

Islamic Law amidst the Pluralism Development of Laws in Indonesia*

By: Akhyar Ari Gayo**

I. Introduction

At the beginning of history in Indonesian law development, only original customary laws with their order and institutions were effective. At 7th century, customary laws accepted Hindu's Law. Only then in 14th century, the situation changed with the addition of Islamic elements in some customary laws at several areas in Indonesia.

Furthermore, through the historical process, at the time when Indische Staatregelngg regulations (S 1855-2) were effective, law and all of its aspects in Indonesia based on Article 163 jo 131 Indische Staatregelngg was divided into 3 (three) sub-systems of law (norm) and its order and institutions, those were based on (1) Western Law System, (2) Customary Law System, and (3) Islamic Law System.

Until to Independence Day on 17 August 1945, the pluralism situation of laws still prevailed. More over due to 1945 Constitution through Stipulation Article II Transitional Clause, laws in before Independence Day were still effective, so with the addition of National Law products

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**Researcher in Center office for Legal Research and Development, National Law Development Agency (BPHN), Department of Law and Human Rights RI, He was graduate from Law Faculty of Islamic University Jakarta (1990) and finished IBLAM Post Graduate Program in 2003.

(based on 1945 Constitution) which from 1945 until now increased more and more in numbers, the pluralism of laws still prevailed due to a number of such colonial legislations are still applied today or not yet withdrawal even though not all them are necessary. Therefore, carried out: **first**, renewal changes, and adaptation or replacement of colonial legislations with National Law legislations, and **second**, transformation Western Law, Customary Law and Islamic Law into National Law System is carried out conceptually and basically, so it will be integrated and united in National Law System which has philosophy of Five Principles (Pancasila) and based on 1945 Constitution.

Thus, it is obvious that Islamic Law as a part of National Law System which is effective today is recognized, more over with the Amendments of 1945 Constitution which in Clause (2) Article 28 j stated : "In carrying out rights and freedoms, every person is required to obey the predetermined limitations regulated by the law for the sole purpose of guaranteeing recognition and respect over the rights and freedoms enjoyed by other people and to fulfill the just demands in accordance with the considerations of morals, security, and public order within a democratic society."

Some expressions both in Preamble and 1945 Constitution's body show the appreciation, respect and nobleness of religions in Indonesia, with its consequence to arrange in *Muamalah* (relationship between human beings) by the state.

II. Islamic Law in some Legislations

Islamic Law is part of Islamic principles which arrange human behaviour in praying and some *muamalat* relations among human beings¹. In Indonesia, Islamic laws are recognized as *Syari'at*, *Fiqih*, and Islamic Law. Other terminologies whose connotation consists of Islamic Law materials are *qanun*, *decisions of qadli/judge*, *fatwa*, *ijtihad result*, *siyasah syar'iyah*, and so on.

Eclectically, the legislators in Indonesia in the Central and District level decide on and determine law material from various law sources of Religion (Islam), Customary Law, Western Law and others.² They select law materials from various law sources which are consider the most suitable to apply in Indonesia. With this eclecticism, Islamic Law becomes one of the main sources to select the law material, either which later become a part of the regulation substances which is related with the name of *Syari'ah* or not among them are:

1. Act Number 1 Year 1974 on Marriage (Article 2 clause (1) and (2));
2. Act Number 5 Year 1960 on the Main Stipulation of Agrarian Affairs (the inclusion of *wakaf* affair: Article 49 clause (3)) today becomes Law Number 21 of 2004 on *Wakaf*
3. Act Number 7 Year 1992 on Banking as amended by Act Number 10 of 1998 on Banking,;
4. Act Number 7 Year 1989 on Religion Court as amended with Law Number 3 of 2006 on Religion Court;

¹ In terminology, sharia is laws and regulations which were stipulated by Allah for His Human Creatures to be followed in term of the relation with Allah and the relation among human beings, Hasbi ash-Shiddieqy, *Islamic Philosophy of Law*, Semarang: PT Pustaka Rizki Putra, 2001, h. 29

² The three systems function as the raw material for national law development in Indonesia, beside other laws which can be used as the material for national law establishment in Indonesia., Dr. Syahrizal, *Customary Law and Islamic Law in Indonesia*, Yayasan Nadiya, 2004, h. 24.

5. Act Number 17 Year 1999 on Organization of Hajj;
6. Act Number 38 Year 1999 on the management of *Zakat*;
7. Act Number 8 Year 2001 on National *Amil Zakat* Board;
8. Act Number 18 Year 2001 on the Special Autonomy for Special District of Aceh Province as Naggroe Aceh Darussalam Province³.

