

The Islamic Law in National Legal System (Theory of Applicability, Development and Implementation in Indonesia)

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Abstract. *Indonesia is a country of law based on Pancasila and the 1945 Constitution of the Republic of Indonesia, upholding ethical values and moral values, as well as the noble personality of the nation, believing in and being devoted to God Almighty, and respecting diversity in social, national and state life, and protecting the dignity and honor of every citizen. The Unitary State of the Republic of Indonesia also aims to realize an orderly, clean, prosperous and orderly life in the life of the nation, state and society. Existence of Islamic law is closely related to the Islamic religion which is always interesting to study and discuss, because the majority of the population of Indonesia is Muslim. Because Islamic law always follows and cannot be separated at all from the "Principle of Islamic Personality" where people who adhere to Islam are located. The existence of Islamic law has long been understood as an inseparable part of the awareness of Indonesian society regarding law and justice, the existence of which is clear within the framework of contribution as raw material for national law, even as a form of transformation of Islamic law into the national legal system.*

Keywords: *Implementation; Islamic; National; System.*

1. Introduction

It can be explained that Islamic law which is universal, as its main source is the Qur'an and Al Hadith which are general rules, especially those concerning the areas of mu'amalah; These rules, by their nature, do not regulate in detail all events and occurrences that arise in society; even though society continues to develop and events become more complex. So here it is necessary to carry out an internal study involving "*Maqaashid al-Tasyri*" in order to achieve benefits.

Furthermore, it can be explained that among Islamic legal theorists, there is a growing opinion that legal changes can occur due to changes in place, time and

conditions. To avoid the negative impacts of the development of this opinion among the wider community, especially in relation to the belief that the basic principles of Islamic law are binding and constitute the "ultimate truth", special attention is needed to describe certain criteria in the context of the elasticity of Islamic law in order to answer all the problematic challenges of the times.¹

Indonesia as one of the countries whose population is predominantly Muslim, of course, cannot be separated from Islamic law as a set of rules in the implementation of the principle of Islamic personality law as a legal basis for people who will resolve disputes based on Islamic law in Indonesia, as well as for justice seekers who will submit themselves to applicable Islamic law. As with non-Muslims in resolving sharia economic law and submitting themselves to sharia transactions.

This article will discuss the theme "Islamic Law in the National Legal System in Terms of Applicability, Development and Implementation in Indonesia". Implementation means implementation, application; implementing means carrying out, implementing.² Meanwhile, Islamic Law is: Law that originates from and is part of the Islamic religion.³ It can also be defined as Islamic law, sharia law: regulations and provisions regarding life based on the Holy Book of the Qur'an and Hadith.⁴ The purpose of this discussion is, among other things, to respond to the extent to which the real aspects of the validity, development and implementation of the implementation or application of Islamic Law within the framework of the unitary state of the Republic of Indonesia.

2. Research Methods

In its discussion, this article begins with an introduction, understanding the sources of Islamic law and the general characteristics of Islamic law, types of Islamic law and the objectives of Islamic law, theories of the applicability of Islamic law and the implementation of Islamic law in the national legal system in Indonesia and ends with a conclusion/closing.

3. Result and Discussion

3.1. Sources of Islamic Law and the General Characteristics of Islamic Law

¹ Trubus Wahyudi), Ideal Reconstruction of Making Will Contents in Islamic Law Perspective Before Notary, Dissertation, defended in Open Examination, April 5, 2016 To obtain a Doctorate in Law at the Doctoral Program in Law (PDIH) Sultan Agung Islamic University Semarang. p. 49 – 50.

² Sutan Rajasa, Complete Dictionary of the Indonesian Language, (Surabaya: Mitra Cendekia), 2nd ed., 2010, p. 198.

³ Muhammad Daud Ali, H. Prof., SH Islamic Law Introduction to Islamic Law and Legal System in Indonesia, (Jakarta: PT. Raja Grafindo Persada), 9th ed., 2001, p. 37.

⁴ WJS Poerwadarminta, General Dictionary of the Indonesian Language, Jakarta, Balai Pustaka, Third Edition, Cdet. IV, 2007, p. 1364.

The sources of Islamic law can be arranged in order: 1. Al-Qur'an, 2. Al Hadith, 3. Ijtihad. The order of these sources of law is based on the dialogue between the Prophet Muhammad and Muazd`bin Jabal, when he sent Muazd to be Governor in Yemen, revealed in a Hadith which means:

"From Muazd bin Jabal, that the Messenger of Allah. When sending him (Muazd) to Yemen he said: "How do you give a decision when something is presented to you that must be decided, Muazd answered: I will decide based on the Book of Allah. Rasulallah said: What if you don't find it in the Book of Allah? Muazd answered: By the Sunnah of the Prophet. Rasulallah said: If you don't find it in the Sunnah of Rasulallah? Muazd replied: I will make ijthihad with my opinion and all my abilities. So the Messenger of Allah felt relieved and said: "Praise be to Allah who has given taufiq to the Messenger of Allah (Muazd) in matters that were pleased with the Messenger of Allah."⁵

Explanation :

1. The Qur'an is the Kalamullah which was revealed to the Prophet Mumammad saw, written in Arabic manuscripts, which came to us through mutawatir, when read it contains the value of worship, starting with the Al-Fatihah letter and ending with the Al-Naas letter.
2. A-Hadith is in the form of actions, words and/or silence of the Prophet Muhammad SAW. which can be the basis of law. Therefore there are Sunnah fi'liyah, Sunnah qauliyah, and Sunnah takririyah.
3. Al-Ra'yu (Al-Ijtihad) is using all one's abilities to achieve laws that contain uluhiyah values or contain sharia values.

