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OPPORTUNITIES AND CHALLENGES OF THE IMPLEMENTATION OF ISLAMIC LAW IN INDONESIA

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ABSTRACT

Islamic law only became an authoritative source (a legal source that has legal force) in constitutional law when the Jakarta Charter was placed in the Republic of Indonesia's Presidential Decree dated 5 July 159 as can be seen in the preamble to the Decree as follows: "That we believe that the Jakarta Charter is dated 22 June 1945 animates the 1945 Constitution and constitutes a series of units in the Constitution." The word "animating" negatively means that it is not permissible to make laws in the Indonesian state that are contrary to Islamic law for its adherents. Even though Islamic law has failed to be obtained by Islamic parties, the opportunity to make laws based on or inspired by Islamic law through the mechanism of representative democracy in Indonesia is still wide open. Challenges faced by Islamic law The toughest challenge at this time does not lie in the constitutional logic of accommodating Islamic law in national law, but in the dialectics between secular currents of Western thought and expressions of the diversity of Muslims which sometimes creates phobias.

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1. INTRODUCTION

Background to the Problem History has noted that Islamic law (fiqh) has existed and applies to its adherents (living law) since the arrival of Islam in Indonesia.[1] Peacefully in the 7th century AD or coinciding with the 1st century Hijri. When the archipelago was controlled by the Sultans at that time, Islamic law was even integrated into life (the royal state). Even though during the time of the Sultanate Islamic law had been adopted as formal and material law, especially in the fields of marriage, grants, waqf and inheritance, in general they were still guided by the first abstraction and spread throughout the archipelago, namely Sirat-al-mustaqim written by Nuruddin ar -Raniry in the 17th century. According to Hamka, the description of this book and its Syarah were expanded and used as a standard for resolving disputes between Islamic communities in the Sultanates of Palembang and Banten. The same thing was also found in Islamic kingdoms in Java. Therefore, it is very regrettable, even though during the Sultanate he had played the role of advisor and judge, no abstract positive law had been drawn up from the content of fiqh doctrines.

In the original Malacca law which is also the territory of the Archipelago, as stated by Hooker, quoted by Abdul Gafur, even though it recognizes customary law, elements of Islamic law are clearly found in various places.[2] For example regarding the punishment for the killing of free people or slaves, the punishment for cutting off the hand for theft and the punishment for adultery. In marriage law, the elements of Islamic law can be seen even more clearly, because the legal requirements are regulated according to the teachings of fiqh, especially based on the Shafi'i school of thought.[3] Based on this fact, it can be said that the Islamic legal tradition is the law that applies in the archipelago. Normatively, Islamic law covers almost all aspects of life, starting from matters of religious rituals, civil law, criminal

[1] Abdul Ghofur, *Demokrasi dan Prospek Hukum Islam di Indonesia Studi Atas Pemikiran Gus Dur* (Yogyakarta: Pustaka Pelajar, 2002).
[2] Ghofur.
[3] Ghofur.

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law, to matters relating to human relations on a broader scale. Practically speaking, in the context of the formal life of the state, especially as reflected in court practice, it seems that the scope is greatly reduced, and generally only concerns family law.[4] It is not surprising, therefore, that when the Dutch arrived in the archipelago in 1605, Islamic law was ingrained in the souls of its adherents in such a way as it was confirmed by a number of existing Islamic kingdoms.[5]

In the Indonesian context, the term Islamic law refers to a meaning given to fiqh provisions in force in Indonesia which at the same time displays its distinctive Indonesian character. So that Indonesian values and culture are reflected in it, both in terms of legal principles and the patterns of thought that underlie them, showing differences from the fiqh that applies in several other countries, such as Sudan and the Northern Nigeria region, and several other countries that are still trying to implement the scope Islamic law as a whole, including Islamic penal law.[6]

In the struggle for the early days of independence, the Islamic elites fought with all their might to include a phrase in the Preamble of the 1945 Constitution, which obliges Muslim residents to always carry out their religious obligations. This is what is known as the Jakarta Charter which includes 7 words, which are believed to give constitutional basis for the application of Islamic law in Indonesia. This attempt was not successful due to strong tensions between secular nationalists and Islamic nationalists.[7]

Islamic law only became an authoritative source (a legal source that has legal force) in constitutional law when the Jakarta Charter was placed in the Republic of Indonesia's Presidential Decree dated 5 July 159 as can be seen in the preamble to the Decree as follows: "That we believe that the Jakarta Charter is dated 22 June 1945 animates the 1945 Constitution and constitutes a series of units in the Constitution."

