation and state in Indonesia where the majority of its population is Muslim? This question is then answered and responded in various forms by Muslim intellectuals and experts of Islamic Laws in Indonesia.

Nurcholis Madjid or generally called Cak Nur is one of the Muslim intellectuals whose opinion should be presented, although he did not specifically discuss Islamic Laws. He thought that the root of the problem the ummah of Islam encountered is the loss of “psychological striking force” that should be obtained from religions. It is marked by inability of the ummah of Islam represented by its leaders to distinguish between transcendental and temporal values. In this case, Nurcholish suggested that the ummah of Islam should free themselves from any tendency to place things that should be mundane as worldly things, and things that should be perpetual as eternal things.

Then it appears an idea of “secularization” which is a response to a socio-political phenomenon which is the implementation of Nurcholish’s idea and thought about Islam as an open religion and about his suggestion of the idea of progress. Nurcholish asked the ummah of Islam to be always brave to do *ijtihad*, including in responding contemporary problems. He also asked the ummah of Islam not to be afraid of the globalization phenomenon where its implications among other is the acceptance of secularization.¹⁵

In Nurcholis’ s opinion, secularization is closely related to desacralization because the two words contain elements of liberation. Secularization means liberating the world from the religious-mystical understanding. Desacralization also means abolishing or liberating from sacred legitimation. Making transcendence absolute to God should bear “desacralization of views to all, but God; because sacralization to something other than God is naturally *syirik* which is the antonym of *tauhid*. therefore, all objects which have been considered to be sacred so far are those that should be desacralized.

In the contexts of this progressive Islamic movement, it seems that Nurcholish has great obsession to explain that a true Islam is not merely a structure or an arrangement and a group of laws, that stands

¹⁴ Masykuri Abdillah, 2000. “Kedudukan Hukum dalam Sistem Hukum Nasional”, Jakarta; *Jurnal Jauhar*, Vol. 1, No. 1 as cited by M. Anas Kholis & Warkum Sumitro, 2016. “Reformulasi Pola Legislasi Hukum Islam di Indonesia: Sebuah Upaya dalam Mentransformasikan Nilai-nilai *Maaqshid Syariah* dalam sistem Perundang-undangan” a paper in Haris Syamsuddin, et al (editors), 2016. *Menggugat Negara, Dialektika Ekonomi Politik, Hukum & Civil Society*, Malang: Intrans Publishing

¹⁵ Nurcholish’s idea about the use of the term “secularization” has triggered pro and contra and also polemics among Muslim intellectuals and the ummah of Islam. Prof. H.M. Rasjidi dan Dr. M. Kamal Hassan is someone who opposed to Nurcholish. By the term Secularization, Nurcholish is accused of having changed it into secular. M. Kamal Hassan has marked Nuscholish as a “Secular Modernist.” Actually, the tem secularization is used as a sociological term, and according to Talcott Parsons, this term more hints to the term of liberating the society from the fetter of superstition in some aspects of its life, and in this case it does not mean abolition of religious orientation in the social norms and values”. Further searching, see Nurcholish Madjid, 1999 (Cetakan XII_ ISLAM, Kemodernan dan Keindonesiaan, Bandung: Penerbit Mizan. Also see Introduction to the Book written by M. Dawam Rahardjo, “Islam dan Modernisasi : Catatan Atas Paham Sekularisasi Nurcholish Madjid”, pp. 11 -31.

above the state and government formalism. But Islam is the realization of *tauhid*, which is spiritual power that is able to bear *hanif*, inclusive, and democratic soul and to respect social pluralism.¹⁶

For Nurcholish a state is one of the worldly sides of life of which its dimension is rational and political, while a religion is another aspect of life where its dimension is spiritual and personal. A religion and a state is inseparable, but the two should be distinguished in terms of its dimension and the way to approach it.

A democratic government system places secularism is a necessity. The goal of secularism even gives freedom to religions to develop under the hand of society. Not all public affairs can be intervened by religions. The area of politics and state cannot also be intervened by religions. A state should be neutral to religions to assure justice principles, namely similar position of all religions and faiths before a state.

In the context of development in Indonesia in the future, the late Cak Nur proposed 10 Platform to rebuild Indonesia.¹⁷ The ten *platforms* are:

First, realizing good governance in all layers of state management.

Second, upholding the legal supremacy consistently and consequently.

Third, implementing the national reconciliation,

Fourth, pioneering economic reformation by giving priority to the development of productive activities from the bottom.

Fifth, developing and reinforcing the institution of democracy: civil freedom especially for press and academic freedom, clear tasks and authority division between the government, representative, and trial.

Sixth, improving national defense and security by building value and dignity of person and institutions of the Indonesian National Army (TNI) and the Indonesian National Police (Polri) under the frame of bureaucracy.