The three sources of law (Al-Qur'an, Al-Hadith and Al-Ra'yu or Al-Ijtihad) are called the main sources of Islamic law. In terms of Al-Ra'yu or Ijtihad, the Ulama classify sources of Islamic law within the scope of the Al-Ra'yu (Ijtihad) method as: Ijmak, Qiyas, Istihsan, Maslahah murlah, Istishab, Al-Urf, Al-Syar'u Man Qablana, Saddudzari'ah and fathudzdariah and the Sahabat Madzhab.

It can be explained that Islamic law guarantees smooth harmonious relations, in the field of mu'malah maddiyah, as well as in the field of mu'malah adabiyah. According to Dr. Zaidan Abdul Baqiy, the general characteristics of Islamic law include:

1. *Islam was created for the sake of humans, and not humans were created for the sake of Islam.* Therefore, every social reform or legislative reform

⁵ A. Djazuli, H. Prof. Fiqh Science (An Introduction), (Bandung: PD. Orba Shakti), 2nd ed., Year. 1991, p. 59.

(making of laws) must be oriented towards the benefit of humanity, because it is part of the soul (spirit) of Islam.

2. *Worldly affairs that are permissible in sharia and in accordance with the spirit of Islam in the alternative precede ukhrawi affairs.* This is none other than because the world precedes the afterlife, while life precedes death.

3. *The message of Islam is a message of absolute freedom, liberty and brotherhood* according to the limits set by the Shari'ah and law.

4. *Islam is a message that is flexible (elastic), which contains submission (submission) to human interests in matters of this world and the hereafter* and a strong foundation for growth, development and progress in accordance with the conditions of the times.

5. *Islam is a message that is simple and easy to understand.* In it there is no difficulty and no ambiguity. Islam is a religion whose five pillars are quite simple and easy to understand for the layman, even the most intelligent philosopher has the same understanding.

6. *Islam is a treatise on knowledge and thinking;* namely a treatise that distinguishes between people who are knowledgeable and people who are not knowledgeable; upholding people who are knowledgeable and people who value knowledge.

7. *Piety is the foundation of social interaction and behavior, while justice is the foundation of law and justice.* The message of Islam acknowledges/accepts every different human understanding of the law according to the differences in their groups and civilizations.⁶

3.2. Types of Islamic Law and the Objectives of Islamic Law

In the Islamic legal system there are five types of laws or rules that are used as a benchmark for measuring human actions both in the field of worship and in the field of *muamalah*. The five types of rules are called *al-ahkamu al-khamsah*, namely the classification of five laws, namely (1) *jaiz* or *mubah* or *ibahah*, (2) *sunnat*, (3) *makruh*, (4) *wajib*, and (5) *haram*. The classification of five laws or five types of laws in Islamic legal literature is also called *taklifi law*.⁷

Law is a social institution in a society to guarantee the implementation of rights and obligations between members of society, both in relation to individuals and

⁶ Zaidan Abdul Baqiy, Dr., *Al Islam wa al Taghayyur al-Ijtima'iy (Islam & Social Change)*, from *al-Waie al-Islam Magazine*, Th. XVIII, No. 206, Kuwait, December 1981 Translation, Irawan A. Majid, Gresik, CV. Student Star, Cdt. ..., Th., p. 9.

⁷ Muhammad Daud Ali, H. Prof., *Op Cit.* p. 39 – 40.

to the state. Law is also a tool for social engineering towards social welfare. Likewise, Islamic law also has a purpose. The purpose of Islamic law is essentially the purpose of the Creator of Islamic law itself so that the welfare and fulfillment of the needs of society are realized. The purpose of Islamic law is the direction of every human behavior and action in order to achieve happiness in life by obeying all of His laws.

It can be explained that humans are born with provisions for life, namely fitrah. Human fitrah has three powers or potentials, namely: *'aql*, *syahwah*, and *gadlab*. The power of *'aql* functions to know (*ma'rifat*) Allah and to recognize Him as One. The power of *syahwat* functions to induce objects that are pleasant and beneficial to humans. The power of *gadlab* functions to defend oneself and maintain the continuity of a pleasant life.⁸

The purpose of Islamic law reviewed from the perspective of the Lawmaker can be known through inductive reasoning on the sources of *naqli*, namely revelation, both the Qur'an and the Sunnah. In general, it is often formulated that the purpose of Islamic law is to achieve the happiness of human life in the world and in the hereafter, by taking everything that is beneficial and preventing or rejecting what is harmful, namely what is useless for life and living. In other words, the purpose of Islamic law is to achieve the welfare of human life, both spiritually and physically, individually and socially.⁹

The objectives of Islamic Law are seen from the perspective of their importance to humans themselves, namely: 1. Primary objectives or *al-dlaruriy*; 2. Secondary objectives or *al-haajiy*; 3. Tertiary objectives or *al-tahsiiniy*.

1. The primary objective (*al-dlaruriy*) of Islamic law is the legal objective that must exist for the sake of the sustainability of human life. If this objective is not achieved, it will cause instability in the welfare of human life in the world and in the hereafter, and even destroy life itself.

These primary life needs can only be achieved if the 5 (five) objectives of Islamic law are maintained, called "*al-dlaruriyyat al-khams*" or "*al-kulliyat al-khams*" or often also called "*maqashid al-syari'ah*". The five main objectives are: 1. Maintaining religion; 2. Maintaining the soul; 3. Maintaining reason; 4. Maintaining descendants and/or honor; and 5. Maintaining property.