Below will be analyzed some Sharia Principles in some legislations in Indonesia.

1. Banking

As known that the development of *sharia* banking since the establishment of Indonesia Muamalat Bank at 30 October 1991 and began to operate since 1 May 1992 and the accommodation of profit-share principle which was developed by Muamalat Bank as the characteristic of bank based on Islamic Law in Law Number 7 Year 1992 on Banking and the establishment of Government Regulation Number 72 Year 1992 on Bank Based on Profit-sharing Principles, has been developed both in the institution existence and the public enthusiasm to welcome such institutions. The development supported the establishment of Law Number 10 Year 1998 on the consolidation of Law Number 7 Year 1992 on Banking. In this law, the terminology and arrangement of Sharia Banking is formulated explicitly and strictly in Article 1 Clause (12):

“Financing based on Sharia Principle is supplying money or claim which is equal to that based on agreement or treaty between bank and other party which obliges the party which is loaned to return

money or saving claim in certain period with repayment or profit-sharing.”

Article 1 Clause (1) of that Law states:

“ Sharia principle is agreement regulation based on Islamic Law between Bank and other party for fund saving and or business loan, among them is expense based on profit sharing (*mudharabah*), expense based on capital delivery (*musyarakah*), goods trading principle to gain the profit (*murabahah*), or expense capital goods based on pure rental principle without choice (*ijarah*), or with the choice of goods ownership transfer from bank by other party (*ijarah wa iqtina*)”.

In facing the national economic development which deals with fast changing along with intense challenge, and is integrated into the continuous developing international economy, needed is tough national banking. Therefore, Indonesian Bank stipulates various Indonesian Bank Regulations, among them are Indonesian Bank Regulation Number: 6/24/PBI/2004 on General Bank to implement business based on Sharia Principle, Indonesian Bank Regulation Number: 6/9/PBI/DPM Year 2004 on Elimination Abolition Productive Activity for Sharia Rural Bank (Bank Perkreditan Rakyat Sharia) and various circular letters. From data in March 2006⁴, it is founded that there are 3 sharia general banks, 19 unit businesses sharia at general bank, 194 branch offices, 109 Supporting Branch Offices, 94 BPRS, 20 sharia insurance institutions, 12 Mutual Funds (*reksadana*) sharia, and 18 sharia obligation institutions.

³ Prof. Dr. Abdul Gani Abdullah, S.H., Law Politic in Sharia Economic Field and Legislation Agenda, BPHN National Seminar on Sharia Economic System Reform and National Legislation p. 8-9.

⁴ Source: Sharia Banking Directorate June 2006

Problem occurs along with the development of sharia banking in Indonesia that there is no umbrella law to fulfill public needs. Bill on Sharia Banking is still in the discussion between Government and House of Representatives.

Meanwhile to fulfill the need of developing sharia economic practice, the solve is to establish National Sharia Board (*Dewan Sharia Nasional /DSN*) of Indonesian Ulemas Board (MUI) which declares the guidance (*fatwa*) which is needed in sharia economic field generally and Sharia Supervision Board to monitor the activity of economic and finance institutions which act based on sharia principles. The use of National Sharia Board guidance to fulfill the absence of regulations in sharia economic law field in Indonesia is a new phenomenon which is to be considered by the experts. Guidance (*Fatwa*) as a legal opinion usually is not binding legally but some National Sharia Board guidance to some extent is binding sharia economic and finance institutions.

2. Court Field

On 10 June 1991 Islamic Law Compilation (*Kompilasi Hukum Islam/KHI*) in Indonesia has been issued based on President Instruction Number 1 Year 1991. KHI consisted of three books about Marriage Law, Legacy Law, and Religious Foundation (*wakaf*) Law.

Book III has been accomplished to be Act Number 41 Year 2004 about *Wakaf*. Book I and Book II of KHI are also on revision and has become the bill. Islamic Law in KHI is Islamic *Syariat* compilation in marriage, legacy and *wakaf*. Since its

issue, Sejak diterbitkan, KHI has been a material law in Religion Court which is an Islamic Sharia Court in Indonesia.

Along with the completion of Book III KHI to be menjadi Act Number 41 Year 2004 about *Wakaf*, government also changes on Act Number 7 Year 1989 with Act Number 3 Year 2006 about Religion Court, where in one article, especially Article 49 states that the scope of *sharia* economic becomes one of judge's authorities of religion court to investigate, decide and make settlement, covering eleven fields:

1. *Sharia* Bank
2. *Sharia* Macro Finance Institution
3. *Sharia* Insurance
4. *Sharia* Re-insurance
5. *Sharia* Mutual Fund (*Reksadana*)
6. *Sharia* Obligation and *Sharia* fixed-fund (Mid-term obligation)
7. *Sharia* Equity
8. *Sharia* Finance
9. *Sharia* Pawn
10. *Sharia* Pension Fund Institution
11. *Sharia* Business⁵.

