

# THE MELTING POT OF LEGAL SYSTEMS IN INDONESIA (READING THE LEGAL POLITICS OF INDONESIAN ISLAMIC LAW)

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## ***Abstract***

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*Islamic law is integrated into but stands independently from Indonesia's national law. It is integrated in the sense that its substance has been absorbed into the legal systems through laws and other legal rulings and binds all Indonesian citizens. It is independent however, in the sense that its substance governs the internal conduct of Muslims. Islamic law has strengthened the Unitary State of the Republic of Indonesia, especially after the amendments of the 1945 Constitution, whose legal system is not only based on the idea of a rechtsstaat or rule of law, but is also based upon elements of religious laws.*

**Keywords:** legal system, Islamic law politics.

## ***Intisari***

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Hukum Islam dalam sistem hukum nasional Indonesia bersifat integratif dan mandiri. Integratif berarti materi atau substansi hukumnya masuk menjadi bagian produk peraturan perundang-undangan, bersifat mengikat (imperatif) untuk seluruh warga negara. Bersifat mandiri, manakala materi atau substansi hukumnya bersifat mengatur secara interen kalangan umat Islam. Hukum Islam menguatkan Negara Kesatuan Republik Indonesia terutama pasca amandamen UUD tahun 1945, sistem hukumnya tidak hanya berlandaskan pada prinsip negara hukum *rechtsstaat* ataupun *the rule of law*, tetapi juga berlandaskan pada unsur-unsur dari hukum agama.

**Kata Kunci:** sistem hukum, politik hukum Islam.

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## A. Introduction

Talking about the current legal system, especially in connection with “the melting pot of legal system”, clearly alludes to a discourse regarding legal politics. The study of legal politics has its ups and downs, and so has the discontent of legal theorists against the various approaches to law. This situation has persisted from the time of the ancient Greeks up to the post-modern era, due to changes of societal structure, industrialization, politics, economics and the development of software and science.<sup>1</sup> In raising the theme of this article, it is first necessary to present several understandings of the term ‘legal politics’ (*rechts politic*) from various legal and political experts: (1) According to Satjipto Rahardjo,<sup>2</sup> legal politics is the activity by which a society chooses a method and the method itself, to reach a certain social and legal goal in society; (2) According to Bintan R. Saragih,<sup>3</sup> legal politics may be analogized as two sides of a coin. This analogy intends to convey that the relationship between politics and law is an intimate one, so that discussions on the workings of a state or good governance, whether at the central or provincial level, then politics and law must receive first priority for discussion; (3) According to Soerjono Soekanto and Sri Mamudji in Imam Syaukani and A. Ahsin Thohari,<sup>4</sup> legal politics is part of the study of law in two aspects: legal politics as part of legal study and as part of the discourse on constitutional law. Legal politics is part of legal study due to its discussion on the history of legal order, legal systems (public law, private law, property law, family law, inheritance law and criminal law) and the technology of law. It is also a part of constitutional law since

legal politics forms the basis of policies for lawmakers and state government in determining a state’s laws; (4) According to Moh. Mahfud,<sup>5</sup> the definition of legal politics varies greatly, but by believing in a substantive similarity between the definitions available, legal politics may be understood as legal policies which will or have been taken by the government of Indonesia, encompassing; 1) the construction of laws, focused on the creation and renewal of laws against legal matters so that it fulfills current needs; 2) the implementation of legal rules which already exist, including the underlining of institutional functions and supervision of law enforcers. According to the above definition, Moh. Mahfud sees legal politics as encompassing the process of creation and implementation of laws, which could reveal the nature and future course of law; (5) According to Z. Asikin Kusumah Atmadja,<sup>6</sup> legal politics has the object and purpose of conducting proper legal rules (legislative function), Ministerial Decisions, Government Regulation, Presidential Decisions etc. within a given condition, situation and time. Therefore, legal politics determine whether renewal of laws may be conducted, in whole or in part, or whether the time has yet to come in the context of a certain situation, condition or facts in a given time. Legal politics also answer the question how *justitiabelen* (justice seekers) may be prepared as well as possible for such changes; (6) The domain of legal politics encompasses aspects relating to state institutions which construct legal politics, the position of legal politics and internal as well as external factors which influence the construction of the legal politics of a state.<sup>7</sup>

<sup>1</sup> Moh. Mahfud, “Arah Politik Hukum Indonesia Saat Ini Terkonsep dalam Prolegnas, Tidak Lagi Spontanitas Seperti Dulu”, <http://unila.ac.id/index.php/en/component/content/article/74-berit-depan/1818-arah-politik-hukum-indonesia-saat-ini-terkonsep-dalam-prolegnas-tidak-lagi-spontanitas-seperti-dulu>, accessed on 29 July 2012.

<sup>2</sup> Satjipto Rahardjo, 1996, *Ilmu Hukum*, 4<sup>th</sup> Edition, Citra Aditya Bakti, Bandung, p. 352.

<sup>3</sup> Bintan, R. Saragih, 2006, *Politik Hukum*, Utomo, Bandung, p. 1.

