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Islamic Law in Indonesia (History and Prospects)

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Abstract

This article discusses about Islamic Law in Indonesia in history perspective. This article analyses the problem and prospect of Islamic law in Indonesia as epistemologically discourse. This article asays that the Islamic law of Indonesia has developed since Dutch East Indies Period. It mixed in the customary law of Indonesian muslim people. Indonesia in the post colonial period, which uses Eropha Contnental Legal System makes a legislation to establish the national law. Therefore, Islamic law may become the national law if it's drafted as a bill to be enacted, such as marriage law (act of 1, 1974 on marriage), law No. 10 of 1998 on the amendment of Law No. 7 of 1992 on Banking, the law no. 35, 1999 on Zakat Management, the law no. 17, 1999 on hajj, and the law no. 3, 2006 on the Amandment of the law no. 7, 1989 on eligion Court.

1. Introduction

Term Islamic law is a translation of the word 'al-Fiqh al-Islami', which in Western literature called 'the Islamic Law', or within the limits of looser 'the Islamic Jurispeudence'. The former is more likely to sharia (Schach, 1982: 1), while the second to the fiqh, (Schach, 1982: 3) but both can not be used consistently (Rofiq, 2001: 11). The term 'Islamic law' experienced the ambiguity between *fiqh*, the law practically taken from the arguments tafsili (detailed) (Wahhab, 1978: 11) and *Shari'ah* that regulations created by God for human in order to be followed in dealing with God, with each other, the environment an d with life (Wahyuni, 2006).

Apart from the various definitions mentioned above, Islamic law can be expressed as *devine law* (law of God) that governs every aspect of human life, and not distinguishing between morality and the law (Wahyuni, 2006). Inside are the legal aspects of worship, the law that governs the relationship between man and God; and legal aspects mu'amalah that regulating legal relations between human beings and between humans and their environment. This is one of the difference of Islamic law (which is devine law) from positive law (*legal positivism*), which only regulate the social order in the relationship between the individual one (as a legal subject) with other individuals, or between individuals as citizens with government or the State (Rahardjo, 2000).

Islamic law is the law comes from God's revelation that is guided by the Muslims. Meanwhile, the positive law in Indonesia that adheres to the Eropha Continental legal system, many adopted the law of the Netherlands as the Code of Penal which was derived from *WvS (Wetboek van Strafsrecht),* the Civil Code that derived from the *BW (Burgerlijk Wetboek),* and the Commercial Code which was derived from *WvK (Wetboek van Kopendel*). The promulgation of laws or regulations in Indonesia also adopts the regulation and legislation as applicable in the continental Eropha, such as the legislation by the legislative.

However, today there is the phenomenon of 'assimilation' of Islamic law and positive law in Indonesia. For example is the enacment of Law No. 1 of 1974 on Marriage that widely adopted of fiqh munakahat material. Islamic law as the law that decreed as national law is a phenomenon that occurs in many Muslim countries, which have implemented the western legal system. In Indonesia which is predominantly Muslim, the aspiration to apply the Islamic law as national law is so strong, that the strategy of Islamic law materials legistation in the form of legal drafting to be established as the national law of Indonesia.

At the beginning of the New Order era Muslims who are the sociological majority but became politically minority even suffered oppression (Effendy, 1998: 111). At the end of the New Order had occurred a harmony between the government (state) with the Muslims, so it appears some legal products that claimed to be the work of Muslims ('Islamic law in Indonesia'), such as Act 1 of 1989 on Religious Courts, IMPRES No. 1, 1991 on Dissemination of Islamic Law Compilation (KHI) (Basri, 1999: p. 8). The harmony would also continue in the post-New Order era, especially the era of transition, so many products of legislation that is a representation of Muslim aspirations, such as law No. 35 of 1999 on Zakat Management, and Law No. 17 of 1999 on the Implementation of Hajj (Usman, n.d.: 133). Moreover, this article discusses about the history and prospect of Islamic law in Indonesia.