The extension of Religion Court Authority in *sharia* economic with the explanation of Article 49 (i) is based on the consideration suitable to the public law necessity. With the coverage of eleven types of sharia economic law, it means that almost all scope of *Fiqh Mu'amalah* in Islamic *Sharia* has become positive law in Indonesia.

Consideration given by the legislators (House of Representatives and Government) to add the new authority to the Religion Court is due to the *sharia* economic practice which becomes vast among Indonesian people.

⁵ Explanation of Article 49 letter (i) Act Number 3 Year 2006 on the Amendment of Act Number 7 Year 1989 on Religion Court.

To implement the Religion Court role in *sharia* commerce dispute settlement as the consequence of the authority and competence of the religion court in accordance with Article 49 especially in investigation, decide and settle the dispute in the level among Islamic people in *Sharia* economic field is needed material law aspect (*sharia* insurance, *sharia* pawn, *sharia* mutual fund (*reksadana*), *sharia* obligation, excludes banking⁶), human resources aspects, facility and infrastructure aspects.

In term of carrying out the absence of material law in *sharia* business, before the establishment of relevant legislations in *sharia* economic, formed was Economic and/or Finance Law Compilation following Islamic Law Compilation in the field of Marriage, Legacy and *wakaf*. Regarding with this topic, the National Law Development Agency, Department of Law and Human Rights RI on 11 and 12 July 2006 brought about a Seminar on Nash and Hujjah *Syar'iyah* Compilation in *Sharia* Economic Field, cooperating with the Faculty of *Sharia* and Law, State Islamic University of *Syarif* Hidayatullah Jakarta. From the recommendation of the seminar, a Working Group of Islamic Law Compilation in *Sharia* Economic Field is established.

3. Government Field

3.1. Nanggroe Aceh Darussalam

The development of Indonesian State Structure after the fall of New Order regime and continued by the reformation order is marked with the reformation agenda, which among them is the necessity of changes in politic mainly in

in the policy of the central government to the district government. For the reason, it is needed to arrange the new reformulation about district government, by the stipulation of district autonomy, which is arranged in Act Number 22 Year 1999 as amended with Act Number 32 Year 2004 on District Government. Especially Aceh, it is arranged with Act No 18 Year 2001 on Special Autonomy for Special District of Aceh Province.

By the issue of Act No 18 Year 2001 on Otonomi Khusus Special Autonomy for Special District of Aceh Province as Nanggroe Aceh Darussalam Province which has been started since the 9 August 2001, this law is given as compensation of the government after for 32 years New Order regime ruled with centralistic system which directly or indirectly caused injustice in some districts possessing more nature resources than other districts.

Act No. 18 Year 2001 is a policy which is proper to establish, so that all needed by Aceh people about Special Autonomy can be gained. For Islamic *Sharia* Law enforcement in Nanggroe Aceh Darussalam Province, was established *Syar'iyah* Court of Nanggroe Aceh Darussalam Province. It is arranged in the article 25 with the stipulation as follow:

- (1) Islamic *Syari'at* Court in Nanggroe Aceh Darussalam Province as a part of national court carried out by *Syar'iyah* Court which is different from the interfere of any other parties.
- (2) The authority of *Syar'iyah* Court as mentioned in Subsection (1), is based on Islamic *Syariat* in National Law System, which is arranged further with *Qanun* (canon) of Nanggroe Aceh Darussalam Province.

⁶ In the regulation of Indonesian Bank Number 6/24/PBI/2004 on General Bank which implement the activity based on *sharia* as the implementation of Act Nubmer 10 Year 1998 and Act Number 23 Year 1999 on Indonesian Bank. Bill on *Sharia* Banking is in House of Representatives (DPR) discussion.

(3) The authority as mentioned in subsection (2) is effective for Islamic People.

Beside being arranged in the *qanun* as the operational base of this act, government issued Presidential Decree Number 11 Year 2003 on *Syar'iyah* Court. The existence of Presidential Decree Number 11 Year 2003 is a concrete step to unify the views on *Syar'iyah* Court institution which is often particularly and variously interpreted.