The word "animating" negatively means that it is not permissible to make laws in the Indonesian state that are contrary to Islamic law for its adherents. Positively it means that adherents of Islam are required to carry out Islamic law. Therefore, a law must be made that will enforce Islamic law in national law. This opinion is in accordance with the statement of Prime Minister Juanda in 1959 which reads: Recognition of the existence of the Jakarta Charter as a historical document for the government also means recognition of its influence on the 1945 Constitution.

Although the Jakarta Charter which would give constitutional status to the application of Islamic law was not accommodated by the New Order government as part of the 1945 Constitution, several aspects relating to the application of Islamic law have been legislated in the national legal system. At least, there are seven legal rules that are legislated into Indonesian positive law. Namely First Law No. 1 of 1971 concerning Marriage; Second, Law No. 7 of 1989 concerning the Religious Courts;[8] Third, PP No. 28 of 1977 concerning Waqf; Fourth Law No. 7 of 1992 jo. Law No. 10 of 1998 and Law Number 23 of 1999 concerning the National Banking System which permits the operation of Islamic Banks; Fifth, Presidential Decree No. 1 of 1991 concerning Compilation of Islamic Law; Sixth Law No. 17 of 1999 concerning Organizing Hajj; and Seventh, Law Number. 38 of 1999 concerning Management of Zakat.

All of these legal products accommodate elements of Islamic law that are applied without having to include any reference to the Jakarta charter.[9] The tug-of-war to turn the values of Islamic law into positive law often occurs, between nationalist and Islamic political forces which have become the two currents of power that determine the stability of the management of state power. Even though Islamic law has failed to be obtained by Islamic parties, the opportunity to make laws based on or inspired by Islamic law through the mechanism of representative democracy in Indonesia is still wide open. However, that does not mean without challenges that must be faced. In this challenge, there seems to be a concern that secular Western thought and religious expressions of Muslims sometimes give rise to phobias and on the other hand, Islamic activists will use democracy to kill democracy. This article tries to describe the long journey of the struggle to incorporate Islamic law into the Indonesian constitution and laws, the extent of the opportunities and challenges. With the various descriptions described above, several main issues can be formulated, how are the opportunities for implementing Islamic law in Indonesia and what are the challenges faced by Islamic law in Indonesia.

[4] Muhammad Abdun Nasir, *Positivisasi Hukum Islam di Indonesia* (Mataram: IAIN Mataram Press, 2004).
[5] Juhaya S. Praja, *Hukum Islam di Indonesia Perkembangan dan Pembentukan* (Bandung: Remaja Rosda Karya, 1991).
[6] Nasir, *Positivisasi Hukum Islam di Indonesia*.
[7] Praja, *Hukum Islam di Indonesia Perkembangan dan Pembentukan*.
[8] Praja.
[9] Azyumardi Azra Arskal Salim, *No TitleNegara Dan Syariat Dalam Perspektif Politik Hukum Indonesia, dalam Syariat Islam Padangan Muslim Liberal, editor* (Jakarta: Sembrani Aksara Nusantra, 2003).

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2. RESEARCH METHODS

This research is a type of library research. What is called library research or often also called literature study, is a series of activities related to methods of collecting library data, reading and taking notes and processing research materials [10].

In this study, the author applies the library research method because at least there are several underlying reasons. First, that data sources cannot only be obtained from the field. Sometimes data sources can only be obtained from libraries or other documents in written form, either from journals, books or other literature. Second, literature study is needed as a way to understand new symptoms that occur that cannot be understood, then with this literature study it will be possible to understand these symptoms. So that in overcoming a symptom that occurs, the author can formulate a concept to solve a problem that arises. The third reason is that library data remains reliable to answer the research questions.[11] However, information or empirical data that has been collected by other people, whether in the form of books, scientific reports or research reports, can still be used by library researchers. Even in certain cases the field data is still not significant enough to answer the research questions that will be carried out.

The stages that must be taken by the author in library research are as follows: a. Collect research materials. Because this research is a library research, the material collected is in the form of information or empirical data sourced from books, journals, results of official and scientific research reports and other literature that supports the theme of this research. b. Read bibliography. Reading activities for research purposes is not a passive job. Readers are asked to simply absorb all "knowledge" information in reading material, but rather a "hunt" activity that requires active and critical involvement of the reader in order to obtain maximum results.[12] In reading research materials, readers must dig deeply into reading materials that allow them to find new ideas related to the research title. c. Make research notes. The activity of recording research materials is arguably the most important stage and perhaps also the heaviest culmination of the entire series of library research [13]. Because in the end all the material that has been read must be drawn a conclusion in the form of a report. d. Processing research notes. All materials that have been read are then processed or analyzed to get a conclusion drawn up in the form of a research report.