2. Results And Discussion

2.1 History of Islamic Law in the Indonesian Legal System

1. In the Dutch East Indies Period until the New Order Indonesia

Indonesia is a former Dutch colony which was usullay called by Dutch East Indies, has experienced a period of the ongoing process of introduction and the development of a foreign legal system into law indigenous society (Wignjosoebroto, 1994: 1). The development of law in Indonesia since the Dutch East Indies can be divided into three periods: first, the year 1840-1890 is a development that is strongly influenced by the policies of liberalism, which is trying to open wide opportunities for European intervention against the Dutch East Indies. The development of law in this period began with the realization of the policies of the new colonial with the beginning of the victory of the ideas of political liberalism in the Netherlands. Their victory led to the enactment of policies to manage governance colony, which at that time was known as the Dutch East Indies is Regeringsreglement. What is interesting in this period has been the transformation of the legal system of supra-system of a

particular culture (Europe) to the supra-system of another culture (Indies) non-European and plural. The liberals who embrace universalism (Wignjosoebroto, 1994: 37), consequent in an attempt to realize the ideas that exist in Europe to non-European, regardless of the culture of the colonial area. They want to transfer the whole of European law to the colonies (including the Dutch East Indies). It is called unification (Wignjosoebroto, 1994: 5-8).

Liberals make efforts to collect the laws material into a book of the law, who are called by codification (code)-- and restructure the judicial procedure. The efforts for unification and codification in the Dutch East Indies, only succeeded in criminal law which was enacted in 1915 (732 in 1915 Stbl jo Gazette, 1917 No. 497, and 645) and is valid from the date of 1918. While the unification of civil law for all population groups Indies was failure. It was related to the emergence of ethnography flow-legal and ethical political exclusion (in the next period) (Wignjosoebroto, 1994: 10).

The second period of 1890-1940 began with the appearance of ethical political ideas and its realiasation. It increasingly respected the rights of indigenous cultural. They argued that the law policy wherever possible to consider the existence of religious rules and customs agencies adopted indigenous communities, in applying European law in the Indies **(Wignjosoebroto, 1994: 8)**.

The policy does not mean that the idea of law unification for all people of Indies was not forgotten by the Dutch government. In 1904 the government wanted to realize the unification of civil law for the whole class of people of the Indies by European law except family law, inheritance, land, endowments and the village government. But these efforts can be thwarted thanks to the services of a legal ethnography Cornelis Van Vollenhoven objecting to policies that ignore the law of the majority indigenous people domiciled. Period based on the ethical policy also gives opportunities for the native son to get an education and welfare, especially the elite. This policy had affected the development of the next period (Wignjosoebroto, 1994: 10).

Three-year period 1940-1950 was the post-colonial period that begins with the history of collapse and disintegration of colonial rule ensued decolonization. At first the national leaders want to develop the law by trying to escape and the thought of the influence of the colonial legal system, but it turns out it is not easy. The belief that the law substance of the colonized peoples will be raised and fully developed into a national legal substance was apparently difficult. This is due to the diversity of the people that the laws are generally not explicitly formulated. The law of colonial legacy has been created entirely, so it is not easy to change (Wignjosoebroto, 1994: 14). The national leaders were also trapped in the state government that adheres to the principle of nationality and unity, then finally they also believe that centralism has a positive function as unifying the nation. Therefore, the Indonesian national law this period also faced with the classic problem of between unification and pluralism (Wignjosoebroto, 1994: 20).

Political and cultural globalization of the economy which patterned on Western civilization increasingly complicated efforts to transform the local law (*adat*) for

national interest. Legal development in Indonesia had difficulties to make *adat* law as national law, because the law should be upheld as a symbol of cultural forces indigenous people, and on the other hand the West with globalization urgently and want to replace the legal system is deemed to be superior and modern (Raharjo, 1980: 157-159). The situation is much more difficult for Indonesian leaders to release from the domination of Western legal ideas.

Attempts to hold the unification always fail, so that the Indonesian people must be satisfied with the law of the colonial legacy has diunifikasikan form of the Criminal Code. While civil law –exception the areas of family law, inheritance, and *waqf*- imposed is Burgrerlijk Wetsbook (Wignjosoebroto, 1994: 11), whereas the exclusion of jurisdiction was returned to customary law. In addition to traditional law in Indonesia there is also religious law mainly Islamic law in some areas. Islamic law is the law of religion professed by the majority of Indonesia's population, so traditional law -especially *Bumi Putera* Muslim- is modified with Islamic law (Usman, 1993: 15-16).

