

## ISLAMIC LAW IN NATIONAL LAW SYSTEM

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### **Abstract**

For the purpose of the development of national legal system, Islamic law has paid significant contribution, at least in terms of the spirit. During decades, Islamic law has experienced significant development. The opportunity for the penetration of more aspects of Islamic law into Indonesian legal system is in positive trend.

*Keywords: Islamic Law, Islamic/Religious Court, National Legal System*

### **Preface**

Addressing Islamic Law in the middle of National Law will focus on position of Islamic Law in National Law System. Indonesian Law System, as a result of the development of its history is plural. It called so because up to this moment in Republic of Indonesia there are several law systems that have their own characteristic and structure. Those law systems are law of custom, Islamic law and western law.

From the beginning of Islam's present in the seventh century of AD Islamic law has been practice and develop in society and Islamic court. Hamka raise facts about several works of Indonesian Islamic Law expertise, such as Shirat al-Thullab, Shirat al-Mustaqim, Sabil al-Muhtadin, Kartagama, Syainat al-Hukm, and other expertise.<sup>1</sup> But those works are still addressing fiqh in substance. The nature of those works is law doctrine and Indonesian fiqh system oriented on the teaching of Imam Mazhab.

In the era of Sultan and Islamic palaces, Islamic court has formally existed. There are some called chieftain courts like those in Java, Syar'iyah court in Islamic sultanate in Sumatera, Qadi court in Banjar and Pontianak

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<sup>1</sup> Hamka, *Antara Fakta dan Khayal "Tuanku Rao"*, (Jakarta: Bulan Bintang, 1974), p. 324

sultanate. Regretfully even though in era of sultanates Islamic court has been established and Moslem scholars play role as adviser and judge, but there is no compilation of systematic positive law. Law that implemented are still abstraction withdrew from the obstetrical of fiqh doctrine.

In 1760, VOC assigned D.W. Freijer to compile law later recognized as Compendium Freijer. This Compendium became the source of law to solve dispute between Islamic societies in regions governed by VOC.<sup>2</sup>

The use of Compendium Freijer only happened for a meantime. In 1800 VOC give power to Government of Indies Dutch. Along with that, the compendium is gone and sunk. New law politics has born, which is based on reception theory or conflict theory of Snouck Hurgronje and van Vollenhoven. Since then, systematically, Islamic law is being removed. As the replacement, customary law is used and performed. The government of Indies Dutch tried to only enforce two systems of laws, customary law for native and western law for Europeans.

The last constraint effort to remove the role of Islamic law was enforced in Staatsblad 1937 No. 116. This regulation is result of Ter Haar commission effort, consists of these recommendations: 1. To not completely implemented Islamic hereditary law by society. 2. Cancel the authority of Islamic Court (*Raad Agama*) to convict hereditary cases, and this authority is given to *Landraad*. 3. Islamic court placed under the supervisor of *Landraad*. 4. the verdict of Islamic court could not be executed without *executoir verklaring* from head of *Landraad*.<sup>3</sup>

After Indonesian Independence, even though transitory regulation stated that older law is still valid as long as its spirit does not in conflict with the 1945 Constitution, the entire regulation of Indies Dutch regulation based on reception theory is void because its spirit is in conflict with 1945 Constitution.

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<sup>2</sup> Supomo and Djoko Sutowo, *Sejarah Politik Hukum Adat 1609 – 1848*, (Jakarta: Djambatan 1955), p. 26

<sup>3</sup> M. Yahya Harapan, *Informasi Materi Kompilasi Hukum Islam: “Mempositifkan Abstraksi Hukum Islam”*, in, *Kompilasi Hukum Islam dan Peradilan Agama dalam Sistem Hukum Nasional*, (Jakarta, Logos, 1999), p. 27

*Receptie* theory has to exit because it is in conflict with al-Qur'an and Sunnah Rasul.<sup>4</sup> Hazairin called *receptie* theory as devil theory.

According to his opinion, Hazairin develop a theory called *receptie exit* theory. The essences of his theory are:<sup>5</sup> 1. *Receptie* theory has broken down, void and *exit* from Indonesian civic since 1945 with Indonesian Independence and the enactment of 1945 Constitution. 2. According to 1945 Constitution Article 29 sentence 1 then Republic of Indonesia has obligation to form Indonesian national law which the source is law of religion. The government has political obligation to do so. 3. Law of religion which enter and integrated in national law not only Islamic law, but other religion as well for other than Moslems. Law of religion in the field of civil and criminal law is absorbed into Indonesian national law. It is the new Indonesian law with Pancasila.