Seventh, maintaining the unity of the territorial integrity of Indonesia through a cultural approach, an affirmation of diversity and oneness and the development of autonomy.

Eighth, leveling and improving the quality of education throughout the archipelago.

Ninth, realizing the social justice for all people as the goal of establishing a state.

Tenth, playing active roles in improving the world place.

An expert in Islamic laws Ahmad Qodri Azizy developed a thought of Islamic laws with an eclecticism theory (a system of religion or philosophy) critically created by choosing from various sources and doctrines as efforts to reformulate the Indonesian Islamic Law. He argued it by giving an example of the regulation of the Compilation of Islamic Laws as the national legal product from the aspects of language and substance that still causes various understandings. Its orientation cannot be separated from the idea of the national political struggle with Islamic laws by abolishing a dichotomy between the national law and the Indonesian Islamic Law.

¹⁶ See Nurcholish Madjid, 1997. *Tradisi Islam, Peran dan Fungsinya dalam Pembangunan di Indonesia*, Jakarta: Penerbit Paramadina; baca juga Ahmad Gaus AF, 2010. *Api Islam, Nurcholish Madjid, Jalan Hidup Seorang Visioner*, Jakarta: Penerbit Buku Kompas. Attend to an Epilogue written by Budhy Munawar-Rachman, pp. 334-366.

¹⁷ For the explanation and description of each Platform, read Nurcholis Madjid, 2004. *Indonesia Kita*, Jakarta: Penerbit Buku Gramedia bekerjasama dengan Universitas Paramadina dan PMKI

From different points of view, a muslim intellectual and prominent leader of Muhammadiyah, Ahmad Syafi'i Maarif explained the development of the Dutch colonialism succeeding in taking over all power of Islamic kingdom in Indonesia has caused Islamic laws to be gradually cut , until what is left is - besides worship - merely a part of family laws (marriage, divorce, reconciliation, inheritance) where the Religious Court serves as the implementer so that it needs reorientation according to the plurality of laws in Indonesia. According to him, a strategic step is needed to build legal cultures that are in accordance with the plurality of laws that develops in Indonesia.¹⁸

Ahmad Gunaryo explained that the history of the political struggles of the Islamic laws in the archipelago cannot be separated from the understanding which is in line with cultures. Gunaryo stated that the adjustment of Islamic laws to the cultural diversity may be explained among others by reconciling accommodating laws and the dynamics of Islamic laws so that it is through the reconciliation between Islamic laws and the national laws that real national laws may be created.¹⁹

Muhammad Alim stated that a republic country like Indonesia has the potency to develop laws appropriate with Islam during the Prophet and his comrade's era. The potency to realize the independent justice which is impartial in upholding justice, giving priority of human rights and obligations, possessing a constitution (Al-Quran and Sunnah) and the like, as a capital to towards the institution and positivation of real Islamic laws. To realize it, it is necessary to make an accommodating step towards values that are supported by the majority of community under the frame of Pancasila democracy.²⁰

Various opinions above confirm that the legal struggle of the Islamic laws in Indonesia is a form of the political struggle of the national laws dealing with the development of studies of Islamic laws on AL-Din--Syari'ah -Fiqh that are really needed in line with the socio-cultural development in Indonesia repacking fiqh studies using a modern legal language. It is also as an effort to straighten perception of sharia through the Religious Court especially its judges, to familiarize the ummah of Islam (ullemas) with jurisprudence, and make a compilation of Islamic laws and regulations in accordance with the needs of Indonesian people and their socio-cultural aspects.²¹

The transformation of values of Islamic laws is the state's constitutional obligation in building the national legal system in Indonesia coming from three legal sources: customary (positive (the Dutch) and Islamic laws. The three legal sub-systems are the living law for the Indonesian people and state on the basis of the state Constitution as reflected in the 1945 Constitution Preamble. Article 29 of the 1945 Constitution states that Indonesia is not a religious state, but it is a religious republic state, namely a state that recognizes official religions namely Islam religion, Catholic religion, Protestant religion, Hindu religion, and Buddhist instead of a secular country. In the context of the legal politics, a state is obliged to take legal values from religions recognized by the country officially if the religions possess legal systems in order to develop the national legal system in Indonesia through a constitutional mechanism. Dealing with the Islamic Laws as *the living law*, adopting the Islamic laws in the national law is an obligation on the basis of the mandate in the 1945 Constitution through the political mechanism which is democratic or at least the Islamic law should become a reference for establishing the national law in Indonesia. In the context of the Indonesian Islamic legal politics in Indonesia. In this case, Abdul Halim stated:

¹⁸ Ahmad Syafii Maarif, 1996. *Islam dan Politik, Teori Belah Bambu masa Demokrasi Terpimpin (1959-1965)*, Jakarta: Gema Insani Press

¹⁹ Ahmad Gunaryo, 2006. *Pergumulan Politik dan Hukum Islam*, Yogyakarta: Pustaka Pelajar kerjasama pasca sarjana IAIN Walisongo