The existence of Islamic law has been governed since 1882 by regulation of the religious courts. In 1929 issued the Ordinance on Muslim marriages are valid in Java and Madura, which contains about marriage, divorce, and administrative arrangements. In 1946 Indonesia (after independent) established regulations on registration of marriage and divorce are implemented in Java and Madura . Since 1950 Indonesia has been trying to form a draft law marriage and divorce for Muslims, but it was always rejected and canceled. In 1974, it was the newly enacted ie. Law No. 1 of 1974 on Marriage, which was forced by Govermental Regulation No. 9 of 1975 (Mahmood, 1987: 205-207).

With the marriage laws, the government has imposed Islamic law for Muslims in Indonesia. It can be seen from Article 2, which states that 'marriage is legal if it is done according to the law of each religion', material such laws also adopt many of the concepts of Islamic law such as the rules on polygamy (Article 3, 4 and 5), the material about the terms of the marriage (Article 6), the prohibition of marriage (Article 8), the concept of the waiting period and so on. This law also confirms the Religious Courts for the Muslim, namely article 63 which states that the court referred to in the legislation are the Religious Courts for their Muslim and the General Court for others. Therefore, in 1989 issued a law 7/ 1989 on Religious Courts governing its jurisdiction. Article 2 states that the Religious Court is one implementation of judicial power for the people seeking justice Moslems regarding certain privat matters stipulated in this law, and Article 49 that the Religious Court duty and authority is to examine, decide and settle the matter-case among those who are Muslims in the areas of: a) Marriage, b) Inheritance, bequess and gift (*hibah*), which is based on Islamic law, c) endowments and sadaqah.

The Religious Courts as institutions that deal with matters of marriage, inheritance, *wasiah* and *hibah*, as well as *waqf* and *sadaqah* require their material law, but the law no. 1 of 1974 does not contain material inheritance and *waqf*. Therefore, a draft of Islamic civil law which contains material about marriage, divorce, family law

and all materials, and material of inheritance, *wasiah* and waqf was prepared. In the process, the draft bill is not legislated because the (new order) political situation does not allow for issuing the draft becomes law, then taken a shortcut by Presidential Decree no. 1 in 1991 instructing the Minister of Religious Affairs to disseminate the draft to the parties concerned, hereinafter referred to Islamic Law Compilation (KHI) (MD et al., 1999: 1-5). KHI is composed of three books is the first law book of marriage, the second law book of inheritance and the third law book of waqf.

2. Islamic Law Legislation in the Reformation Order

The reformation era began after the fall of the New Order regime or the fall of Suharto from the presidency. In the transitional period of national leadership, BJ Habibie, who was then vice president, performed to be the President of the replacement. This period is followed by the elections of 1999, which started the multi-party era after the limitation of political parties in the new order. In the Habibie period, there are several laws legislations that can be considered as a matter of Islamic law including the Law No. 10 of 1998 on the amendment of Law No. 7 of 1992 on Banking, Law No. 17 of 1999 on Hajj, and law No. 38 of 1999 on Zakat Management.

a. Banking Act

The law of banking in Indonesia before 1998 was law No. 7 of 1992 which replaced Law No. 14 of 1967 on the Principles of Banking. In its development, the Indonesian nation experienced various challenges that required various improvements to formate the banking system which able to maintain public confidence. Therefore, law No. 10 of 1998 on the amendment of Law No. 7 of 1992 on Banking was enacted. These changes ware an effort to overcome various problems and difficulties faced by Indonesia. It was also aimed at the effectiveness of the guidance and supervision of banks, accelerating the selection of capital banks in Indonesia, increasing efforts to community control over banking institutions, and as a result of restructuring and comprehensive response to the banking system in Indonesia.

In law No. 10 of 1998 on the amendment of Law No. 7 of 1992 on this bank, raised some fundamental changes to the previous law, namely by incorporating aspects of Islamic shariah as the basic principles of banking. Therefore, the banks in Indonesia must apply the banking system based on principles of Shari'ah. This law determined that the bank can carry out its activities in a common pattern (conventional) and based on the principles of Shariah, or at the same general pattern (conventional) and based on the principles of Shari'ah. In his speech the Minister of Finance, representing the government in connection with the approval of the bill states that among the materials this change is the ease of Shariah principles in business activities of the bank, with the possibility of a commercial bank to carry out its operations in conventional and at the same time can also run the pattern of financing and other activities based on the principle of Shari'ah.