Besides Hazairin, a figure who also disagrees with *receptie* theory is Sayuti Thalib who wrote book "Receptie a Contrario: Hubungan Hukum Adat dengan Hukum Islam. This theory reflected a thought that customary law is valid when it does not in conflict with Islamic law. Through this theory the spirit of Preface and 1945 Constitution has overruled Article 134 sentence 2 of that *Indische Staatsregling*.<sup>6</sup>

According to Ismail Sunny after the Independence of Indonesia and of 1945 Constitution effective as the base of country even though without containing seven words from Jakarta Charter then *receptie* theory is void and lose its legal power. The later Islamic law is effective for Indonesian Moslem citizen according to Article 29 1945 Constitution. Sunny called this era as the Periode of the Acceptance of Islamic Law as Persuasive source.<sup>7</sup>

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<sup>4</sup> Ichtijanto, "Pengembangan Teori Berlakunya Hukum Islam di Indonesia", in, *Hukum Islam di Indonesia Perkembangan dan Pembentukan*, (Bandung: Rosdakarya, 1991), p. 128

<sup>5</sup> Amiur Nuruddin and Azhari Akmal Tarigan, *Hukum Perdata Islam di Indonesia*, (Jakarta: Kencana, 2004), p. 17

<sup>6</sup> Sayuti Thalib, *Receptie a Contrario*, (Jakarta: Bina Aksara, 1985), p.37-40

<sup>7</sup> Ismail Sunny, "Tradisi dan Inovasi Keislaman di Indonesia dalam Bidang Hukum Islam", in, *Hukum Islam dalam Tatanan Masyarakat Indonesia*, (Cik Hasan Bisri (ed), (Jakarta: Logos Publishing, 1988), p. 96

By the acknowledgement of Islamic Law in President of Republic of Indonesia Decree on July 5, 1959, then this era could be called as the acceptance of Islamic Law as authoritative source. Consequently, Jakarta Charter often called as the spirit of 1945 Constitution and an integrated series in the Constitution. The word spirit could has negative sense means that it forbids the existence of other law in Republic of Indonesia contradict with Islamic syari'at its holders. The positive sense is Moslems are obliged to implement Islamic syari'at. It is needed law that will enforce Islamic law in the National law.

### **Islamic Law**

The word of Islamic law could not be found in Al-Qur'an and Islamic Law literatures. Words exist in the Al-Quran are syari'ah, fiqh, Allah law and those with the same root with it. Words Islamic Law is a translation from term "Islamic Law" from Western literatures.

It is found in the explaintation about Islamic Law from Western literature the definition of Islamic Law, which is: whole Book of Allah regulates ways of life of every Moslem in each of its aspect.

Hasbi Asy-Syiddiqy defines Islamic Law as "collection of efforts fuqaha in implementing syari'at Islam suitable with society's needs".<sup>8</sup> The definition of Islamic Law here is similar with the sense of fiqh.

In order to give more explanation about the meaning of Islamic law, it is important to first understand the meaning of word "law". In fact, there is no perfect definition of law. However, in order to give it a more understandable definition, althought it may contains weaknesses; definition adopted by Muhammad Muslehuddin taken from Oxford English Dictionary need to be revealed. According to him, law is "the body of rules, wether proceeding

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<sup>8</sup> Muhammad Hasbi Ash-Shiddiqy, *Falsafah Hukum Islam*, (Jakarta: Bulan Bintang, 1993), p. 44

from formal enactment or from custom, which a particular state or community recognizes as binding on its members or subjects”.<sup>9</sup>

When law is related to Islam, then Islamic Law means: “Set of rules based on vision from God and Sunnah Rasul about behavior of human mukallaf legitimated and believed effective for and bide all societies holding Islam”.<sup>10</sup>

From the mentioned above definition, it could be understood that Islamic law covers Syari’ah and Fiqh Law, because of the meaning of syarak and fiqh are covered in it.

### **National Law**

National law is law which created by Indonesian nation, after the Independence of Indonesia and effective for Indonesian residents, especially for its citizens as the replacement of colonial law.

Creating a national law for Indonesian nation consists of multi ethnic with different culture and religion, as well as with law diversity as product of previous colonial government, is not an easy job. The creation of national law would be effective for all citizens regardless of their religion should be done with care, because between religions that hold by Indonesian citizen, there are religions that could not be apart from law. Islam, for instance is a religion contains law regulates the connection between humans and object in the society. Islam is religion of law in the actual sense. Therefore, in the creation of national law in the country with majority of Moslems such as Indonesia, the substances of religion law is a very important consideration. To do so, it needs clear wisdom and a wise policy.

National law have to be able to protect and uphold every aspect of life of all citizens, according to Minister of Legal Affairs Ismail Saleh (1989) in making plan of national law creation, we have to use national wisdom which

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<sup>9</sup> AS. Honrby, *Oxford Advanced Learner’s Dictionary of Current English*, (Britain: Oxford University Press, 1986), p. 478

<sup>10</sup> Amir Syarifuddin, “*Pengertian dan Sumber Hukum Islam*”, in *Falsafah Hukum Islam*, (Jakarta: Bumi Aksara, 1992), p. 14.

is a tree in one which is inseparable among them, they are: national wisdom, archipelagic wisdom and wisdom of *bhineka tunggal ika*.