The purpose of the law of worship refers to maintaining religion, such as faith, saying two sentences of the creed, paying zakat, fasting during Ramadan, etc.

⁸ Juhaya S. Praja, Dr., Philosophy of Islamic Law, (Bandung: Piara Foundation), First Edition, 1993, p. 151.

⁹ Muhammad Daud Ali, Op Cit, p. 54

2. The secondary objective (*al-hajiy*) of Islamic law is the maintenance of the goals of human life which consist of various secondary needs of human life. These secondary needs of life if not fulfilled or maintained will cause narrowness which results in difficulties in human life. However, the narrowness of life will not cause damage that causes damage to human life in general.

The maintenance of the secondary objectives of Islamic law in worship, for example, can be achieved by the existence of the *rukhsah* law in the form of dispensation to combine and shorten prayers for those who are on a safari trip or because they are experiencing difficulties, either due to illness and/or other reasons. In the field of *muamalah*, it can be achieved, among others, by the existence of the law of *musaaqah and salam*. In the field of criminal law or *jinayat*, such as the existence of an oath system (*al-yamiin*) in the process of proof and fines (*diyat*) in the imposition of legal sanctions on perpetrators of criminal acts.

3. The Tertiary Objective (*al-tahsiniyyat*) of Islamic law is the objective of Islamic law which is aimed at perfecting human life by carrying out what is good and best according to custom and avoiding things that are reprehensible according to common sense.

The achievement of the tertiary objectives of Islamic law is usually found in the form of noble character or *akhlauqul karimah*. This noble character or *akhlak* includes legal ethics, both the ethics of worship, *muamalat*, customs, criminal or *jinayah* and *muamalat* or civil law.

The ethics of worship law, for example, are reflected in the existence of legal provisions for purification or *thaharah*, covering the genitals, purifying and cleaning impurities from places of worship, decorating, carrying out good deeds in the form of charity, etc.¹⁰

3.3. Theories of the Applicability and Development of Islamic Law in Indonesia

Ichtijanto, formulated six theories of the application of Islamic law in Indonesia, namely: the theory of Islamic teachings on obedience to the law, the theory of acceptance of legal authority, the theory of *receptio in complexu*, the theory of *receptie*, the theory of *receptie exit*, and the theory of *receptie a contrario*.¹¹ Then, from the aspect of developing the theory of the application of Islamic law in Indonesia, Ichtijanto introduced the theory of existence.¹² After the birth of the Compilation of Islamic Law (KHI), the implementation of which was based on

¹⁰ Juhaya S Praja, Op Cit, p. 153

¹¹ Edi Rudiana Arif et al., *Islamic Law in Indonesia: Its Development and Formation*, (Introduction by Juhaya S. Praja), (Bandung: PT Remaja Rosdakarya, First ed., 1991) p. xiii.

¹² I bid, p. 137.

Presidential Instruction Number 1 of 1991 dated June 10, 1991¹³ and based on the Regulation of the Supreme Court of the Republic of Indonesia Number 2 of 2008 concerning the Compilation of Sharia Economic Law (KHES). Based on several theories of the Applicability and development of Islamic law, the author argues that there are 9 (nine) theories of the applicability and development of Islamic law in the National Legal System in Indonesia, each of which will be explained as follows:

1. Theory of Islamic teachings on obedience to the law

The theory of Islamic teachings on obedience to the law, put forward by H. Ichtijanto. It is meant that Muslims must obey the teachings of Islam and Islamic law which are sourced and contained in the sources of teachings and sources of law, namely the Qur'an and Sunnah (Al-Hadith). In the Qur'an there is a provision that Muslims are basically ordered to obey Allah and His Messenger. (QS: 4: 59; QS: 24: 51). Muslims are not allowed to take other legal options if it turns out that Allah and His Messenger have established a definite and clear law (QS: 33: 36).¹⁴

2. Theory of Acceptance of Legal Authority

This theory was put forward by HAR Gibb in his book, *The Modern Trend of Islam*, which states that Muslims, if they have accepted Islam as their religion, accept the authority of Islamic law, obey Islamic law, The level of obedience of each person must vary, depending on their piety to Allah. Some have a level of obedience in all aspects of law, some only in several areas of law. According to Gibb, Islamic law is a powerful tool to unite Islamic social ethics. Muslims internationally are united in the values of Islamic law. However, in Islamic society, there is also a diversity of Islamic legal understandings. In Islamic society, tolerance of differences in legal understandings and legal practices develops because of the differences that exist, but the legal ethics are the same. Because Muslims obey Allah, His Messenger, and uphold the scholars who developed Islamic law because of the demands of the times and differences in the situation and conditions of society.¹⁵

3. Reception Theory in Complexu

This theory was put forward by Lodewijk Willem Christian van den Berg (1845 – 1927), who said that Islamic law fully applies to Muslims because they have embraced Islam, although there are deviations in its implementation. Van den Berg was in Indonesia in (1870 – 1887). He also tried to ensure that Islamic inheritance

¹³ Wahyu Widiyana, H, Drs., MA. *Collection of Legislation in the Environment of Religious Court Visits*, (Jakarta: Directorate of Development of Islamic Religious Courts, Ministry of Religion of the Republic of Indonesia, 2001) p. 313.

¹⁴ More about the theoretical basis of Islamic teachings on obedience to the law can be seen in QS: 1: 5; QS: 2: 179; QS: 4: 13, 14; QS: 4: 49, 63, 105; QS: 5: 44, 45, 47, 48, 49, 50; QS: 24: 51, 52. Complete with translation.