The Shari'ah principles become the basic value in every chapter in this law, such as in Article 1 (3) that a commercial bank is a bank conducting conventional business and or based on the principle of Shariah in its activities providing services in payment

traffic; Article 6 (m) provide financing or undertake other activities based on the principle of Shariah, in accordance to the provisions stipulated by bank Indonesia; Article 7 (c) to make temporary investment to overcome the consequences of credit failure or financing failure based on the principle *Syari'ah*, with the condition that they must withdraw their ownership interests, by fulfilling the conditions set by Bank Indonesia; Article 8 (2) of commercial banks are required to have and implement guidelines for lending and financing based on the Shariah principle, in accordance with the provisions stipulated by Bank Indonesia, and other articles about banking fulfilled by the term 'based on the principle of Shari'ah'.

In general terms what is meant by financing based on the principle of Sharia in article 1 (12) is to provide cash was based on agreements between the bank and other parties that requires the financed party to return the money or the charges after a certain period in accordance to the sharing profit; and in article 1 (13) states that the principle of rule of Sharia is Islamic law based on the agreement between the bank and other parties to hold funds or financing business activities, or other business declared in accordance to sharia, among other financing based on the profit sharing principles (*mudaraba*), financing is based on the principle of equity (*musharaka*), the principle of buying and selling goods with profit (*murabaha*), or the financing of capital goods is based on the principle of rent pure without selection (*ijara*), or with the selection of the transfer of ownership of goods leased from the bank by another party *(ijara wa iqtina*).

From the exposure can be said that with the banking legislation of the new Islamic banking principles have been applied to the system for results as well as other principles in *fiqh mu'amalah* like *musharaka, mudaraba, ijara* and so forth. In other words, the regulation has justified the implementation of the banking system of Shariah (Islamic banking) in Indonesia.

b. The act of Hajj

The law on the Hajj was also an inisiatif bill, the bill drafted and formulated by the Parliament for the proposed and decreed, on the basis of the right of initiative of the Parliament. The background of filing of the bill was that the pilgrimage has been done by the people of Indonesia for centuries, and requires coordinated action of government in an effort to ensure the independence of its citizens to worship according to their respective religions, as well as the increasing number of Muslims making the pilgrimage year to year. Around the year 1995/1996, the excess of the quota caused various problems. During this time the legislation concerning the organization of Hajj listed in *Pelgrims Ordinance* of 1922 including its changes and enhancements, and *Pelgrims Verordering* 1938, and a wide variety of laws and regulations governing the organization of the Hajj, the PP No. 3 of 1960 on the Implementation of the pilgrimage is interdepartemantal field, Presidential Decree no. 6 of 1969 on the Implementation of Hajj Affairs by the Government, and Presidential Decree No. 62 of 1995 on organizing the Hajj Affairs. These regulations are considered no longer appropriate to the situation and condition of Indonesia, the

legislation that is valid for this need to be customized and upgraded to become law (MD et al., 1999: 8).

The purpose of the legislation organizing the Hajj is to establish the mechanism for administering the pilgrimage from registration pilgrims, coaching, implementation of the pilgrimage in Saudi Arabia, to pilgrims back in Indonesia, and protection against the candidate/ pilgrims on the principle of Equality position as citizens countries, in order to materialize the organization of the pilgrimage that is safe, orderly and smoothly in accordance with the demands of religion (MD et al., 1999: 8).

The law no. 17 of 1999 on Hajj was enacted. As stated in article 4 that the organization of the Hajj by the principles of justice have the opportunity, protection and legal certainty in accordance with Pancasila and the Constitution 1945, and article 5 that the implementation of the Hajj aims to provide guidance, care, and protection as well as possible through the system and management Providing good so that implementation of the pilgrimage can walk safely, orderly, smooth and comfortable in accordance with the demands of religious pilgrims as well as independently in order to obtain Hajj *mabrur*. Therefore, the material law on Hajj is merely regulatory. It does not talk about the rituals or procedures of the pilgrimage as a religious *ritus* -like discussion about the terms and the pillars of hajj. It can be seen from the chapters are discussed, such as on general provisions, principles and objectives, organization, costs, registration, guidance, health, immigration, transportation, luggage, accommodation, organizing the Hajj particular, the organization of pilgrimage, and provisions criminal. In the chapter VI of the guidance states that the Minister is obliged to establish the pattern and manner of coaching pilgrims, and the Minister is obliged to issue guidelines and guides the rituals of the pilgrimage.