Seen from national wisdom, National Law System has to have its full orientation to Indonesian aspiration and interest. This national wisdom, according to Minister of Legal Affairs, is not a closed national wisdom, but open to see future generation's interest and capable to absorb values of modern law.<sup>11</sup>

Archipelagic wisdom also implemented in the creation of national law, it demands one national law so unification efforts in law field have to be done as far as we could. This means that every layers of society will be regulated with one law system which is national law system. But, for the sake of justice, according to Minister of Legal Affairs, national law that will be implemented based on those two wisdoms has to pay attention to different socio-cultural background and law necessity demand by certain groups of society. Therefore, beside those two wisdoms, the creation of national law has to use wisdom of *bhineka tunggal ika*. By the later wisdom, law unification expected by national law has to warrant the channeling of aspiration, values and the needs for public relation within national law system. With wisdom of *bhineka tunggal ika*, ethnical, cultural, and religion diversity as asset of national development has to be honored, as long as, of course, do not endanger the nation's union and unity.

Using those three wisdoms, at once and inwrought different Islamic Law principles and rules, also Adat Law and former Western Law would be an integral in national law, both written and unwritten national law or law of custom.

The position of Islamic law, as mentioned above, according to Minister of Legal Affairs: "...could not be denied, most of Indonesian society are Moslems". Islam, he said, "has substantive Islamic Law consist of two fields, they are (1) worship field and (2) mu'amalah field. Regulations on worship field is detailed, regulations on mu'amalah or every aspect of life is not detailed. What found in the

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<sup>11</sup> Quoted by M. Daud Ali, dalam *Pengembangan Hukum Material Peradilan Agama*, see *Jurnal Mimbar Hukum: Aktualisasi Hukum Islam Nomor 17 Tahun V (Nov – Des 1994)*, (Jakarta: Al-Hikmah dan Direktorat Pembinaan Badan Peradilan Agama Islam, 1994), p. 34

last field are just principles. Development and the application of principles in mu'amalah field are: pass on fully towards executive body and government, which are *ulil amris*. And, because Islamic law plays important role in building and guiding the social order of Moslems and influencing every aspect of their lives, the best way that could be taken is academical attempts to transform Islamic law norms into national law, as long as it, according to Minister of Legal Affairs, suits with Pancasila and 1945 Constitution and relevant to Moslems' special needs". According to Minister of Legal Affairs, there are lots of principles which the nature is universal contained in Islamic law that could be used in creating national law.

### **The Contribution of Islamic Law in Creating National Law**

As the effort to guide and to build national law, Islamic law's contribution is very big, at least from the spirit side. This statement is strengthened with few arguments.

*The first*, Act No. 1/1974 regarding Marriage. Article 2 of this Act stated that marriage is valid when it is done according to law of each religion. Meanwhile article 63 regulates the definition of court in this Act is Religion Court for those who are Moslems.

*Second*, in Act No. 2/1989 regarding National Educational System, stated that in order to create a complete human being is believing and godfearing to God, kind hearted, having knowledge and skills, physically healthy, having a settled and independent personality, having a sense of responsibility to society and nation.

*Third*, Act No. 7/ 1989 regarding Religion Court. This Act proves that the existence of Religion Court is appropriate, grows, and developed in Indonesia. This is the proof of Moslems' contribution as majority.

*Fourth*, Islamic Law Compilation, although it is not in the form of Act, but President Instruction No. 1/1991. This compilation is very helpful for judge in making verdicts especially in Religion Court.

*Fifth*, Government Regulation No. 28/1978 regarding transfer to communal ownership of owned land, aside from Act No. 5/1960 as the core