Content analysis or content study is a research methodology that utilizes a set of procedures to draw valid conclusions from a book or document [14]. Meanwhile, Harold D. Lasswell stated that content analysis is research that is an in-depth discussion of the content of written or printed information in the mass media. From the explanation above, it can be concluded that content analysis is a research method with certain stages to extract the essence of an idea or information and then draw a conclusion. The author uses data analysis techniques in the form of content analysis because this type of research is a type of library research, where the data source is in the form of books and documents as well as literature in other forms.

3. RESULT AND DISCUSSION

Because this research is a library research, the material collected is in the form of information or empirical data sourced from books, journals, results of official and scientific research reports and other literature that supports the theme of this research.

Research Results and Discussion

A. Opportunities for Islamic Law to Enter the National Legal System

Islamic law is constitutionally very strong because it has become an integral part of the national legal system. The legal system in this context means the unified whole of an order which consists of parts or elements that are closely related to one another. The Indonesian legal system adheres to the principle of pluralism as a logical consequence of the social and political conditions of a pluralistic society. Broadly speaking, the development of national law originates from three legal systems, namely customary law, Islamic law and Western law. All three are a unified system, the parts of which can work together and are interrelated according to certain patterns and plans. In a legal system, there should not be contradictions or overlapping between the existing parts.[15]

When viewed from the legal principle, respectively, the legal system which seems to stand alone without ties, is actually bound by several meanings that are more general in nature, namely that both express an ethical claim. In

[10] Mestika Zed, *Metode Penelitian Kepustakaan* (Jakarta: Yayasan Obor Indonesia, 2008).
[11] Zed.
[12] Zed.
[13] Zed.
[14] J Moleong Lexy, *Metodologi Penelitian Kualitatif* (Bandung: PT. Remaja Rosdakarya, 2008).
[15] Zaini Rahman, *Fiqh Nusantara dan Sistem Hukum Nasional dan Sistem Hukum Nasional Perspektif Kemaslahatan Kebangsaan* (Yogyakarta: Pustaka Pelajar, 2016).

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this case as part of the national legal system, Islamic law has its own uniqueness, especially in its attachment to the legitimacy of how to understand and issue it from the sources of the Qur'an and Hadith. The ethical norms or values displayed by the Islamic legal system certainly have different essences and perspectives from those in the Western customary and legal systems.

Within the framework of the national legal system, what is meant by Islamic law is not the Koran and Hadith themselves, but rather the product of understanding these two sources. As a product of understanding, ideally it must adapt to the demands of the locality and state system. According to the principles and principles of the state, the existence and enforceability of Islamic law is tied to the legal framework for the formation of national law. Because the norms of Islamic law cannot be carried out without legitimacy and governmental authority, especially those relating to public law. In the Islamic doctrine itself, the need for state institutions or government authorities is obligatory both in reason and syara.[16]

In the Indonesian context, with Pancasila as the basis of the state, the values of Islamic law which were originally individually rooted in the individuals of the Muslim community can be transformed in such a way as to become a unified whole with the national legal system. Therefore, the existence of demands for the formulation of Islamic law seen from the point of view of positive legal theory is logical. After Indonesia became independent, and Pancasila and the 1945 Constitution were established as a source of law, then in the context of the implementation of Islamic law it emerged as a counter theory to the theories of the colonial period. There are at least three theories that can be noted, namely the theory of receptive exit, receptive a contrario and the theory of existence. The three theories essentially refute the previous theoretical arguments. At the same time, he acknowledged and emphasized the existence of Islamic law and Pancasila and the 1945 Constitution.[17]

Throughout the New Order, Islamic law was never a separate policy in particular. There is not a single pointer in the legal political texts of the New Order concerning the existence of Islamic law. However, this does not mean that Islamic law does not receive attention. In practice, in practical terms, Islamic law has a place in the national legal system, and even formally, its position is better than in previous times.

In this context, it seems that the New Order regarded Islamic law as part of religion, not as an autonomous law, which could be developed independently as long as it referred to its basic sources. This assumption is not wrong, but there can be a narrowing of meaning if religion is understood in a secularistic frame of mind, such as ongoing perception. This can be seen clearly in the division of the judicial area into four neighborhoods. The first is the General Court. Second, the Religious Courts. Third, Military Court, Fourth, State Administrative Court.[18]

This division of the judiciary indicates the existence of religious and non-religious areas, so that by itself it forms the terminology of religious law and state (non-religious) law. Within this perceptional framework that tends to be secularistic, Islamic law gets its justification from the New Order's legal politics. This justification is actually a continuation of previous periods, namely Law no. 22 of 1946 jo. UU no. 32 of 1954 and PP no. 45 of 1957.[19]