c. Zakat Management Act

In contrast to Law No. 17 of 1999 on Hajj which was an initiative Bill, Law No. 38 of 1999 on the management of Zakat was submitted by the government to the letter of the President No. R.31 / PU / VI / 1999 dated June 24, 1999. The government expressed the Bill on Management of Zakat to the Parliament and commissioned the Minister of Religion, who was held by Malik Fajar-representing the government in a joint discussion. Among the proposed rations at the time was that the zakat is one of the pillars and the duty of every Muslim who is able, which if managed properly will become a potential source of funds that can be used to alleviate poverty, create prosperity and social justice. Therefore, it is necessary to manage zakat to the maximum and professional organization established by the government.

Through the Project of Center Law Planning and Codification of the National Law Development Agency at the Department of Justice Republic Indonesia in 1884/1885 have been prepared Academic Legislation on Zakat by a working team comprising representatives from the Ministry of Religious Affairs and the Ministry of Justice, but these activities have not been followed up by efforts to prepare bill on Zakat Management. Since the beginning Repelita I through appeals the Government

has made efforts to promote religious activities zakat, infaq and sadaqah are implementing fully carried out by the community through the establishment of *Badan Amil Zakat*, *Infaq* and *Sadaqah (BAZIS*) in these areas, but the results have not been as expected. In 1991 the Minister of Religious Affairs and Minister of the Interior seeks to improve supervision on *Bazis* in the region through decree No. 29 and 47 on the Development *Badan Amil Zakat* and *Sadaqah Infaq (BAZIS*) followed by the Minister of Religious Instruction No. 15 of 1991 and minister of interior Instruction No. 7 of 1991 on the Implementation of the decree. The National Working Group I of *ZIS* and Zakat Forum on January 7, 1999 has recommended the urgent need to prepare a bill on the Management of Zakat, which then drafted a bill on management of charitable and legislated in Law No. 38 of 1999 on Zakat Management. Material legislation on the management of Zakat is also a lot that is regulative. This can be seen in the chapters discussed them on zakat management organizations, oversight, and sanctions. In the material zakat management mentioned the establishment of Amil Zakat from the center to the District and Sub-district, which carry out the management and supervision of zakat.

d. Amendment of Religion Courts

In 2006, the Act No. 7 of 1989 on Religion Courts was amended by Act No. 3 of 2006 on Amendment of Act No. 7 of 1989 on Religion Courts. With the amendment of this law stated that the Religion Court is one of the courts under the Supreme Court, along with other justice that is Publik Court, the Administrative Court and Military Courts. Amendment Act also expands the authority of the Religion Court in accordance with the development of the law and the needs of the Muslim community in Indonesia today. Along with the proliferation of Islamic economic discourse and the development of shariah businesses and financial, such as banks Shari'ah, the Shari'ah insurance, up to the capital market Shari'ah, will increase also the Islamic economics disputes. The new amandement also add an authority of the Religion Court, which is to resolve the disputes of Islamic economics.

In more detail, some of the changes in the Law include (Anwar, 2008: 199-201): a) Enhance the dignity and position of the Religion Court as a sub-system institution of judicial power under the Supreme Court, where the previous law has also increased the Religion Court as an independent judiciary, independent to the District Court; b) Position, duties and functions of the Religion Court are adapted to the demands for reform, the 1945 results amandemant, Law No. 4 of 2004 and Law No. 5 of 2004 as a modern and independent judiciary; c) The jurisdiction of Religion Court was expanded to include Islamic civil matters and some criminal cases Islam (for Shari'ah Court in NAD) reaffirmed his absolute authority, so there is no longer an option in the case of inheritance law, restrictions with property disputes and other civil and other clauses complicated. It also affirmed the subject of the law, namely that the seeker of justice in Religion Court is that everyone, citizen or foreigner seeking the justice on the trial in Indonesia, was referred to the people who are Muslims, included person or legal corpotation which is built according to the Islamic law. All is regarded as matters of Religion Court jurisdiction in accordance with Article 49 of the Basic Agrarian law No. 3 of 2006; d) Organization Religious Courts

adjusted to the Supreme Court may open the path of career into Religion Court officials to the Supreme Court, both the secretariat and the secretariat; e) Religion Court is no longer a special court beside the General Courts, but it is a judicial environment as well as the general courts. Religious Courts can establish a special court. NAD Shari'ah Court is an example of a special court within the Religion Court throughout its authority regarding the authority of the Religion Court, and also a special court within the general courts throughout its authority regarding the authority of the General Court (Article 3A of Law No. 3 of 2006 and the Explanatory Notes).