act regarding land in Indonesia. As the execution, it also has been enacted Regulation of Minister of Religion in 1978 regarding execution regulation Government Regulation No. 28/ 1978. For that execution, it has been enacted few regulations as followed: 1. Decision of Minister of Religion No.73/ 1978 regarding the Delegation of Authority to Head of Provisionsal/its level Regional Office Department of Religion within Indonesia to constitute or disband the Head of District Religion Affairs Office as PAIW; 2. Join Instruction between Minister of Religion and Minister of Domestic Affairs, they are No. 1/1978 regarding the execution of Government Regulation 28/1978; 3. Instruction of Minister of Religion No. 3/1979 regarding Guidelines of the Execution of Decision of Minister of Religion No. 73/1978 regarding the Delegation of Authority to Head of Provisionsal/its level Regional Office Department of Religion within Indonesia to constitute or disband the Head of District Religion Affairs Office as PAIW; 4. Regulation of General Director of Bimas Islam and Pilgrims Affairs No. D.II/5/Ed/14/1980 regarding the Use of Seal Cost with the attachment of record of Letter of General Director of Tax No. S-629/PJ.331/1080 regarding Regulation of Minister of Finance for signs intended in Regulation of Minister of Religion No. 1/1978 regarding the Regulation Execution of Government Regulation No. 28/1977; 5. Regulation of Minister of Domestic Affairs No. 6/1977 regarding the Procedure to Register Land regarding Transfer to Communal Ownership of Owned Land. 6. Letter of General Director of Bimas Islam and Pilgrim Affairs No. D.II/5/Ed/07/1981 regarding the registration of Transfer to Communal Ownership of Owned Land; 7. the Letter of General Director of Bimas Islam and Pilgrim Affairs No. D.II/5/Ed/11/1981 regarding Guidelines to fillin the number into Form of Transfer to Communal Ownership of Owned Land.<sup>12</sup>

Islamic law as law order that guide and obeyed by majority of Indonesian society is law that has been live within the society, and is part of Islam teaching

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<sup>12</sup> M. Yasir, *Pelaksanaan Perwakafan di Indonesia, Permasalahan dan Pemecahannya*, Fakultas Syariah UIN Jakarta; Jurnal Ahkam No. 16/VII/2005. hal. 275



and believe that exist in life of national law, and is material in its guiding and development.

The history of law development in Indonesia, the existence of Islamic Law in National Law is a fight for existence. Existence theory formulating the condition of Indonesian national law in the past, present, and future, emphasizing that Islamic law is exist within Indonesian national law, both written and unwritten. It exists in every life of law field and law practice.

Existence theory, regarding to Islamic law is a theory elaborating the existence of Islamic law within Indonesian National Law, they are: (1) Exist, in sense as integral part of Indonesian National law; (2) Exist, in sense its recognized independence, the existence of its power and reputation, and given status as national law; (3) Exist, in sense national law and Islamic Law norms functioned as filter of Indonesian National Law raw material; (4) Exist, in sense as main material and main element.

So, *existentially*, the position on Islamic law within National law is a sub system of national law. Consequently, Islamic law also has the opportunity to contribute in order to create and regenerate national law, although it has to be admitted that its obstacles and constraints never ends.

*Sociologically*, the position on Islamic law in Indonesia involve the awareness of diversity for society, the society that more or less also connected with law awareness, both religion norms and law norms, always demand for order.

Thus, it is clear that the connection between both is very tight. Both demand order and obey from citizen. Both have to be developed to one direction, harmony, and balance. Both could not be allowed contradict each other.

### **Islamic Law in Reformation Era**

In reformation era born few regulations that could strengthen Islamic law:

#### **1. Act regarding the Conduct of Pilgrim**

Act No. 17/1999 regarding the Conduct of Pilgrim enacted and enforced in Jakarta on May 3, 1999 (statute book of Republic of Indonesia 1999 No. 53 addition of statute book of Republic of Indonesia No. 3832).

Indonesia is a country with most pilgrims. Due to the quota determined by Arab Saudi is 1 percent out of total citizens of a country. The citizen of Indonesia approximately 250 million, then quota of pilgrim is about 250 thousand.

To conduct pilgrim well, there is no obstacle, both domestic and in the foreign country, it needs good management. Pilgrim conducted far away from Indonesia, further than 10.000 miles, involving many people and departments, conducted once in a time with millions of people from all over the world in one place and time. To do so the government has to be involved directly in its conduct because it linked to reputation of Indonesia.

To support the effort to conduct effective, efficient, and succeed pilgrim, then government enacted Act No. 17/1999 regarding the conduct of Pilgrim. It followed up by the Decision of Minister of Religion No. 224/1999 regarding the Conduct of Pilgrim and Umroh. Before, in the colonial of Netherland era, it enacted the regulation of conduct of Pilgrim, Ordinance of Pilgrim (*Pelgrims Ordonantie Staatsblad*) on 1922 No. 698 including the alteration and addition to *serat Pelgrims Verodening* in 1938.<sup>13</sup>

The Act of Conduct of Pilgrim consists of 15 chapters and 30 Articles. Globally its contents as followed:

Chapter I General Provision (Article 1-3), Chapter II Principles and Objectives (Article 4-5), Chapter III Organization (Article 6-8), Chapter IV Fees to Conduct Pilgrim (Article 9-11), Chapter V Registration (Article 12-14), Chapter VI Guidance (Article 15), Chapter VII Health (Article 16), Chapter VIII Immigration (Article 17), Chapter IX Transportation (Article 18-20), Chapter X Luggage (Article 21), Chapter XI Accommodation (Article 22), Chapter XII Especial Conduct of Pilgrim

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<sup>13</sup> Suparman Usman, *Hukum Islam, Asas-asas dan Pengantar Studi Hukum Islam dan Tata Hukum Indonesia*, (Jakarta: Gaya Mediaprata, 2001), p. 187

(Article 23-24), Chapter XIII the Conduct of Umrah (Article 25-26), Chapter XIV Criminal Provisions (Article 27-28), Chapter XV Provision of Conversion (Article 29), and Chapter XVI Closing Provision (Article 30).