Islamic law as positive law (lex positive constitutum) was first enacted in Law no. 1 of 1974 article 2 paragraph (1) is still general in nature (religious law), not specifically Islamic law, the article reads "marriage is valid, if it is carried out according to the laws of each religion and belief". Then article 63 paragraph 1 emphasized that the Religious Courts as contained in article 10 of Law no. 14 of 1970 is specifically for people who are Muslims.[20] This is based on the history of the Religious Courts in Indonesia which has been running for more than one hundred years, and on the premise that only Islam brings law in its purest sense (aqidah wa shari'ah). Therefore, Muslims need a court where they seek legal justice. Therefore, the existence of the Religious Courts (Islam) in Indonesia, is not because Muslims constitute the majority in Indonesia, but because the Religious Courts are a legal necessity for Muslims. In other words, Islamic law insofar as it concerns the areas of authority of the Religious Courts is the national law in the Republic of Indonesia. Indonesian national law is a collection of legal norms in society derived from elements of Islamic law, customary law, and Western law (general law science).

If this is limited, it is actually not progress. Since the VOC era, Islamic marriage and inheritance laws have become positive law and are used as material law in determining court decisions for native Muslims. During the Old

[16] Rahman.
[17] Marzuki Wahid & Rumadi, *Fiqh Madzhab Negara Kritik Atas Politik Hukum Islam di Indonesia* (Yogyakarta: LKiS, 2001).
[18] Eklektisisme dan Hukum Nasional Kompetensi Antara Hukum Islam dan Hukum Umum, *A. Qodri Azizy* (Yogyakarta: Gama Media, 2002).
[19] Abdul Halim, *Peradilan Agama dalam Politik Hukum Islam di Indonesia dari Otoriter Konservatif Menuju Konfigurasi Demokrasi Responsif* (Jakarta: Raja Grafindo Persada, 2000).
[20] Bustanul Arifin, *Pelembagaan Hukum Islam Di Indonesia Akar Sejarah, Hambatan dan Prospeknya* (Jakatra: Gema Insani Press, 1996).

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Order era, Law no. 5 of 1960, which was accused of being communist, also brought awareness to the validity of agrarian law over religious law. It is a necessity for the existence of Islamic law within the ius constitutum framework, with the enactment of Law no. 7 of 1989 concerning the Religious Courts and Presidential Instruction No. 1 of 1991 concerning Compilation of Islamic Law. The existence of these two laws, Islamic law is not only recognized for its existence, but definitively it has become part of national law and a pillar of state justice, both materially and formally. It has become part of the restructuring and reform of national law.

The existence of the reality of the world of Indonesian politics and the content of legislation in Indonesia reflects the application of Islamic law to be reckoned with. The proof is that there are seven legal regulations that have been legislated into the positive law of the State of Indonesia. Namely First Law No. 1 of 1971 concerning Marriage; Second, Law No. 7 of 1989 concerning the Religious Courts;[21] Third, Government Regulation Number 28 of 1977 concerning Waqf; Fourth Law No. 7 of 1992 jo. Law No. 10 of 1998 and Law Number. 23 of 1999 concerning the National Banking System which permits the operation of Islamic Banks; Fifth, Presidential Decree No. 1 of 1991 concerning Compilation of Islamic Law; Sixth Law No. 17 of 1999 concerning Organizing Hajj; and Seventh, Law Number. 38 of 1999 concerning Management of Zakat.

It's just that, as a material law, we still haven't fully received political wiil from the state apparatus, we're still at a crossroads. And its legal area is still limited to the law of inheritance, marriage and endowments, wills, grants and sadaqah, not much with the actual capabilities of Islamic law.[22]

Meanwhile, in terms of value, the provisions of Islamic law do not only color Law no. 1 of 1974 (concerning Marriage), Law no. 7 of 1989 (concerning the Religious Courts), and Presidential Instruction. No. 1 of 1991 (concerning the dissemination of the Compilation of Islamic Law). But also included in the legal provisions of PP No. 9 of 1975 (implementation of Law No. 1 of 1974) PP. No. 28 of 1977 concerning Waqf of Owned Land), PP. No. 72 of 1992) concerning Banks based on the Principle of Profit Sharing) and Law no. No. 4 of 1979 (regarding child welfare).[23]

Thus, the dynamics of Islamic law in Indonesia experience a pattern of renewal in the history of its practical empirical development as positive law into the juridical institutionalization model. Therefore, the Islamic world, for example, has very diverse experiences related to efforts made to maintain the existence of its religious laws, ranging from the most "extreme left" to the extreme right..[24] Abdullah Ahmed Anna'im, in detail explained the pattern of renewal in the Islamic world in general in the field of inheritance and family law in the Islamic world which he considered unsatisfactory.:

1. Takshih al-Qadhi (the right of the ruler to decide and uphold court decisions), is used as a procedure to limit the application of sharia to matters of civil law for Muslims. The same procedure is also used to prevent courts from applying sharia in specific circumstances without changing the relevant sharia rules. For example, to prevent child marriage, Egyptian law in 1931 denied matrimonial assistance through the courts by blocking the court from claiming marriage if the husband was not yet 19 years old or the wife was not 16 years old at the time of the proceedings.
2. Takhayyur, namely selecting various schools of thought in an eclectic manner such as Sudan through fatwas (judicial directives) that allow courts to deviate from the rules of the Hanafi school of thought.[25]
3. A form of reinterpretation is used to limit a man's freedom of divorce and polygamy for example, the Tunisian Law of personal status of 1956. It states that divorce does not occur except by court decision, and courts are permitted to oblige the husband to pay a sum of money as compensation if the court feels that the husband is not treating his wife fairly or is looking for reasons to divorce. The same thing also happened in Indonesia which is reflected in Law no. 1 of 1974 and the Compilation of Islamic Law (KHI).

Islamic law has enormous prospects and potential in the development of national law. There are several considerations that make Islamic law worthy of being a reference in the formation of national law. When viewed from the political reality and legislation in Indonesia it seems that the values of Islamic law are increasingly deserving of reckoning as seen in several laws and regulations whose presence further strengthens Islamic law, namely: Marriage Law Law No. 1 of 1974 concerning Marriage was ratified and promulgated in Jakarta on January 2, 1974 (State Gazette of 1974 No. Supplement to State Gazette Number. 3019). Law on Religious Courts Law no. 7 of 1989 concerning the

[21] Praja, *Hukum Islam di Indonesia Perkembangan dan Pembentukan*.
[22] Rumadi, *Fiqh Madzhab Negara Kritik Atas Politik Hukum Islam di Indonesia*.
[23] Nasir, *Positivisasi Hukum Islam di Indonesia*.
[24] Rumadi, *Fiqh Madzhab Negara Kritik Atas Politik Hukum Islam di Indonesia*.
[25] Abdullah Ahmed An-Nai‟m, *Dekonstruksi Syariah Wacana Kebasan Sipil, Hak Asasai Manusia dan Hubungan Internasional, terj* (Yogyakarta: LKiS, 1994).

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Religious Courts passed and promulgated in Jakarta on December 29, 1989 (State Gazette of the Republic of Indonesia of 1989 No. 49, Supplement to the State Gazette of the Republic of Indonesia No. 34). Then on March 20, 2006 Law No. 3 of 2006 concerning Amendments to Law no. 7 of 1989 concerning the Religious Courts. What is a relief from this law is the wider authority of the Religious Courts, especially the authority to resolve cases in the field of sharia economics. To explain the various sharia issues above, the National Sharia Council (DSN) has issued a number of fatwas relating to the sharia economy, which to date have reached 53 fatwas.

The fatwa can be the main material in preparing the compilation. In connection with the addition of quite a lot of authority to the religious courts as stated in Law no. 3 of 2006 concerning sharia economics, while Islamic law regarding sharia economics is still scattered in the books of fiqh and fatwa of the National Sharia Council, the existence of the Compilation of Sharia Economic Law (KHES) which is based on PERMA Number. 2 of 2008, September 10, 2008.[26] In addition, there are several regulations containing Islamic law and their level below the law, among others, in the era of democracy, especially after the reforms and amendments to the 1945 Constitution, the opportunity for the application of Islamic law in a wider area is very large. To see the extent of the visibility of these opportunities can be analyzed through three approaches; namely the legal system and political approach, the socio-cultural approach, as well as the paradigm of Islamic legal thought which will be built in the Indonesian context. These three approaches can be models for studying the actualization of Islamic law in the state context, not only in Indonesia but in countries with a majority Muslim population and not Islamic countries.[27]

B. Challenges to the Implementation of Islamic Law in Indonesia

The Challenges Faced by Muslims in Establishing Islamic Shari'ah Through State Institutions Since the beginning of the historical period for the formation of Islamic law, debates about whether Islamic law needs to be codified or legislated by the state have emerged. Ottoman rule began in the early 14th century in Anatoli Turkey and lasted approximately four centuries. The Ottoman state initially did not adhere to a particular school, then followed the Hanafi school officially for fatwas and trials. The Ottoman government intended to codify laws. However, it encounters several obstacles, including the following:

1. The source of Islamic tasyri': the source of tasyri' is a sacred thing. In doing ijtihad they are afraid of making mistakes that hinder the implementation of codification.
2. Freedom of ijtihad: to have ijtihad for those who are entitled is a human right. If the results of ijtihad have been codified, it means that they no longer accept other ijtihad, even though in the case of new issues it is obligatory to have ijtihad.
3. Freedom of belief: Islam does not force people to embrace religion. Therefore, if this fiqh is codified, it means limiting the freedom of belief for others.