¹⁵ Edi Rudiana Arif, Op. Cit. p. 114 – 115.

and marriage laws were implemented by Dutch judges with the assistance of Islamic penghulu qadi. Before that, during the VOC era, Islamic civil law had been recognized. Islamic religious law has been applicable to the native population of Indonesia since before 1885. With the issuance of Regeerings Reglement in 1885, the existing legal situation was strengthened and reinforced with the form of legislation in the *Compendium Freijer* which is a legal book of Islamic marriage and inheritance laws by the VOC Court (*Resolutie der Indische Regering* dated May 25, 1760).¹⁶ The essence of Van den Berg's *receptie in complexu* theory asserts that the law that applies to a society is the law of the religion it adheres to. Or in short and simple terms, every religious person is subject to the law of the religion they adhere to.¹⁷ Van den Berg conceptualized *Stbl. 1882 No. 152* which contained provisions that for indigenous people or colonized people, the law of their religion in their living environment applies. In practice, what applies to colonized people who are Muslim in Indonesia is Islamic law.¹⁸

4. Reception Theory

This theory was put forward by Christian Snouck Hurgronje (1857 – 1936), then developed by C. Van Vollenhoven and Ter Haar. Snouck Hurgronje was an advisor to the Dutch East Indies government in 1898 on Islamic and indigenous issues. To study Islam, he entered Mecca under the pseudonym Abdul Gaffar in 1884 – 1885 (approximately seven months and almost able to perform the Hajj), disguised as an eye doctor and photographer. In addition to his expertise in Islamic law, Snouck Hurgronje was also an expert in customary law in some areas of Indonesia. His writings are *De Atjehers* and *De Gajoland*. In the main points of the *receptie* theory, Hurgronje stated that for indigenous people, customary law basically applies, and Islamic law will apply if Islamic legal norms have been accepted/absorbed by the customary law community. This theory was developed by Vollenhoven and Ter Haar solely for the benefit of the emergence of Pan Islamism pioneered by Sayid Jamaluddin Al Afghani so that it would not have an influence in Indonesia, and to formulate suggestions to the Dutch East Indies government regarding policies towards Islam known as "Islam policy".¹⁹

5. Reception Exit Theory

This theory was put forward by Hazairin, who gave opposition to Snouck Hurgronje's *receptie* theory. According to Hazairin, Islamic law is an independent law and free from the influence of other laws. Hazairin is of the opinion that after Indonesia's independence, after the Proclamation and after the 1945 Constitution was made the state constitution, although the transitional rules stated that the old

¹⁶ H. Arso Sosroatmodjo, SH. And HA Wasit Aulawi, MA, *Marriage Law in Indonesia*, Bulan Bintang, p. 12.

¹⁷ Aqib Suminto, *Islamic politics in the Dutch East Indies*, (Jakarta: LP3ES, 1985), p. 9.

¹⁸ Edi Rudiana Arif, *Op Cit*, p. 120.

¹⁹ *Ibid*, p. 123.

law was still valid as long as its spirit did not conflict with the '45 Constitution, all laws and regulations of the Dutch East Indies government based on the teachings of the receptie theory were no longer valid, because its spirit was contrary to the '45 Constitution. The receptie theory must Exit because it is contrary to the Qur'an and Sunnah. Hazairin called the receptie theory the devil's theory.²⁰

It is emphasized again in Paragraph IV of the Opening of the 1945 Constitution: "The state is based on the One Almighty God." This is a compromise to implement Islamic law in the state constitution.²¹ Apart from that, Article 29 paragraph (1-2) of the 1945 Constitution is a guarantee for the ongoing implementation of Islamic law in Indonesia, and Snouck Hurgronje's receptie theory is automatically rejected.

6. Theory of Reception a Contrario

This theory was developed by H.Sayuti Thalib, and is also a development of the Receptie Exit Hazairin theory. In his writing, Receptie a Contrario: The Relationship between Customary Law and Islamic Law;

The results of Sayuti Thalib's research found conclusions regarding the problems of marriage and inheritance that: (a) Islamic law applies to Muslims; (b) Islamic law applies in accordance with the legal ideals, moral ideals and the inner life of Muslims; (c) customary law applies to Muslims, if it does not conflict with the Islamic religion and Islamic law;²²

7. Existence Theory

This Existence Theory was introduced by H. Ichtijanto, a development of the receptie a contrario theory developed by H. Sayuti Thalib. It can be explained that Theory or theory (English) is a systematic arrangement of facts (laws), which tends to something real or something hypothetical. Existence or existence (English) is the state of existing; the condition of being; the form of being which consists in interaction with other things; state of being actual; the condition of objectivity (The New Gloier Webster International Dictionary of the English Language p. 33).²³

The Existence Theory means that "Islamic law exists in national law," so the existence theory in relation to Islamic law is a theory that explains the existence of Islamic law in the Indonesian national legal system.

²⁰ H. Habiburrahman, Op Cit. p. 15.

²¹ Muhammad Daud Ali, Islamic Law: Religious Courts and Their Problems, (Bandung: Rosdakarya, 1991), p. 74.

²² Edi Rudiana Arif, Op Cit, p. 132.

²³ I b I d , p. 137.