## **2. Act regarding Zakat Management**

Act No. 36/1999 regarding Zakat Management enacted and enforced in Jakarta on September 23 1999 (Statute Book of Republic of Indonesia in 1999 No. 164, addition of statute book of Republic of Indonesia No. 3885).

Country warrants its citizen to conduct their religion teaching, protect the poor and to establish welfare of Indonesian citizen as stated in Article 5 paragraph (1), Article 20 paragraph (1), Article 29 and Article 34 of 1945 Constitution, then government has to make yudicial tools to support those efforts. Then, government enacts Act No. 38/1999 regarding Zakat Management. To execute that Act created President Decision No. 8/2001 regarding National Body of Amil Zakat, stating the importance of three components to manage zakat, they are Executor Body, Concil of Contemplation dan Supervisor Commitment. Before that Act effective, since the colonial of Netherland there are regulations regarding zakat, they are *Bijblad* No. 2/1893 on August 4, 1893 and *Bijblad* No. 6200 on February 28, 1905.<sup>14</sup>

In the opportunity of Nuzulul Qur'an Celebration in 1422 H, President of Republic of Indonesia Megawati Soekarnoputri has socialize Government Regulation regarding 2,5% of tax reduction for tax bearer who has pay zakat through Bank Account appointed by National Body of Amil Zakat. Further more, this has been conducted in Director General of Taxation.

Act of Zakat Management consists of 10 chapters and 25 articles. Globally the content as followed:

Chapter I General Provision (Article 1-3), Chapter II Principles and Objectives (Article 4-5), Chapter III Organization (Article 6-10), Chapter

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<sup>14</sup> Muchsin, *Masa Depan Hukum Islam di Indonesia*, (Jakarta: STIH Iblam, 2004), p. 41

IV the collect of Zakat (Article 11-15), Chapter V Zakat Empowerment (Article 16-17), Chapter VI Supervision (Article 18-20), Chapter VII Penalties (Article 21), Chapter VIII Other Provisions (Article 22-23), Chapter IX Provision of Conversion (Article 24), and Chapter XVI (Article 25).

### **3. Act regarding Communal Ownership**

Act No. 41/2004 regarding Communal Ownership enacted and enforced in Jakarta on October 27, 2004 by President Susilo Bambang Yudoyono (Statute Book of Republic of Indonesia in 2004 No. 159).

In fact in Indonesia there are several regulations regarding Communal Ownership, among them are Government Regulation No. 28/1997 regarding the Transfer of Owned Land to Communal Ownership. Government Regulation No. 28/1997 only regulates social communal ownership (general wakaf) over one's or legal entity owned land. Land that given for communal ownership on that Government Regulation is limited into owned land; meanwhile the other rights over land such as rights of tenure by long lease, rights to utilize building, and rights to use the land are not regulated. Besides, other properties such as money, share, etc. are not regulated as well in the Government Regulation. Therefore, the development of Land of Communal Ownership in Indonesia is quite small.

When compared to few regulations regarding communal ownership, there are few new and important things. Among them is regarding nazhir, property for communal ownership (*mauquf bih*), and purposes of property for communal ownership (*mauquf 'alaih*), and the importance of Indonesian Communal Ownership Body establishment. In regards to nazhir, due the fact that this act not only manage unmovable properties that is familiar in Indonesia, but also movable properties such as money, gold, marketable securities, vehicles, intellectual property rights, right of rent, etc, then the nazhir demanded to manage those properties.

In this act, property for communal ownership not limited to unmovable properties only but also to movable properties such as money, gold, marketable securities, vehicles, intellectual property rights, right of rent, and other properties regarding to syari'ah and positive law provisions. Further more in this act, money for communal ownership regulated in its own part. In article 28 of this act mentioned that authority: a. guide *Nazhir* in managing and developing properties for communal ownership; b. manage and develop properties for communal ownership for national and international scale; c. give approval or permission of alteration of purposes and status properties of communal ownership; d. dismiss and change *nazhir*; e. give approval upon the exchange of properties of communal ownership; f. give advise and consideration to government in making policies in communal ownership field.

In the same article paragraph (2) mentioned that in the execution of its duties Indonesian Body of Communal Ownership cooperate with Government instantiation both central and regional, social organizations, experts, international bodies, and other relevant parties.