The method adopted in carrying out the codification was carried out in stages in the first century, namely; First, determine the state's official school of thought. Abu Jafar al-Mansur asked Imam Malik bin Anas (d. 179 H./796 AD) that his school contained in the book al-Muwata' be determined by the caliph as the official school (state) as the only standard book for reference to Islamic law.[28] Imam Malik rejects and asserts that there is no exclusive claim to divine truth, How does Imam Malik insist that there is no valid reason to force a certain set of legal opinions to be applied in a country, because it would be contrary to other sets of legal opinions.[29] I am an ordinary human being who has limitations in understanding the hadith of the Prophet. What I have collected in my book is only part of Islamic law. The companions of the Prophet had died and the knowledge of Islamic law had also gone with them. Therefore, my book is inadequate if used as a reference.[30] Then Sultan Salim 1 (1512-1520), the ninth Sultan Uthman) saw the need to establish an official state school, so a Sultan decree was issued (Qararan Sultaniyyan/firman) announcing the Hanafi school of thought as the official state school that must be followed in matters of "judicial and fatwa" . This way was followed in Egypt. After Egypt was controlled by the Turks, the system of four qadi in Egypt after the reign of Mahmud

[26] Rahman, *Fiqh Nusantara dan Sistem Hukum Nasional dan Sistem Hukum Nasional Perspektif Kemaslahatan Kebangsaan*.
[27] Rahman.
[28] H. Rachamt Djatmika, *Perkembangan Fiqh di Dunia Islam, dalam Tjun Sudarman, Hukum Islam Hukum Islam di Indonesia Perkembangan dab Pembentukan* (Jakarta: Remaja Rosda Karya, 1991).
[29] Khaled M. Abou El Fadhl, *Melawan Tentara Tuhan Yang Berwewenang dan dan yang kesewenang-wenangan dalam Wacana Islam* (Jakarta: Serambi, 2001).
[30] Nurrohman, "Hukum Islam Di Era Demokrasi: Tantangan dan Peluang bagi Formalisasi Politik Syari"at Islam di Indonesia," *ADDIN* Vol. 9, No (2015): 170.

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Ali Pasha, the Ottoman government, issued the Word (Sultan's decree) that the fatwa and the Court must be based on the fatwa of Imam Hanafi.[31]

Second, the preparation of an opinion (madzhab). The preparation of a school of thought to be enforced in the territory of the Ottoman Empire, namely by compiling the Ottoman civil law (al-Qanun al-Madani al-Uthmani), which is known as Mjallatul Ahkam al-Adliyah, and other Ottoman laws taken from the Hanafi school. The government (caliph) determines its validity and orders all people to obey it, by including in the last paragraph of article 1801 that judges must follow the sultan's orders and may not follow other Mujtahid.

Third, make a compilation from different sects. Apart from being based on the Hanafi school of thought as the official school of thought, when drafting laws that would apply to the entire Ottoman territory, other schools were also taken from other schools if the other schools were more suitable for human benefit. This method was also followed in Egypt, Syria, Iraq, Tunisia, and others. For example, in legislation regarding al-ahwalusy-syakhsiyyah waqf, inheritance, and wills that are adapted to current needs and the changing social conditions that surround them. (al-ahwal wa al dhuruf).

Fourth, taking modern legislation, the fourth stage in drafting legislation in the Ottoman Arab State was taking several laws that were in accordance with Islamic sharia from modern legislation such as civil law (civil), trade law (tijari), and criminal law (jana'i).[32]

Since then, Islamic law has lived and developed independently of state mechanisms. Each judge has the freedom to choose the Islamic law that he will apply and the state does not have the authority to interfere in their affairs. Establishing Islamic sharia norms through state institutions or qanunization contains both positive and negative aspects. The positive aspect can provide a relatively uniform standard of Islamic law. But the negative aspect can reduce the freedom of the judge in choosing the provisions of Islamic law that are most suitable for the particular case he is facing. In the classical Islamic tradition, it is the judge who makes the law. The tradition and history of Islamic law is closer to the common law tradition than to continental law. There has never been a codification of law in the social history of Islamic law until the end of the Ottoman dynasty. The codification of Islamic law at the end of the Ottoman dynasty was the result of contonantal European influence.