The considerations of amendments are as follows (Anwar, 2008: 171-175): a) the general reason, that politics Indies always limit the powers of the Religion Court at that time. Therefore, along with democratization, this time as a judicial Religion Court State which is positioned parallel to the other courts at the Supreme Court, is granted the authority based on the needs of Muslims; b) the juridical reason is to adapt to changes in the 1945 Constitution and Law no. 4 of 2004 on Judicial Authority, and to be adjusted by the needs of society and the development of national law; c) the special reasons are: 1) The number of violations of marriage rules, and their sanctions are not effective, then it needs for a legal shelter to be effective; 2) In line with the formation of the Shariah Court which handled jinayah, require a legal shelter in the form of legislation; 3) the concept of Islamic economics put the values of Islam as the basis and foundation in economic activity in the framework of the public welfare. The efforts to realize these values, is to establish social institutions (including economic institute) is based on sharia law. Therefore, the Shari'ah business disputes will become the jurisdiction of this Religion Court.

e. The bill for Applied Legal Religious Court

Law No. 1 of 1974 concerning marriage and PP No. 9 in 1975 as its implementing regulations, not enough for legal sebgai materially Religious Courts. Then the Islamic Law Compilation (KHI) established by Presidential Instruction No. 1 of 1990 was used as a guide for judges in religion courts. However, political law of Indonesian requires that the laws of material that formed the basis for the judges to examine and decide the case not enough to just be guided by a presidential order, but it must be based on substantive law governed by legislated law. KHI has no legally binding force of law, although it proved to be effective as a reference to the judges. Therefore, we need a law that specifically regulates meteriil law applied in religious courts as guidance for judges. Unfortunately, this effort can't be realized until this time.

2.2 Prospects and Problems Implementation of Islamic Law in Indonesia

a. Epistemological Problem

Islamic law is the law of God, but in the formation of Islamic law formulated by the Islamic jurists. This can lead to the basic conflict between the revelation of God or the human mind (the thinking of jurists). Since the formation of Islamic law, there is disagreement about whether Islamic law derived from revelation or just a sense also plays a role in understanding Islamic law. This debate can be seen in some books of Fiqh ushul; between Ash'arite, Mu'tazila and Maturidiyah. Ash'arite group considers

that Islamic law is known only from divine revelation, while Mu'tazila view that Islamic law can be known by human reason, (Wahhab, 1978: 97-99) while Maturidiyah as an act of compromise between the two is that Islamic law is derived from God's revelation and can be known by human reason. Differences of opinion also appear in the case of the ahl al-hadith and ahl ar-ra'yi, since the early days of the establishment of Islamic law that continues to the formation of Maliki and Hanafi. The debate over these two streams Shafi'i compromised by analogy with the method (Qiyas) (Coulson, 1969: 6).

Noel J. Coulson noted several basic conflict in Islamic law, namely, the first conflict between revelation and reason-as exposed above, the second, the conflict between unity and diversity, namely that the laws of Shariah law is believed to be the single and uniform rules of conduct prescribed by God for His creatures on earth. But in reality, the one of shari'ah which can be understood in various ways. The conflict can be compromised by the concept of ijma '(consensus). This concept is the principle of unanimous approval of the jurists authorized to issue an opinion, has a binding and absolute authority. Third, the conflict between authority and freedom, that of whether the judge has the freedom to determine the law or must follow the legal authority that has been recognized. The efforts to understand the source of this Lord law is called by ijtihad. Initially, the scholars have full freedom to perform ijtihad, but then there are restrictions in this ijtihad space.