Seen from its duties and authorities in this act, it is clear that Indonesian Body of Communal Ownership has responsibilities to develop communal ownership in Indonesia so that in the future communal ownership could function as it meant to be. To do so, people in Indonesian Body of Communal Ownership are expected to have competencies in their field that suits with the body's needs. One important thing in this act is the purpose of properties of communal ownership is not only for worship and social purposes but also directed for society's welfare by creating potencies and economic benefit of properties of communal ownership.

This enables the management of properties of communal ownership to enter area of economic activities in broad sense as long as that management is suitable with principles of management and syari'ah economic.<sup>15</sup>

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<sup>15</sup> Farida Prihantini, SH,MH,CN dkk, *Hukum Islam Zakat dan Wakaf Teori dan Prakteknya di Indonesia*, (Jakarta: Papan Sinar Sinanti & FHUI, 2005), p. 135

Act No. 41/2004 regarding communal ownership consists of XI Chapters and 71 Articles, Chapter I General Provision (1 Article), Chapter II Foundation of Communal Ownership (30 Articles), Chapter III Registration and Announcement of Properties of Communal Ownership (8 Articles), Chapter IV Alteration Status of Properties of Communal Ownership (2 Articles), Chapter V Management and Development of Properties of Communal Ownership (5 Articles), Chapter VI Indonesian Body of Communal Ownership (15 Articles), Chapter VII Dispute Resolution (1 Article), Chapter VIII Guidance and Supervision (4 Articles), Chapter IX Criminal Provisions and Administrative Penalties (2 Articles), Chapter X Provision of Conversion (2 Articles), and Chapter XVI Closing (1 Article).

#### **4. Act regarding Managing Exclusivity in Aceh**

Act No. 44/1999 regarding Managing Exclusivity in Aceh was enacted in Jakarta on the 4<sup>th</sup> of October 1999 (Statute Book of Republic of Indonesia in 1999 No. 172, Addition of Statute Book of Republic of Indonesia No. 3893).

In the dawn of the reformation, the independence of the country opened the constraints of public opinion. The government became more responsive to the aspirations of society, and democratic life continued on dynamically.

The aspirations of Aceh citizens, that during the New Order were not channelled, this time obtained a huge response from the government. The life of the Aceh people, who are known to be religious, holds their customs high, and places the Ulama at a much respected place in the society's lives; needed to be cultivated and developed.

For that reason, the government gave a guarantee of legal certainty in managing the exclusivity of the people of Aceh, according to Act No. 44/1999 regarding Managing Exclusivity in Aceh.

Act No. 44/1999 consists of 5 chapters and 13 sections. In general they state:

Chapter I General Provision (Article 1), Chapter II Authority (Article 2), Chapter III Implementation of Exclusivity (Article 3 – 11), Chapter IV Provision of Conversion (Article 12), Chapter V Closing Provision (Article 13).

### **5. Act regarding Specific Autonomy of Aceh**

Act No. 18/2001 regarding Specific Autonomy of Aceh as Nanggroe Aceh Darussalam Province was enacted and enforced in Jakarta on the August 9, 2001 (Statute Book of Republic of Indonesia in 2001 No. 114, Addition of Statute Book of Republic of Indonesia No. 4134).

Based on 1945 Constitution, The Governmental System of Republic of Indonesia recognizes and respects units of Local Government with exclusive or “special” nature, as asserted in the national Act.

With the reformation and aspirations of the people of Aceh, the government bestowed upon them special autonomy. For that purpose, the act, Act No. 18/2001 regarding Specific Autonomy of Aceh as Nanggroe Aceh Darussalam Province was formulated.

The people of Aceh hold strong Islamic culture in their daily lives. Not only that, but they had also shown and given great participation during the reclamation of Indonesia’s independence. Those were some of the considerations in establishing Act No. 18/2001 regarding Specific Autonomy of Aceh as Nanggroe Aceh Darussalam Province along with the growth of the reformation and aspirations of Aceh.

Act No. 18/2001 consists of 14 Chapters, detailed into 34 sections. It’s general contents are as such:

Chapter I General Provision (Article 1), Chapter II Arrangement and Position of the Province of Nanggroe Aceh Darussalam (Article 2), Chapter III Authority of the Province of Nanggroe Aceh Darussalam (Article 3), Chapter IV Finances of the Province of Nanggroe Aceh Darussalam (Article 4 – 7), Chapter V Symbols Including Nature in the Povince of Nanggroe Aceh Darussalam (Article 8), Chapter VI The Legislative Body in the Povince of Nanggroe Aceh Darussalam (Article 9), Chapter VII Wali

Nanggroe and Tuha Nanggroe as the Conductors of Traditions, Culture, and Unifier of the Society (Article 10), Chapter VIII The Executive Body of the Province of Nanggroe Aceh Darussalam (Article 11 - 16), Chapter IX Voters and Voters' Rights (Article 17 – 20), Chapter 10 Police Force of the Province of Nanggroe Aceh Darussalam (Article 21 – 23), Chapter XI The Court of the Province of Nanggroe Aceh Darussalam (Article 24), Chapter XII The *Shari'a* Court of Law of the Province of Nanggroe Aceh Darussalam (Article 25 – 26), Chapter XIII Provision of Conversion (Article 27 – 30), and Chapter XIV (pasal 31 – 34).