<sup>4</sup> Imam Syaukani, et al., 2004, *Dasar-Dasar Politik Hukum*, Raja Grafindo Persada, Jakarta, pp. 33-45.

<sup>5</sup> Moh. Mahfud, 1998, *Politik Hukum di Indonesia*, Pustaka LP3ES, Indonesia, p. 9.

<sup>6</sup> Z. Asikin Kusumah Atmadja, “Politik Hukum Nasional” in Abd. Hakim G. Nusantara, et al., 1980, *Beberapa Pemikiran Pembangunan Hukum di Indonesia*, Alumni, Bandung, pp. 15-16.

<sup>7</sup> Moh. Mahfud, *Op.cit.*, p. 5.

After considering the previous opinions, it could be concluded that a discourse of legal politics regarding the legal system of a *rechtsstaat* could be understood as follows: **Firstly**, legal politics discusses the present law or legal system (*ius constitutum*), whether or not it should or could be upheld, how the law envisioned (*ius constituendum/de iure constituendo*) could be achieved and what must be realized from that envisioned law, whether as a whole or in part, its timing, whether reforms are necessary, or whether change needs to encompass the institutional or structural aspects of law, its substance or its culture. **Secondly**, legal politics at its heart is the activity of choosing which legal norms will apply in a given state with a given legal system. **Thirdly**, legal politics is a part of constitutional law. According to H.D. van Wijk as quoted by Sri Soemantri, “[...] in relation to a legal system, constitutional law is the foundation, the base or the mouth by which all other branches of laws stem from”.<sup>8</sup> Van Wijk and le Roy both place constitutional law as the central law for the implementation of state laws.<sup>9</sup> It is here that legal politics becomes very important to consider as it is relevant to the mechanism of state bodies authorized to determine a state’s legal politics. **Fourthly**, legal politics follows the principle of double movement,<sup>10</sup> which besides being a framework for state institutions to draft legal policies, is also being utilized to critically analyze legal products made by those policies. **Fifthly**, the domain of legal politics encompasses aspects relating to state institutions which construct legal politics, the position of legal politics and those internal and external factors which influence the construction of the legal politics of a state.<sup>11</sup>

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<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

## B. Discussion

### 1. The National Legislation Program (*Prolegnas*) and the Constitutional Court (MK)

The National Legislation Program and the Constitutional Court both constitute as essential elements of the state, which exercise a very vital function in the betterment of the legal system. As explained by Moh. Mahfud,<sup>12</sup> in contemporary situation, legal politics in Indonesia starts to display a certain orderly shape — a phenomenon which is partly realised under the Prolegnas. The Constitutional Court can be metaphorically likened to a strong fortress where the validity of parliamentary acts or their equivalence is tested and examined, both substantially and procedurally.

With the introduction of the Prolegnas, “[t]he portrait of our legal politics can clearly be seen, as the contents of Prolegnas gives a snapshot of Indonesian legal politics, as determined by the incumbent political powers and government. This means that all future policies will have been determined and formed in Prolegnas. For example, with regards to local governance up to 2014, it has been determined that five special regions will exist in Indonesia: Jakarta, Yogyakarta, Aceh, Bali and Papua.”<sup>13</sup> Additionally, Prolegnas is used to provide mechanisms in determining the legal products needed to actualize the state’s goal, namely to improve public welfare that is just and prosperous as a form of the state’s aspirations enshrined within the Preamble of the 1945 Constitution. It is furthermore to be understood that the Prolegnas<sup>14</sup> has a function to serve as a bridge on which we will progress towards the achievement of the state’s goal.

It is perhaps equally true to say that the Prolegnas is a technique of legal politics, because through the reading of Prolegnas, we

can understand the procedures and mechanism behind the issuance of laws. For example, table of contents and drafts or plans submitted to Prolegnas must receive approval from the President, who will then coordinate with the House of Representatives (DPR) through the Legislative Body (Baleg). Then, if a Ministry would like to propose a draft act (RUU), the draft must be coordinated with the Ministry of Law and Human Rights, so it can be brought in line with Prolegnas. If such steps in legislation are done, it is hoped that the process to create legal products could be done systematically and harmoniously.

Prior to the introduction of Prolegnas,<sup>15</sup> statute-making process in Indonesia was conducted spontaneously and abruptly in response to the current needs, but such actions are no longer possible. In the quest of realising a more orderly system of legal instruments, Prolegnas seeks to avoid such process to avoid contradictory regulations. Flaws in the implementation of Prolegnas can be remedied by judicial review at the Constitutional Court, which consists of material review against the substantive content of the act and formal review against the procedures of statute-making process.

## **2. Indonesia as a *Rechtsstaat* after the Amendments of the 1945 Constitution**

Article 1(3) of the amended 1945 Constitution states that, "The state of Indonesia shall be a state based on law", without being followed by the terms *rechtsstaat* or rule of law afterwards. According to Moh. Mahfud, the concept of the legal state following the constitutional amendments follows principles both from the concepts of *rechtsstaat* and rule of law, even from other legal systems being the norms of religious law.<sup>16</sup> This view invokes an understanding where the concept of Indonesia as a 'state based on law' should not only emphasize on the principles of legal certainty (rule of law) so that truth should be ascertained from formal and procedural

perspectives, or on the wordings of regulation but also on the fulfilment of the value of truth based on the principle of justice (*rechtsstaat*) encapsulating spiritual norms from religious law.