This theory also reveals that the form of existence of Islamic law in the Indonesian national legal system is:

1. There is in the sense of being an integral part of Indonesian national law.
2. Existence means existence with its independence recognized and its strength and authority by national law and given the status of national law.
3. It exists in national law in the sense that Islamic (religious) legal norms function as a filter for Indonesian national legal materials.
4. There is in the sense of being the main material and main element of Indonesian national law.²⁴

8. Theory of Compilation of Islamic Law (KHI)

The Compilation of Islamic Law was enacted based on Presidential Instruction of the Republic of Indonesia Number 1 of 1991 dated June 10, 1991, then followed up by the Decree of the Minister of Religious Affairs of the Republic of Indonesia Number 154 of 1991 dated July 21, 1991 concerning the Implementation of Presidential Instruction of the Republic of Indonesia Number 1 of 1991 dated June 10, 1991. Meanwhile, the main contents of Presidential Instruction Number 1 of 1991 dated June 10, 1991 are: Addressed to the Minister of Religious Affairs of the Republic of Indonesia, to disseminate the Compilation of Islamic Law which consists of:

- a.* Book I on Marriage Law;
- b.* Book II on Inheritance Law
- c.* Book III on the Law of Funerals;

As has been well received by Indonesian Ulama in the Workshop in Jakarta on 2 to 5 February 1988, for use by Government Agencies and by the community who need it;

In full, the Compilation of Islamic Law consists of:

Book I on Marriage consists of Chapters I to XIX containing Articles 1 to 170; Book II on Inheritance consists of Chapters I to VI, containing Articles 171 to 214; Book III on Deputies, consists of Chapters I to V, containing Articles 215 to 229.²⁵The material of the Compilation of Islamic Law (KHI) is applied law or material law of Religious Courts.

8. Theory of Compilation of Sharia Economic Law (KHES).

The Compilation of Sharia Economic Law is a work compiled by a Team formed by Islamic Scholars, intellectuals and legal practitioners whose activities involve

²⁴ I b I d.

²⁵Op Cit, Wahyu Widiana, pp. 318 – 374.

formal law and material law as well as sharia economics; based on the Decree of the Chief Justice of the Republic of Indonesia Number; KMA/097/SK/X/2006 dated October 20, 2006.

The books used as references in the preparation of the Compilation of Sharia Economic Law (KHES) are: 1. *Al-Fiqh al-Islam wa-Adillatuh*, by Wahbah al-Zuhaili, Damascus; 2. *Al-Fiqh al-Islami fi Tsaubih al- Jadid*, by Mustafa Ahmad al-Zarqa, Damascus; 3. *Al-Mu'amalat al-Madiyahwa al-Adabiyah*, by Ali Fikri, Egypt; 4. *Al-Wasith fi Syarh al-Qanun al-Madani al- Jadid*, by Abd. Al-Razaq Ahmad al-Sanhuri, Beirut; 5. *Al-Muqaranat al-Tasyri'iyah baina al-Qawanin al-Wadh'iyah al-Madaniyah wa al-Tasyri' al-Islami*, by Sayyid Abdullah Ali Husaini, Egypt; 6. *Durar al-Hukkam, Syarh Majallat al-Ahka*, by Ali Haidar, Beirut; 7. Fatwa Association of the National Sharia Council (DSN) MUI, Jakarta; 8. Bank Indonesia Regulation on Sharia Banking; 9. Statement of Accounting Standards Finance (PSAK) Number 59 dated May 1, 2002 concerning Sharia Banking.

The legal basis for the validity of the Compilation of Sharia Economic Law (KHES) is based on the Regulation of the Supreme Court of the Republic of Indonesia Number 2 of 2008 dated 10 September 2008.

The contents of the Compilation of Sharia Economic Law consist of:

Book I: Concerning Legal Subjects and Amwal; consists of 3 Chapters, including Articles 1 to 19.

Book II: About Contracts, consisting of 24 chapters; there are Articles 20 to Article 667.

Book III: On Zakat and Grants; consists of 4 Chapters, containing Articles 668 to 727.

Book IV: On Sharia Accounting; consists of 7 Chapters, including Articles 728 to 790.²⁶

3.4. Islamic Law in the National Legal System from the Perspective of its Implementation

Law is a social institution in a society to guarantee the implementation of rights and obligations between members of society, both in relation to individuals and to the state. Law is also a tool of social engineering towards social welfare. Likewise with Islamic law.

When associated with Legal Values and Norms, then value is a standard or measure used to measure everything. Value is a state that is abstract in nature. In essence,

²⁶Supreme Court of the Republic of Indonesia, Directorate General of Religious Courts, 2011, *Compilation of Sharia Economic Law*, pp. 1 – 227 & Appendix p. viii.

the relationship between values, principles, norms, and attitudes in life according to law in a linear manner is very closely related. There are various types of value laws according to the type of value, namely: 1) Materialist values related to the size of existing material; 2) Ideal values that express the position of justice and loyalty; 3) Sociological values that show the significance between practical life and other values; from these various values, truth values, goodness values, and beauty values can be formulated.²⁷

According to HAR Gibb, Islamic law has an important role in building public order in Muslims and has a big influence on their lives. Because Islamic law as an integral part of Islamic teachings cannot be separated from the main framework or basis of the Islamic religion. In the life of an Islamic society, the norms or rules contained in the Islamic religion are implemented in the form of basic rules called Islamic sharia. Allah SWT. obligates Muslims to implement Islamic law in their personal, social and state lives. Sharia must be implemented both as a religion and as a social institution.²⁸

Islamic law as one of the social institutions has experienced actualization and even further internalization into various social institutions available in society. The occurrence of the process of allocating Islamic law in the sharia dimension into these social institutions, becomes the basis and gives meaning and direction in the lives of Indonesian society. The implementation of the rule of law itself cannot be separated from the philosophical strength foundation concerning the view of the nature or essence of the rule of law in this case to guarantee justice, order and welfare as well as legal certainty.²⁹

Islamic law, when examined in depth in a specific context, has different meanings, distinguishing between Islamic Law, Fiqh and Sharia.