With the establishment of Act No. 18/2001 regarding Specific Autonomy of Aceh as Nanggroe Aceh Darussalam Province, one of which falls under the category of law, *Qanun* (Regional Regulation) No. 13/2003 regarding gambling, No. 14 regarding alcoholic drinks, No. 15 Tahun 2003 regarding immoral issues were enacted, and Flogging applied as a legal punishment.

## **6. Shari'a Banking**

Even though *Shari'a* Banking is still currently a draft, Act No. 10/1998 regarding banking strengthens the position of Islamic law such as in sections 1, 6, 7, 8, 11, and 13; which explains the dual system in banking (conventional and *shari'a*).

## **7. Act No. 3 Year 2006 Regarding Changes to Act No. 7/1989 Regarding Religion Court<sup>16</sup>**

On February 28, 2006, Act No. 7/1989 regarding religion court was amended with Act No. 3/2006 regarding amandement of Act No. 7/ 1989 (Statute Book of Republic of Indonesia in 2006 No. 22). The amendment was made because Act No. 7/1989 was no longer relevant with the legal necessities and constitutional lives of the society based on 1945 Constitution; inherent with the

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<sup>16</sup> This writing originally formulated from works of writers that have been published in Ombudsman Magazine.



section 24 of the constitution, paragraph (2) that states that the Religion Court is a jurisdictional environment under the Supreme Court along with other courts in the General Court, the Civil Service Arbitration Tribunal and Martial Court

Likewise, section 10 paragraph (2) of Act No. 4/2004 regarding Judicial Power, states that body of court under the Supreme Court includes those under the General Court, Religion Court, Martial Court, and Civil Service Arbitration Tribunal. Therefore, a single policy is applied. Since 2004, the Religion Court shifted from the Department of Religion to the Supreme Court. Wahyu Widiana, whom was formerly a director in the Islamic court in the Department of Religion was recruited into the Supreme Court and now holds position as the Director General of the Religion Court.

Act No. 4/2004 regulates changes in organization, administration, and finances of every jurisdictional environment to the Supreme Court. Hence the organization, administration, and finances of any body of court under the Religion Law previously under the Department of Religion with bases upon Act No. 7/1989 is adapted with Act No. 3/2006.

Act No. 4/2004 asserts the existence of a special court formed under a specific judicial environment based on a code of law; hence the existence of a specialized court under the Religion Court is regulated in Act No. 3/2006, *Shari'a* Islam Court in Nangroe Aceh Darussalam.

The authority of the Religion Court was originally in inspecting, determining, and handling first-level cases between Moslems in areas of: a. Marriage, b. Heritage, testament, and grants in escrow, as well as c. *Wagaf* and *shadaqah*. Pursuant to Act No. 3/2006, the authority of the Religion Court was extended into the field of *shari'a* economy, *Shari'a* Bank, *Shari'a* Insurance, *Shari'a* Reinsurance and Middle-Class Marketable Securities, *Shari'a* Securities, *Shari'a* Court, *Shari'a* Financial Institution Pension Budget (DPLK), *Shari'a* Business, and *Shari'a* Microfinance Institution.

In the last few years, there indeed has been rapid economical development in the field of *shari'a*. This may present a problem in the future. *Shari'a* business transactions are not only conducted by Moslems, but also may occur between a

Moslem and a non-Moslem. The problem remains whether the Religion Court has authority to handle *Shari'a* cases between a Moslem and a non-Moslem. These types of problems are also found in heirs of different religions.

Therefore in the clarification in Article 49 Act No. 3/2006, it is explained that “between people of Islamic beliefs encompasses individuals or legal bodies who voluntarily bows down to the laws of Islam regarding issues under the authority of the Religion Court, in accordance with Article 49.”

*Choice of law* applies in Act No. 7/1989; namely in areas of inheritance, where Moslem parties may decide to choose what law will be used in dividing their heritage before going to court. In Act No.3/2006, this principle is no longer used; hence Moslems at law with other Moslems on the issue of inheritance will find their case under the authority of the Religion Court.