In the Indonesian context, Islamic law that is suitable for certain areas is not necessarily suitable for other regions. Islamic law formulated in classical books is also not necessarily suitable for today's conditions. Therefore qanunization or the formalization of Islamic law has the potential to curb changes in Islamic law which are always developing with the opening of the door to ijtihad. Because of this, Islamic law, which is enacted by state authorities who have the authority to form qanun regulations, will quickly become obsolete.[33]

Challenges also come from those who do not agree with the formalization of Islamic law through state laws. With the promulgation of Islamic law through state laws, the implementation of Islamic law seems to depend on the state. Views like this become a debate related to the relationship between religion and the state which drains so much of this nation's energy. From the early days of preparation for independence to more than half a century after independence. However, during that long period of time, a common platform has not been found even though during the New Order era this debate "as if" was considered finished. In fact, in the 2000 MPR annual session on the basic issues of the state, or at least the desire to include the word "Islam" in one of the articles of the 1945 Constitution, was still on the agenda of certain Islamic groups represented by the PPP and Crescent Star factions.

To see what the position of Islamic law is in the course of Indonesian history, at least there is a theory related to the relationship between religion and the state that characterizes the lives of Muslims. The terms religion and state referred to here are religion and state in their current institutionalized form. Religion in its basic sense is a system of values/teachings or spiritual moral awareness that is believed to be true by its adherents to be used as a view and guide in life. For Islamic teachings sourced from the revelation of Allah SWT, namely the Qur'an and Al-Sunnah. but in its development to this day, religion is not only a system of spiritual values/teachings and moral awareness as it originated, but has turned into an institution or organizational body. As a result of this change, at the empirical practical level, bad relations often occur, such as inter-sect conflict of the same religion, between religions, and between religion and the state.[34]

Islamic political theorists sociologists formulate several theories about the relationship between religion and the state. These theories are broadly divided into three paradigms of thought:

[31] Djatmika, *Perkembangan Fiqh di Dunia Islam, dalam Tjun Sudarman, Hukum Islam Hukum Islam di Indonesia Perkembangan dab Pembentukan*.
[32] Djatmika.
[33] Rumadi, *Fiqh Madzhab Negara Kritik Atas Politik Hukum Islam di Indonesia*.
[34] Rumadi.

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1. Integralistic Paradigm (Unified Paradigm) In the integralistic paradigm, religion and the state are integrated (integrated) the area of religion includes politics or the state. The state is both a political and a religious institution. Therefore, according to this paradigm, the head of state is the holder of religious power and political power. Its government is organized on the basis of "divine sovereignty", because supporters of this paradigm believe that sovereignty originates and is in the "hands of God." This paradigm is adopted by the Shia group and the Jamaat Islami Fundamentalist group in Pakistan to call the state (ad-dawlah) replaced by imamate (leadership)..[35]
2. Symbiotic Paradigm (Symbiotic Paradigm) Religion and the state, according to this paradigm, are related symbiotically, namely a relationship that is reciprocal and requires each other. In this case, religion requires a state because with the state, religion can develop. Conversely, the state also needs religion, because with religion the state can develop in spiritual ethical and moral guidance. It seems that al-Mawardy (w.1058 M) and al-Ghazali as one of the Islamic political theorists who support this paradigm.
3. The secularistic paradigm This paradigm rejects the two paradigms above. Instead, the secularistic paradigm proposes a separation (disparity) of religion over the state and the separation of the state over religion. The concept of addunya al-akhirah, ad, din ad dawlah or age ad dunya, age ad-din is dichotomized separately. In the context of Islam, this paradigm rejects the basis of the state on Islam, or at least rejects the determination of Islam in a certain form of state. The supporter of this secularistic paradigm is Aliy Abdul ar-Raziq (1887-1966), a Muslim scholar from Egypt. 33 And it was practiced in earnest by Mustafa Kemal Ataturk when he came to power in Turkey in the 20s of this century..[36]

What about the reality of Islamic politics in Indonesia. The paradigm of thought mentioned above in the context of the Indonesian state, still has adherents of the secularistic paradigm, adherents of the first two paradigms whose performance appears to be more prominent and therefore always identified as a cultural Islamic movement. It seems that Muslims who struggle outside of secular Islamic groups/organizations are not seen as an Islamic political constituency. Din Syamsuddin quoted M. Arskal Salim G.P. trying to map the mainstream of Islamic political thought in Indonesia tends to ignore adherents of the secularist paradigm. He mentioned that there are at least three schools of Islamic political thought in Indonesia, namely formalistic, fundamentalistic, militant, extremist, radical, fanatical, jihadist and substantive. The formalistic school (Islamic scriptualism) which places more emphasis on symbolic-legalistic expressions, and the fundamentalistic school which places more importance on the revivalism of classical Islamic culture are presumably loyal adherents of the integralistic paradigm above. Meanwhile, the subtantivistic school offers a religious understanding that places more emphasis on the substance of the teachings. Rather than a formal legal form of teaching, it is an adherent of the symbiotic paradigm.[37]