This conflicts couses a partial understanding among Muslims in Islamic law. It also results the two meanstrem thoughts. On the other hand, the view of Indonesian people against Islamic law -which has been legislated into law legislation -- also varied. The first, view which does not recognize the Indonesian law as a rule that replaces the Islamic legal rulings (*fiqh*), because Islamic law for them is what's written in the books of fiqh. Second, the view which recognizes these Islamic Indonesian laws as laws that must be obeyed in his capacity as a citizen, and in the same time as they still recognize and run the rules of fiqh. They said: "The case was valid according to religion, although it deviates from the provisions of the state." Such as registration of marriages. The third view, which regard the Act as state laws that regulate legitimate Muslims, and it is an Indonesian fiqh (Syarifuddin, 2002: 49-50).

b. Methodological problem

From the epistemological difference above, has implications for the methodological differences. The groups who believe that Islamic law only comes from God's revelation, would see the source of law is the legal texts and the inventive methods tend textual and linguistic. While the group who believe that Islamic law is also derived from reason, it felt that not enough if only to see the texts as textual then they develop many models of interpretation other linguistic methods.

This difference has been around since the beginning of the establishment of Islamic law. During the development of the schools of fiqh also there are different methods of *istinbat*. As seen in *usul fiqh* discourse there are several production systems of meaning among other things, the first level, *manthuq an-nash* that discuss *sharih* (Zaharah, 1997: 118- 124) and *ghairu sharih* (Zaharah, 1997: 124-134) Second,

mafhum an-nash that discuss *mafhum muwafaqah* (Zaharah, 1997: 147-148) and *mafhum mukhalafah* (Zaharah, 1997: 148), Third, *ma'qul an-nash* that relates to *ijtihad ta'lili* ie. to fine the law by *illat* (method qiyas) (Zaharah, 1997: 218); And the fourth, *ruh an-nash* that relates to *ijtihad ta'lili* as establishing laws with *mashalahah* and wisdom, or so-called *istishlah* (Zaharah, 1997: 278).

The development of contemporary *ushul fiqh* also have discussed a method of understanding the new Islamic law such as the method of interpretation of the double movement proposed by Fazlur Rahman (Rahman, 1995: 7), Naskh reversal method which was introduced n by Mahmoud Taha (Taha, 1985), Methods of *hudud* / theory of limits proposed by Muhammad Shahrur (Muhammad, 1992: 543) and many more. The other method that combines the texts normatively and empirically reality society has also been developed by Louay Sofi. These methodological problems present in the formulation phase of Islamic law to be applied in a country. Therefore, the aspirations of the application of Islamic law in Indonesia should also consider the methodological problems.

c. Political problem

Formalization of Islamic law, or in other words, to implement Islamic law in Indonesia requires political forces that will support it. In many countries that embrace Continental European legal systems, enforcement of the law is done through the legislative process by the legislature. Therefore we need members of the legislature who will fight for the imposition of Islamic law.

In the context of the post-New Order Indonesia, the political problems in the application of Islamic law is the aspiration polarization of Islamic parties in the implementation of Islamic law as well as the competition between the political stream (primarily between nationalist and Islamist groups) in the executive institutions. In the multiparty era, these parties can be mapped into a nationalist party and the party based on religion (Islam and Christianity), in this regard, the Islamic party. Islamic Parties are just a few of the whole party in Indonesia, but there was a same understanding in the implementation of Islamic Shariah.

In relation to the aspiration on the implementation of Islamic law, the Islamic Party can be mapped into groups. They are liberal, modernist and conservative of the Islamic party. Liberal Islamic party groups in this case is a mass-based party of Muslims, but does not carry the aspirations of the application of sharia law. For them Islam is a religion that is carried by each person individually, without any interference from the state for pemberlakukannya. This group emphasizes the propagation of Islam culturally. Modernist Islamic party group that is mass-based party of Muslims who carry the aspirations of the application of sharia law, but they must first formulate it in formulatif, it may even be legal darfating to be a bill that will be legislated into national law. Meanwhile, a group of conservative Islamic party, namely that carries the aspirations of the application of sharia law, but have not defined it in certain formulations to be decreed. They consider Islamic law is what is in the Qur'an and in the hadith and fiqh formulated. They also fight for the implementation of sharia law through the constitution, the amendment of Article

29UUD 1945. These differences understanding of Islamic law among Islamic parties have become a problem in the application of Shari'ah itself.

2.3 Alternative Strategies of Islamic Law Implementation in Indonesia

By looking at the map of thoughts and aspirations on the application of Islamic law in Indonesia mentioned above, it can be seen that basically the majority of the Islamic party wants to apply of Islamic law in Indonesia, but they have various strategy, through the constitution, legislation and propagation of Islam culturally. From some of these strategies can be done, but gradually: first, legislation and propaganda strategy culturally can be performed simultaneously. Because basically the application of the Islamic law requires juridical validity through legislation, while also requires the readiness of society to accept and comply with such regulations. The struggle for the implementation of Islamic law through the constitution by integrating the seven words of the Jakarta Charter, it is still hard to do because there are groups of people who are resistant to the hat.