Islamic law is a typical Indonesian term, as a translation of al-fiqh al-Islami, this term in the discourse of Western legal experts is used as Islamic Law.

In the Qur'an and As-Sunnah, the word sharia is used, which in its explanation then gave birth to the term fiqh. Sharia and fiqh have a very close relationship. Because fiqh is a formula that is understood from sharia. Sharia cannot be understood well, without going through fiqh or adequate understanding, and formulated in a standard way. Fiqh as a result of adequate efforts, is greatly influenced by the

²⁷ Amran Suadi, H, Dr. Drs, SH., MH., MM. *Philosophy of Law, Reflection of Pancasila Philosophy, Human Rights, and Ethics*, (Jakarta: Prenada Media Group, Cdet. I, 2019) pp. 41 – 42.

²⁸ [izanperdana:blogspot.co.id/2015/04/implementasi-hukum-islam-di-Indonesia.html](https://izanperdana.blogspot.co.id/2015/04/implementasi-hukum-islam-di-Indonesia.html). accessed on August 12, 2024.

²⁹ Trubus Wahyudi & Sutrisno, *Legal Review of the Implementation of Supreme Court Regulation (PERMA) Number 5 of 2019 Concerning Guidelines for Adjudicating Applications for Justice-Based Marriage Dispensation*, *Journal of Legal Reform*, Vol 9, Number 2, August 2022. Page 314.

demands of space and time which include the faqih (plural fuqaha) who formulate it. Therefore, it is very natural if there are differences in their formulations.

Sharia can be interpreted in English as "canon law of Islam". Fiqh or Islamic Law is knowledge about a person's rights and obligations as stated in the Koran and Sunnah. The concept of Islamic law has a dual function; Firstly, it functions as sharia and secondly, it functions as fiqh.

The function of Sharia is an institutional function that Allah SWT has ordered to be fully obeyed, namely the entirety of Allah's commands, or the essence of Allah's guidance for individuals in regulating relations with Allah, fellow Muslims, fellow humans, and with all creatures in this world.

Islamic law in Indonesia in the last decade has been very encouraging due to many factors. According to Ahmad Azhar Basyir, the sense of religiosity among Muslims has shown an increasing tendency, so that awareness of the activities and obligations to carry out Islamic teachings which are believed to be an outpouring of Allah's mercy to the universe has also increased. Islamic law is an integral part of Islamic teachings that cannot be separated from the lives of Muslims, based on their Islamic beliefs.

Therefore, Muslims will experience inner peace in their religious life, if Islamic law becomes the basis and order of their life, which receives full support from the state, by being confirmed in laws and regulations. This is the Republic of Indonesia, with Pancasila as the basic philosophy of the state and the 1945 Constitution as its constitutional basis, not only possible, but also a constitutional legal necessity.

The development of the inclusion of Islamic legal elements in legislation in the framework of national legal development is always open, in line with constitutional legal requirements. The question is how to make the provisions of Islamic law understandable, realized and felt as an alternative that brings blessings to the entire Indonesian nation, the majority of whom are Muslims, who are required by their religious teachings to submit to Islamic law.³⁰

There are at least 4 (four) types of Islamic legal thought products known in the history of Islamic Law, namely: fiqh books, fatwas of scholars, decisions of religious courts and laws and regulations in Muslim countries. Meanwhile, if it is called social fiqh, it is a product of the thoughts of a fiqh scholar in giving Islamic meaning to the growth and development of social institutions in Indonesia.³¹

³⁰ I b l d.

³¹ M. Atho Mudzor, *Reading the Waves of Ijtihad: Between Tradition and Liberation* (Yogyakarta: Titian Ilahi Press 1998) p. 92

Indonesia is a Pancasila democracy where religious values are accommodated in the formation and implementation of social life. This understanding is the legitimacy of the regulation of religious implementation in Indonesia which is monumentally stated in the Jakarta Charter and the 1945 Constitution, where the Jakarta Charter legally normatively inspires the 1945 Constitution. Both are a series of constitutions that are enforced as the basis for the implementation of religious life and the legal system in Indonesia. Article 29 of the 1945 Constitution is the basis for legal life in the religious field, thus legislation can be created for adherents of Islam.

Efforts to institutionalize or institutionalize Islamic Law in the legal system in Indonesia are a historical necessity for the development of Islamic law in Indonesia. This is done as one of the strategies for developing Islamic teachings that are more in line with the character and needs of a sense of justice and peace in community life.

The implementation of the institutionalization of Islamic Law in Indonesia is manifested in the legal struggle in the effort to formulate legislation and legal order in Indonesia. This thought tries to analyze the development of Islamic law in the perspective of history and formal juridical in the legal order in Indonesia.

Institutionalization or legislation of Islamic law is an effort made to make Islamic law nationally positive in Indonesia. Islamic law in this sense is all legal norms derived from Islamic law such as family law, banking based on the principle of profit sharing or sharia banking. The law of worship that requires state involvement in regulating the implementation of religious rituals better. Likewise with the public legal system that seeks to regulate and prevent greater violations, so that Islamic public legal legislation becomes one alternative in its implementation.