Another charge regulated in In Act No.3/2006 for the Religion Court was their authority to inspect and determine property disputes or civil cases concerned with objects of dispute modulated in Article 49, if the subjects of dispute are all Moslems. This is to avoid attempts of delaying or postponing the settlement of dispute based on excuses of the existence of ownership or any other civil disputes, which are often used by parties who feel harmed by claims made against them to the Religion Court. On the other hand, if the subject who claims for property rights or other civil disputes is not a subject under the Religion Court, the case is postponed to wait adjudication of the General Court, where the claim is made. This deferral can and will only be made if the objecting subject submits evidence to the Religion Court that an appeal for the object of dispute in the Religion Court has been made to the district court. The Religion Court does not need to defer their decision regarding unrelated objects of dispute.

An addition to the authorities of the Religion Court is that they are able to bear an *itsbat rukyat hilal* witness for early month decisions in *Hijriyah* years. This is regulated in Act No.3/2006, since the Religion Court gives a decree (*Itsbat*) toward the testimony of people who has witnessed or seen *hilal bulan* every beginning of the month of *Ramadhan* and early every *Syawal* month of the

*Hijriah* year, for the Minister of Religious Affairs had issued a national decree for the determination of 1 (one) *Ramadhan* and 1 (one) *Syawal*. The Religion Court may also give an official statement or advice regarding the differences in determining the direction and time for *shalat*.

Developments of those authorities are heavily related to the readiness of government officials, including judges and fiscal clerks. Judges' comprehension of *shari'a* economy, for instance, is absolutely essential. The issue of Act No.3/2006 is expected to inspire law officers in the Religion Court to increase performance and quality in giving more optimized public services in the field of law.

What we must bear in mind is the existence of a constitutionally-recognized Religion Court. With the penetration of Religion Court into 1945 Constitution, there will no longer be any debates regarding the presence of religion court in the judicial power systems of Republic of Indonesia.

### **Obstacles and Problems for Islamic Law in Indonesia**

The development of law is aimed for the establishment of a national law system that covers the nation's interests, with a comprehensive early formation of law materials based upon Pancasila and 1945 Constitution. For that reason, we need to underline that formation of national legislative programs, including law amendments based on Pancasila and 1945 Constitution, are clever attempts in the process of institution a national law with national and religious values.

Thoughts of change in the national law are actually manifestations of the will to release ourselves from an undemocratic, fascist and repressive life. These thoughts are dialectic struggles from discontent with our colonially inherited system of law, which are not in line with Indonesia's socio-cultural values.

This concept is written in the history and values of the nation's struggles, crystallized in the Jakarta Charter consensus as a culmination point that pioneered

the Proclamation of Independence, August 17, 1945. This shows that Islamic law has its historical roots deep in the soul of Indonesia.

Asides from sociological opportunities as stated above, Islamic law also suffers a number of obstacles and problems, especially revolving its integration into the national law, such as:<sup>17</sup>

*First*, national diversity. We must bear in mind that Indonesia consists of vast regions, each with their own social and cultural conditions, making it difficult to unite one to another. However, attempts of integrating each socio-cultural element into the national system of law must be preceded with the careful choosing of fields which should be joined relevantly.

*Second*, methods of law education. Up to this date, education of law taught to students of law branches out in three ways between Western law, Islamic law, and customary law. Because the society of Indonesia is relatively heterogenic and the lands are broad, there is still a search for common grounds between those elements of law. Hence what we now need is integrated understanding from experts of law in those three sources of law, which needless to say, requires deep intellectual effort.

*Third*, the lack of academic presentation of Islamic law; underdevelopment in expanding centres for Islamic studies are caused by: (a) historically, centres of studies did not value Islamic law and did not provide a space for its study; (b) the study of Islamic law is placed between the study of religion and the study of law, causing a lack in the circumstantialities of the specific study of Islamic law; (c) a weak development in the adherence of Moslems to the religion, especially in *akidah* and moral beliefs that are hard to control, causing a decrease in moral quality in the implementation of law; (d) the continuing existence and compliance to Dutch politic law which has its own political interests such as 1. Moslems may not bow to their own law, and 2. Religion Court does not stand independently in civil disputes except for family law; and (e) there are many problems still faced by Moslems,

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<sup>17</sup> Said Agil Husin al-Munawar, *Hukum Islam dan Pluralitas Sosial*, (Jakarta: Penamadani, 2004), p. 17

while there is still not yet to be found *fatwa hukum* that can encompass everything in a single code of law that is accepted by all elements of Islamic society.

These are the problems currently faced by Moslems; when they wish to give Islamic law contribution in the development processes of national law.

### **Conclusion**

In its journey, Islamic law has undergone significant development. During its progress, there are still many opportunities in the Indonesian Code of Law that Islamic law may enter into. We can currently see a positive phenomenon in the acceptance of the society, elite arbiters, and legislative bodies toward the legislation of Islamic law.

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