In the history of Islamic politics in Indonesia, the formalistic school that adheres to the Integralistic paradigm above was once dominant, especially during the Old Order Government. However, the dominance of this formalistic school collapsed when the New Order came to power in Indonesia. With the concept of depoliticization of religion, through the application of the principle of unity, the formalistic school that manifested itself in the form of Islamic political parties was "dominated" by the New Order government so that it lost its relevance. The thoughts of Nurcholis Madjid who are famous for the Islamic jargon Yes, Islamic Party No also helped eliminate the significance of this formalistic school.[38]

As a substitute, during the New Order, the substantive school with its symbiotic paradigm became dominant. This flow reinforces a new perspective in viewing the relationship between religion and the State as follows:

1. There is no clear evidence that the Qur'an and al-Sunnah oblige the Islamic community to establish an Islamic State;
2. Islam is not a political ideology. Islam contains only political principles or ethics;
3. Understanding of Islamic political teachings should be based on a contextual and comprehensive interpretation according to the demands of the times;
4. Understanding of Islamic political doctrine is relative and therefore opens up opportunities for multiple interpretations and can change;
5. Islamic political struggle is more directed to build commitment to Islamic values and not to institutions or organizations that use Islamic symbols.[39]

[35] Rumadi.
[36] Arskal Salim, *No TitleNegara Dan Syariat Dalam Perspektif Politik Hukum Indonesia, dalam Syariat Islam Padangan Muslim Liberal, editor*.
[37] Arskal Salim.
[38] Arskal Salim.
[39] Arskal Salim.

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Procontracts in response to this paradigm, for example between NU and Muhammadiyah do not support Islamic sharia legislation projects in the regions because they prefer national law. This is because society in general realizes that Islamic law is actually more of an ethical norm that originates from religious teachings. As an ethical norm, Muslims both individually and collectively can actually carry out all the ethical norms contained in Islamic law without any interference or coercion from the authorities. Contemporary thinkers criticize the formalization of Islamic law in Aceh that the implementation of conservative Islamic law in Aceh should be a lesson for everyone. We should not repeat our failures and allow conservative groups to dictate Islamic law as happened in Aceh. Many people in the community do not realize how Islam in Aceh has been exploited in such a way by conservative groups to promote something new, namely a type of Islam that suppresses women, restricts freedom of speech, applies strict rules of conduct which are actually contrary to local traditions and the character of Islam. alone.[40]

The toughest challenge at this time does not lie in the constitutional logic of accommodating Islamic law in national law, but in the dialectics between secular currents of Western thought and expressions of the diversity of Muslims which sometimes creates phobias. The fact is that law in Indonesia is dominantly patterned with the legal system inherited from the Netherlands which has long been the mainstream of legal thought in Indonesia. This situation objectively according to the logic of legal democracy is not something that needs to be questioned. On the contrary, awareness must be awakened that Islamic law cannot simply appear with religious symbols without the emergence of substance and legal concepts that take into account the principles of national pluralism, culture, customs, and other religious legal values.

This is where the importance of a collection of thoughts and methods of establishing adequate Islamic law in the Indonesian context. This is because the classical fiqh formulations that have been the reference for Indonesian Muslims in particular still display old legal statuses that may only be suitable for the area and time of the author, but as a whole are not necessarily in accordance with the socio-political conditions in Indonesia. That is, before talking about constitutional opportunities for accommodation of Islamic law in the development of national law, it is first necessary to formulate the substance and style of Islamic law which will be applied in Indonesia, of course which will not damage the pillars of nationality.[41]

4. CONCLUSION

Based on the results of the study above, in this paper several core points can be concluded, namely: 1). The opportunity for Muslims is actually guaranteed by the constitution to formalize Islamic law, but this hope is increasingly unclear. However, over time, the opportunity to apply the values and norms of Islamic law teachings into the constitutional system of Indonesian legislation continues to gain a significant portion. The legal systems that color the national legal system are the western legal system, customary law and the legal system. Islam. Of these three legal systems, Islamic law has the opportunity to provide input for the formation of national law. On the other hand, even though Islamic law does not gain legitimacy from the State, the values and norms of Islamic law still exist and are fully implemented by Indonesian Muslims based on Islamic teachings contained in the Qur'an and the Sunnah of the Prophet. 2). Challenges faced by Islamic law The toughest challenge at this time does not lie in the constitutional logic of accommodating Islamic law in national law, but in the dialectics between secular currents of Western thought and expressions of the diversity of Muslims which sometimes creates phobias. The fact is that law in Indonesia is dominantly patterned with the legal system inherited from the Netherlands which has long been the mainstream of legal thought in Indonesia.

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