The assumption that the Jakarta Charter would lead to division and discord between religions and even internal Islamic religion itself still dominates the thinking of Indonesian society, then it is this strategy requires the preparation of a very heavy, at both the formulation, socialization, and at the political level (for a hat this requires political force who support both in the legislature, the majlis, as well as mass organizations, and society in general).

In the concept of reform in Islamic law, legislation is the best effort Islamic law in order to adapt to the Western legal system which has now been adopted in many Muslim countries, including Indonesia. Legislation is done by formulating Islamic laws in the form of legal rules drafted with chapters and articles (in legal drafting) to be proposed as a Bill to the legislature for approval, then ratified gazetted as a regulation legislation. The stages that must be carried out within the framework of Islamic law legislation are:

a. Formulation Stage

In this stage should be disaggregated material which Islamic law would be decreed. Fiqh for the example, divided into several aspects including individual aspects (relationships with God ansich) such as praying, fasting, ethics (eating, drinking, defecating, etc.), aspects of worship associated with social and cultural aspects such as Friday praying, as well as mu'amalah fiqh material in the field related to social and cultural aspects, which need the juridical rules, such as marriage and divorce, inheritance, *wakaf*, *zakat* management, and so on. The last material that should be formalized in legislation while the issue of fiqh in individual aspects of worship do not require setting legally. In this formulation stage should also be defined methods to be used to understand the legal materials, so it can be a definition of law in accordance with the realities and needs of the community.

Schools of this formulation should involve all among Muslims with the representation of the scholars, scientists in related disciplines, academics and community leaders in order to get unanimity. This formulation stage as synonymous

with the concept of earlier *ijma 'ulama*, but if the ijma' is an agreement of Muslims as a whole, but the *ijma* in the formulation of Islamic law in Indonesia is "Indonesian local *ijma*".

b. Socialization Stage

The law is basically a rule that contains a command and assessment within society itself (Rahardjo, 2000: 65-66). However, with their ideas of positivism in various aspects of human life, including the law, then the law becomes a positive regulatory formalized through juridical justification of a country. However, with the positivization or formalization of the law should not eliminate the law as a living law in society. Therefore, the law should be the aspirations of the people, and the formalization of the law should be the formalization of rules that have been living in the community. Thus, the socialization of the law is necessary in the context of a legal formalization. Within this context, the cultural approach Islamic law is indispensable in order to socialize Islamic law in society, to prepare a legal enforceability.

The applicability of the law (*das geltung das recht* theory) there are three aspects (Soekanto, 1991: 57). Firstly, the judicial enforceability of the law apply if it's enacted procedurally in the state, second, that the enforceability of sociological laws apply if it's accepted in society and enforceability of philosophical ie third law applies if it's appropriate philosophical values of society. Therefore, besides the juridical formalization of Islamic law, Islamic law socialization is also needed both before and after the formalization of Islamic law.

c. Political Stage

After the formulation stage and socialization, the necessary strength is to support the rule of law to find legally by the state. In the Indonesian context, the efforts of these can be done through the government (executive) and the path of the legislature, because the legislation may be proposed by the government is the president or departments concerned with the approval of Parliament, nor by the Parliament's suggestions (initiative Bill) to be ratified by President agreement. Based on the discusses above, the formalization of Islamic law requires a political force that supported the bill of 'Islamic law', both from a political party that sits as a representative in the House of Representatives, or the Muslims who sit on the executive government.

3. Conclusion

Islamic law of Indonesia has developed since Dutch East Indies Period. It mixed in the customary law of Indonesian muslim people. Indonesia in the post colonial period, which uses Eropha Contnental Legal System makes a legislation to establish the national law. Therefore, Islamic law may become the national law if it's drafted as a bill to be enacted, such as marriage law (act of 1, 1974 on marriage), law No. 10 of 1998 on the amendment of Law No. 7 of 1992 on Banking, the law no. 35, 1999 on Zakat Management, the law no. 17, 1999 on hajj, and the law no. 3, 2006 on the Amandment of the law no. 7, 1989 on religion Court.

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