The numbers of *Qanuns* which are issued by the district government of Nanggroe Aceh Darussalam Province, until now are 14 *qanuns*. The writer divides them into three aspects, those are:⁷

1. *Qanun* concerning with the structure or Islamic *Syari'at* implementation institutions. This *Qanun* can be divided into three types, those are:

1) *Qanun* which arranges institution or general Islamic *Syari'at* implementation structure:

It is stated in *Qanun* Nanggroe Aceh Darussalam Province No. 2 Year 2003 on the Formation, state and authority of Regency or City in Nanggroe Aceh Darussalam Province, *Qanun* Nanggroe Aceh Darussalam Province No. 2 Year 2003 on Mukim Governence in Nanggroe Aceh Darussalam Province, *Qanun* Nanggroe Aceh Darussalam Province No. 5 Year 2003 on Gampong Governence in Nanggroe Aceh Darussalam Province.

2) *Qanun* which arranges special institutions or Islamic *Syari'at* implementation structure that is: As being stated in *Qanun* Nanggroe

Aceh Darussalam Province No. 10 Year 2002 on Islamic *Syari'at* Court, *Qanun* of Nanggroe Aceh Darussalam Province.

3) *Qanun* which arranges on the state of institutions and cooperation among institutions and job division or authority of those institutions.

It is stated in *Qanun* Nanggroe Aceh Darussalam Province No. 9 Year 2003 on Relation of Working Arrangement of Ulemas' Deliberations of Representatives Council (*Majelis Permusyawaratan Ulama*) with Executive, Legislative and other institutions. *Qanun* Nanggroe Aceh Darussalam Province No. 11 Year 2004 on Functional Task of District Police of Nanggroe Aceh Darussalam

2. *Qanun* concerning with the material of Islamic *Syari'at* implementation.

This is stated in *Qanun* Nanggroe Aceh Darussalam Province No. 11 Year 2002 on the Islamic *Syariat* implementation in the field of *Aqidah*, Praying and Islamic *Syari'at*. *Qanun* of Nanggroe Aceh Darussalam Province No. 12 Year 2003 on *Khamar* beverage and its sort. *Qanun* Nanggroe Aceh Darussalam Province No. 13 Year 2003 on *Maisir* (gambling). *Qanun* Nanggroe Aceh Darussalam Province No. 14 Year 2003 on *Khalwat* (Indecent) and *Qanun* Nanggroe Aceh Darussalam Province No. 7 Year 2004 on *Zakat* Management.

3. *Qanun* concerning with traditions and culture as the supporting factor to Islamic *Syariat* Implementation.

Qanun Nanggroe Aceh Darussalam Provinsi No. 3 Year 2004 on the Establishment of Fomation Organization and Working

⁷ Ahyar Ari Gayo, S.H.MH, "Legal Research on the Impact of Islamic Law Implementation in Nanggroe Aceh Darussalm (NAD) Province on National Law Year 2006, p. 61-62

Arrangement Aceh *Adat* (Customary) Council of Nanggroe Aceh Darussalam Province and *Qanun* Nanggroe Aceh Darussalam Province No. 12 Tahun 2004 on Aceh Culture.

Those *qanuns* are put into effect based on Article 31 (1) Act Number 18 Year 2001 which states that "The Stipulation on Implementation of this Act concerning with the authority of the government is stipulated with District Regulations"; meanwhile in subsection (2) it is stated that "The Stipulation on Implementation of this Act concerning with the authority of the government of NAD Province is stipulated with the *Qanun* of NAD Province".

According to Article 1 Number 8 Act Number 18 Year 2001, *qanun* is District Regulations as the implementation of legislations in NAD Province territory in term of special autonomy implementation. From that stipulation it is obvious that *Qanun* of NAD Province is regulations to implement special autonomy in the matters which become the authority of Province government. Thus, even though from one side a *qanun* is a district regulation, but in another perspective *qanun* is not submit to authority of government regulations because *qanun* is directly under the legislation⁸.

3.2. District Regulations

The establishment of various legislations based on Islamic Sharia in district level in form of district regulation, circular letters, show the phenomenon of

Islamic Sharia as the law which lives among Indonesian People. The Islamic law stipulation which is stated in various legislations play roles in driving the development of laws which are effective, including Islamic Law, so that in many extents, Islamic Law which is locally put in effect shall not be in conflict with national legislations which have been existed before.