²⁰ Muhammad Alim, 2010. *Asas-asas Negara Hukum Moderen dalam Islam, Kajian Komprehensif Islam dan Ketatanegaraan*, Yogyakarta: LkiS

²¹ Busthanul Arifin, 1996. *Pelebagaian Hukum Islam di Indonesia Akar Sejarah Hambatan dan Prospeknya*, Jakarta: Gema Insani Press

“The constitution theory under the frame of the politics of law here is the transformation religious legal values into the Indonesian national laws which are obligation by constitution to build the national legal system through a democratic constitutional mechanism. This theory is build based on an argument that structurally the 1945 Constitution places the position of religions in a higher position. The 1945 Constitution recognizes and adheres to the idea of the One Supreme God in the life of the people, the nation and the state. The idea of The One Supreme God is not merely confirmed in the formula of the Constitution Preamble explicitly stating the existence this this recognition but also states this idea as the first and main principle in the formulation of Pancasila. While the accomodation theory is built on the argumentation that a state is obliged to accommodate all national legal subsystem into state regulations using a standard of Islamic laws as the laws adhered by the majority of Indonesian people. The development leading to the wider adoption of Islamic laws is compatible with the dynamics of the awareness of laws among Indonesian people as expressed in various forms of regulations and realized in the essence of the legal institution which is developed that may also be related to considerations which are philosophical and institutional natures”.

Islamic laws as the source of values for rules of laws that will be made, are implemented using the way how the values of the laws are obtained and then poured down into the national laws. The majority of Muslim and Islamic prominent leaders seem to consider that the implementation of Islamic laws may be accommodated without any formal legislation as Islamic laws, but by merely integrating principles of Islamic laws into the national laws. Such an integration into the national laws is probably made especially under the framework of the national laws development. Therefore, the implementation of the Islamic laws is not limited to the field of the civil law, especially teh family law, but also other fields such as criminal law, constitutional law, state administrative law and trade law. As a result, Islamic laws will really play roles as the source of the national laws besides Pancasila, without assumption that Islamic laws are out of date. This second model actually had been practiced by the creators of the 1945 Constitution where the values of Islamic (sharia) laws are reflected in it.²²

According to Abdullah Ahmad An-Naim, intellectuals and activists from Sudan, the main problem of the Islamic laws in the modern world is the difficulty in responding the series of realities in the modern era. When faced with the modernity problems, Islamic laws should be able to have multiple characteristics. On the one hand, as the realization of God’s law, it must be resistant to modernity. On the other hand, it should be accommodating to the demand of development. Then at last An-Naim formulated a technique of developing a modern Islamic public law as follows: (1) taking the main issue related to the public law under a modern term and looking for principles of “relevant” Islamic laws and determining a part that might be applied as modern public laws; (3) breaking up conflicts and tension under the framework of Islam as a whole, instead of historical Islamic laws.²³

3. Closing

The political dynamics of the national law shows that the existence of the Islamic law has ups and downs following the existing social dynamic and political configuration. It needs serious efforts to dig up and socialize as many as possible noble values contained in the Islamic laws. The ways to dig up

²² See Ismail Suny, 2005. *Jejak-jejak Hukum Islam dalam Sistem Ketatanegaraan Indonesia (Sebuah Bunga Rampai)*, Jakarta: Konstitusi Press; Masdar Farid Mas’udi, 2010. *Syarah Konstitusi, UUD 1945 dalam Persepektif Islam*, Jakarta: Penerbit Alvabet Bekerjasama dengan LaKiP

²³ Abdullahi Ahmed An-Naim, 2001. *Dekontruksi Syariah: Wacana Kebebasab Sipil, HAM dan Hubungan Internasional dalam Islam*, Yogyakarta: Penerbit LKIS

the values, among others, are to understand philosophical aspects of the Islamic laws as mirrored from the *kulli* (syar'i laws serving as the basis of its thought, the goals of the Islamic laws (*maqashid al-syariat*) including their wisdoms (*hikmah al-tasyri'*), and also the concept of human beings according to Islam.

Besides fighting for Islamic laws, the ummah of Islam should consistently and continuously apply noble characters. One history ordained for the Prophet Saw. Portrayed the condition of a believer (mukmin) that: Makrifat (science) is his capital, justice is the basis of his teaching. Self-control is the basis of his activities. Love is his his association. Longing for Allah is his vehicle. Remembrance is his solace. Satisfaction after maximum efforts is his treasure. Awareness of weakness before God is his pride. Truth is his mainstay. Patience is his clothes. Obedience is his love. Jihad/struggle is his daily activities. While his great happiness is when he is facing Allah Swt. in his prayer"²⁴

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²⁴ M. Quraish Shihab, 2016. Penerbit Lentera Hati, pp. 302-303

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