From an Islamic legal perspective, Indonesian positive law can be classified into three groups according to Masykuri Abdullah³², namely (1) positive laws which are in line with Islamic law, such as family law and most civil law, (2) positive laws which do not conflict with Islamic law even though they are not exactly the same as Islamic law, such as laws on murder and robbery, (3) positive laws which conflict with Islamic law, such as laws on premarital sexual relations, alcoholic beverages and gambling, the perpetrators of which are punished only if they cause damage or disturb other people.

Meanwhile, Padmo Wahjono noted that the use of Islamic law in the development of national law has two forms, 1) Using Islamic law as a positive law that applies

³² Masykuri Abduillah, The Position of Islamic Law in the National Legal System, In Jauhar Vol. 1 No. 1 December 2000, pp. 51 – 71

only to Muslims. 2) Using Islamic law through the expression of values or principles of Islamic law that will apply not only to Muslims but also to all citizens.³³

It can be explained that in this era of Reformation, there are wide opportunities for the Islamic legal system to enrich the treasury of legal traditions in Indonesia so that it can take steps to reform, and even form new laws that are sourced from and based on the Islamic legal system, to then be used as positive legal norms that apply in Indonesian National law.³⁴

Article 27 paragraph (1) of the 1945 Constitution regulates the principle that every citizen has the same position before the law and government, namely the obligation to uphold government laws without exception, this principle is in accordance with universal equality before the law. With this legal principle, the Indonesian state adheres to the principle of balance between rights and obligations for every citizen or resident, without discrimination.³⁵

As a form of implementation of Islamic Law into the National Legal System in Indonesia, several legal regulations have been created, including:

- Law No. 1 of 1974 Concerning Marriage
- Government Regulation Number 9 of 1975 concerning the Implementation of Law No. 1 of 1974 concerning Marriage;
- Government Regulation of the Republic of Indonesia Number 28 of 1977 Concerning Endowment of Land Ownership. Dated May 17, 1977. Promulgated in Jakarta on May 17, 1977 by the Minister/Secretary of State of the Republic of Indonesia.
- Law No. 7 of 1989 concerning Religious Courts, dated 29 December 1989. (LN. of 1989 Number 49).
- Law No. 3 of 2006 amending Law No. 1989 dated 20 March 2006. (LN. 2006 Number 22).
- Law No. 50 of 2009 Second Amendment to Law No. 7 of 1989, dated 29 October 2009. (LN. of 2009 Number 159).

³³ Padmo Wahyono, *Islamic Legal Culture in the Perspective of Legal Formation in the Future*, *Mimbar Hukum* No.3 Year II, 1991, pp. 1 – 9.

³⁴ Amran Suadi, H. Dr. SH, MH, MM *The Development of Islamic Civil Law in Indonesia*, *Varia Peradilan Law Magazine* Year XXXI No. 359 October 2015, p. 58.

³⁵ Trubus Wahyudi & Masrur Ridlwan, *Legal Review of the Imposition of Defendant's Law in Divorce Cases as an Implementation of Perma Number 3 of 2017*. *Advanced Multidisciplinary Research Journal / JAMR*. Vol. 1 No. 2 of 2020, p. 135.

- Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law (KHI),
- Law No. 38 of 1999 concerning Zakat Management, dated 23 December 1999, (LN.RI 1999 Number 164).
- Law No. 20 of 2003 concerning the National Education System;
- Law No. 32 of 2004 and Qanun of Nanggroe Aceh Darussalam Province concerning the Implementation of Islamic Sharia Number 11 of 2002,
- Law No. 41 of 2004 concerning Waqf, dated 27 October 2004. State Gazette of the Republic of Indonesia 2004 Number 159.
- Law No. 19 of 2008 concerning State Sharia Securities (SBSN);
- Law No. 21 of 2008 concerning Islamic Banking.
- Supreme Court Regulation (PERMA) Number 02 of 2008 concerning the Compilation of Sharia Economic Law (KHES) dated 10 September 2008;
- Law No. 44 of 2008 concerning Pornography;
- Law of the Republic of Indonesia Number 34 of 2009 concerning the Stipulation of Government Regulation in Lieu of Law No. 2 of 2009 concerning Amendments to Law No. 13 of 2008 concerning the Implementation of the Hajj Pilgrimage to Become Law;
- Law No. 23 of 2011 concerning Zakat Management, dated 25 November 2011. State Gazette of the Republic of Indonesia 2011 Number 115.
- Government Regulation of the Republic of Indonesia Number 14 of 2014 Concerning the Implementation of Law No. 23 of 2011 Concerning Zakat Management. Dated February 14, 2014. State Gazette of the Republic of Indonesia 2014 Number 38.`
- Law No. 33 of 2014 concerning Halal Product Guarantee;
- Law No. 34 of 2014 concerning Hajj Financial Management
- Law No. 40 of 2014 concerning Insurance.
- Supreme Court Regulation (PERMA) Number 14 of 2016 concerning Procedures for Settlement of Sharia Economic Cases.
- Law No. 16 of 2019 concerning Amendments to Law No. 1 of 1974 concerning Marriage.

4. Conclusion

Constitutionally, the legal basis for the implementation or application of Islamic law in the National Legal System within the framework of the Unitary State of the Republic of Indonesia (NKRI) is Article 29 of the 1945 Constitution. Some Islamic laws have truly been raised to be implemented in laws and regulations, both national and regional normative, Government Regulations, Qanun and or organic regulations (eg. PERMA, SEMA, etc.) as a filler of legal vacuum, of course with the political struggle of constitutionalism and strategic office holders that never fade, as long as Muslims exist in the Indonesian archipelago; where the most prominent characteristic of Islam is where the presence of Islam always provides correct legal and moral guidance for human actions, including in the nation and state. In line with the Theory of Applicability and the development of Islamic law in the national legal system, Islamic law (religion) functions as a filter for national legal materials and as raw material and the main element in the formation of national law in Indonesia, it is possible that new legal regulations will be born that implement Islamic law.