Herewith some district regulations and circular letters in some districts, among them are⁹ :

1. Bulukumba Regency (South Sulawesi),
 - a. District Regulation No 03/2002 on Control and Prohibition on Alcohol Beverage Trading,
 - b. District Regulation No. 02/2003 on Zakat Management, *Infak* and *Sodakoh*,
 - c. District Regulation No 05/2003 on Getting Dressed for Moslem and *Muslimah*,
 - d. District Regulation No. 06/2005 on *Alquran* Literacy, Moslem Clothes, and Zakat Management.
2. Lombok Timur Regency (West Nusa Tenggara), District Regulation No. 09 Tahun 2005 on Profession *Zakat*.
3. Pamekasan (Madura), District Regulation No. 18 Tahun 2001 on Prohibition on Alcohol Beverage.
4. Cianjur Regency (Jawa Barat), Circular Letters No. 06/2896/Org on Recommendation to wear Moslem Working Clothes in working days.
5. Padang (Sumatera Barat), Municipal Instruction Number 451.442/Binsos-III/2005 on the obligation to wear Moslem Clothes.

⁸ On the Article 7 Act Number 10 Year 2004 on Legislation Establishment, it is stated the type and hierarchy of legislation a. 1945 Constitution, b. Law/Government Regulation Substituting a Law, c. Government Regulation, d. Presidential Decree, e. District Regulation. Beside that, legislation is recognized and binding as long as governed by the higher legislation.

⁹ Rifyal Ka'bah, The Jakarta Charter and the Dynamic of Islamic Shariah in the History of Indonesian Law, University of Indonesia, Postgraduate studies Program, p. 34-35.

6. Riau, Governor Letter No 0031/UM/081 about Making Name Board of Arabic-Malay.

Various kinds of Districts Regulations show the support of Islamic Syariat from People Representatives in some districts. It is not impossible that the number of Islamic Syariat District Regulation will increase more and more in the future. Indeed it is not mention the legislation in central level which will be established in the near future to support the law reform in this country.

The implementation of Islamic law either in the form of District Regulation or Circular Letter get the responds from various level in Indonesia and get negative responds from 56 members of House of Representatives (DPR) RI with the reason that the establishment is on the contrary with Pancasila (Five Principles) dan 1945 Constitution. However, a lot of fraction in House of Representatives through their spokesmen stated that there is no matter with District Regulations with *Sharia* nuance. In fact, in a democratic country, the different opinion about one matter is usual, but if there are parties who viewed that certain District Regulations is in conflict with legislations or constitution, they should take legal action by proposing *judicial review* to the Supreme Court¹⁰ or Constitution Court.¹¹ Both institutions are

given authority by the Constitution to investigate, establish and decide whether legislation is in conflict with the higher legislations or with constitution or not.

III. Conclusion

1. Islamic Law as a part of National Law has become positive law whose its effect should be obeyed by people. To fulfill the public need due to the absence of material law as a part of Islamic Law which has become positive law, the arrangement of Islamic Law Compilation is the solution.
2. The stipulation of Islamic Law which is put in effect locally should not be in conflict with national legislations which have existed before.
3. Islam deliberately does not explain all legal problems (mainly in the field of *muamalah*) in Al-Qur'an dan Sunnah. Islam put the general principles which can be used as guidance by Ahluzzikri (Fuqaha' which met mujtahid qualification) to make *ijtihad* to determined law of new problems which later occurred. This is one which guarantees the existence and flexibility of Islamic Law, so that Islamic law will still be *Shalihun Likulli Zaman wa-Makan (up to date)*. Amen

¹⁰Article 31 Subsection (1) Act No. 5 Year 2006 on Amendment of Act No. 14 Year 1985 on Supreme Court states that "Supreme Court has authority to examine legislations under law towards law".

¹¹Article 10 Subsection (1) letter a, states that Constitution Court has the authority to bring a justice in the first and last level whose the decision is final to: "a. examine law towards 1945 Constitution".

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Regulations:

1. 1945 Constitution
2. Act Number 10 Year 1998 on Banking
3. Act Number 3 Year 2006 on Religion Court.
4. Act Number 11 Year 2006 on Aceh Governance
5. Act Number 5 Year 2006 on Supreme Court
6. Act Number 10 Year 2004 on the Establishment of Legislations
7. Sharia Banking Directorate

Islamic Law as a part of National Law System has become Positive Law whose its effect should be obeyed by people. The validity of Islamic Law as a part of National Law System is strengthened by the Amendment of 1945 Constitution. In Practice in centra level or district level, Islamic Law is recognized as *Syari'at*, *Fiqih*, and Islamic Law. Other terminologies whose connotation is Islamic Law material are *qanun*, *qadli* / judge decision, *fatwa*, *ijtihad* result, *siyasah syar'iyah*, and so on.. To fulfill the public need due to the absence of material law as a part of Islamic Law which has become positive law, the arrangement of Islamic Law Compilation is the solution. The stipulation of Islamic Law which is put in effect locally should not be in conflict with national legislations which have existed before. In this paper, "*sharia*" becomes the key word.