5. References

- A.Djazuli, H. Prof. 1991., *Ilmu Fiqih* (Sebuah Pengantar) , Bandung , PD. Orba Shakti, Cet. II
- AlQur'an dan Terjemahnya', 1993, Jakaart: Yayasan Penyelenggara Penterjemah/Pentafsir Al Qur'an, PT Intermedia,
- Amran Suadi, H, Dr. Drs, SH., MH., MM. 2019. *Filsafat Hukum, refleksi Filsafat Pancasila, Hak Asasi Manusia, Dan Etika*, Jakarta : Prenada Media Goup, Cdet. I
-*Perkembangan Hukum Perdata Islam di Indonesia*, Varia Peradilan Majalah Hukum Tahun XXXI No. 359 October 2015
- Aqib Sumitro, 1985. *Politik Islam Hindia Belanda*, Jakarta : LP3ES
- Arso Sosroatmodjo, H, SH., & A. Wasit Aulawi H, MA, *Hukum Perkawinan di Indonesia*, Bulan Bintang
- Edi Rudiana Arif dkk, 1991, *Hukum Islam di Indonesia Pengembangan dan Pembentukannya*, Juhaya S.Praja, Bandung, PT. Remaja Rosdakarya, Cetakan Pertama
- Habiburrohman,2011, *Rekonstruksi Hukum Kuwarisan Islam Diindonesia*, Senopsis Desertasi Gelar Doktor Bidang Hukum Islam UIN SGB Bandung 26 Febuary 2011
- Izanperdana:blogspot.co.id/2015/04/implementasi-hukum-islam-di Indonesia.html. diakses tanggal 12 August 2024
- Juhaya S Praja, Dr., *Filsafat Hukum Islam*, Bandung, Yayasan Piara, Cet. I, 1993
- M. Atho Mudzor, 1998, *Membaca Gelombang Ijtihad Antara Tradisi dan Liberasi*, Yogyakarta : Titian Ilahi Press

- Masykuri Abdullah, *Kedudukan Hukum Islam Dalam Sistem Hukum Nasional*. Dalam Jauhar Vol.1 No. 1 December 2000.
- Muhammad Daud Ali (I), 2001, *Hukum Islam Pengantar Ilmu Hukum dan Tata Hukum Islam Diindonesia* Jakarta, PT Raja Grafindo Persada, Cetakan ke 9
- Padmo Wahyono, *Budaya Hukum Islam Dalam Perspektif Pembentukan Hukum Di Masa Datang*, Mimbar Hukum No.3 Tahun II, 1991
- Sutan Rajasa, *Kamus Lengkap Bahasa Indonesia*, Surabaya, Mitra Cendekia,
- Trubus Wahyudi & Masrur Ridlwan, Tinjauan Yuridis Terhadap Pengenaan Hukum Terdakwa Dalam Kasus Gugatan Cerai Sebagai Implementasi PERMA Nomor 3 Tahun 2017. *Jurnal Penelitian Multidisiplin Tingkat Lanjutan / JAMR*. Unissula, Jil. 1 No. 2 2020,
- Trubus Wahyudi & Sutrisno, Tinjauan Yuridis Terhadap Pelaksanaan Peraturan Mahkamah Agung RI No. 5 Tahun 2019 Tentang Pedoman Pengadilan Dispensasi Kawin, *Jurnal Pembaharuan Hukum (JPH)* Unissula, Vol. 9, Nomo2, August 2022
- Trubus Wahyudi, Hakikat Konsep Rasionalitas Dalam Mengontrak Bisnis Ekonom Islam, *Jurnal AKTA*, Vol. 9 Nomor 4 December 2022
- Trubus Wahyudi, Legal Consequences of Agreement In Islamic Economic Business, *Jurnal Pembaharuan Hukum (JPH)*, Unissula, Vol. 7 Nomor 1, April 2020
- Trubus Wahyudi, *Rekonstruksi Ideal Pembuatan Isi Surat Wasiat dalam Perspektif Hukum Islam di Hadapan Notaris*, Dissertation, defended in Open Examination, April 5, 2016 To obtain a Doctoral degree in Law at the Doctoral Program in Law (PDIH) Sultan Agung Islamic University, Semarang
- W.J.S. Poerwadarminta, *Kamus Umum Bahasa Indonesia*, Jakarta, Balai Pustaka, Edisi ke tiga, Cet. IV, 2007
- Wahyu Widiyana, H, Drs., MA. *Himpunan Peraturan Perundang-undangan Dalam Lingkungan Peradilan Agama*, (Jakarta: Direktorat Pembinaan Badan Peradilan Agama Islam Direktorat Jenderal Pembinaan Agama Islam Departemen Agama RI, 2001)
- Zaidan Abdul Baqiy, Dr. , *Al Islam wa al Taghayyur al-Ijtima'iy* (Islam & Perobahan sosial), dari, Gresik , CV. Bintang Pelajar, Cdet. p. 9. Majalah al-Waie al-Islam, Th. XVIII, No. 206, Kuwait, Desember 1981 Alih Bahasa, Irawan A. Majid.