The national legal system that the Constitution envisions is a system able to accommodate a plurality of law, such as seen in the form of the systems of European, religious (Islamic) and customary laws. However, with the existing the plurality of law, though positive in some respect, also poses a challenge in the development of law in Indonesia into a national legal system. It is positive in some respect as plurality gives a special characteristic and a fertile environment to develop Indonesia's envisioned national laws as well as the materials to foster development, such is due to the three systems or sub-systems of law being donors of legal materials without end. The challenge however lies in the development and dynamics of the three systems of laws which will, in itself, become a problem of its own in the formation of the aspired national legal system. Such challenges exist as the development and dynamic of the three systems of law exists due to the changing society living under the legal systems.

An observation of the reality in the system of laws plurality gives that the state's authority in law must be able to guard the ideological and territorial integrity of Indonesia and must be able to protect its entire people. Therefore, the state must prevent legal products which may foster dissent, including discriminative laws based on primordial connections. National law must be constructed democratically and in accordance with nomocracy, in the sense that the people's aspirations and participation could be fulfilled through fair, transparent and accountable mechanisms. National law must also be able to create social justice in the sense of giving special protection for those who are weak when face with the stronger elements whether domestic or

<sup>15</sup> *Ibid.*

<sup>16</sup> Moh. Mahfud, 2011, *Perdebatan Hukum Tata Negara Pasca Amandamen Konstitusi*, Raja Grafindo Persada, Jakarta, p. 52.

foreign. Furthermore, national law must guarantee religious freedom with full tolerance between believers. The state may only regulate religious life so the extent of protecting public order to avoid conflict and facilitate all individuals to be able to carry out their beliefs properly, without causing a disturbance from or disturbing others.

### 3. The Pattern of Legal Development towards a National Legal System

Socioculturally, Indonesia is plural in the broad meaning of the term, as shown in the existence of the number of systems of laws within it. With this, according to the Framework for the National Legal System (PP-KSHN) and the Long Term Legal Development Plan (RPHJP),<sup>17</sup> it is stated that “the national legal system is a system made up of four components or subsystems which becomes the focal point in its development, being: 1) Legal Culture, 2) Legal Substance, 3) the Legal Institutions, Organizations, Apparatus and Mechanism and 4) the Legal Infrastructure and Superstructure.” These aspects within the legal system are known as the elements of a legal system, or as espoused by L.M. Friedman in his legal theory, encompasses three elements of a legal system, being the legal structure, legal substance and legal culture.<sup>18</sup>

The development towards a national legal system could be done through three choices:<sup>19</sup> **Firstly**, through conservation, where the present legal system must be preserved even though it might be incompatible, so long as a new legal order has not been created to prevent legal vacuum. **Secondly**, through reform, where there needs to be additions to perfect the current legal system in several aspects which are no longer compatible to the present condition. **Thirdly**,

through creation, where new legislation are created to respond to the demands of the changing conditions.

Through the three approaches above, it is hoped that the national legal system could become:<sup>20</sup> (a) Realized, so that the Dutch legal materials have been fully transformed into a national legal system. (b) Functional, so that the implementation, enforcement and legal services conducted by the entire legal apparatus is conducted properly. (c) Embedded, so that the national legal order has been accepted in and by members of the community.

The construction of the national legal system also needs to accommodate the aspirations of society, religious law and customary law,<sup>21</sup> even when in reality this is far from easy considering the myriad legal problems currently faced by this nation. According to Mochtar Kusumaatmadja in Rasjidi and Wyasa Putra,<sup>22</sup> the constraints lies in the social diversity and the diversity in customary laws. Additionally, the plurality of laws also lies in the existence of colonial laws which values are not always compatible with local norms. Furthermore, there also exists difficulties in the society in facing and accepting changes towards their way of life due to the strength of customary laws.

Besides the above factors, the low legal awareness of society, weak law enforcement and the fostering of various legal violations by state actors (legislative, executive and judicative bodies) have also added to compound Indonesia’s problems.

### 4. Islamic Law in the Indonesian Legal System

Islamic Law<sup>23</sup> derives from the Islamic system of belief. The term Islam itself connotes the meaning of submission, where the person

<sup>17</sup> Pola Pikir dan Kerangka Sistem Hukum Nasional (PP-KSHN) serta Rencana Pembangunan Hukum Jangka Panjang (RPHJP), 1995/1996, BPHN Jakarta, p. 6.

<sup>18</sup> Lawrence M. Friedman, 2001, *American Law An Introdution (Second Edition)*, translated into Bahasa Indonesia by Wisnu Basuki, “Hukum Amerika Sebuah Pengantar, Tata Nusa, Jakarta, pp. 7-11. See also Lawrence M. Friedman, 2009, *Sistem Hukum Perspektif Ilmu Sosial (The Legal System: A Social Perspective)*, Nusamedia, Bandung, pp. 12-19.

<sup>19</sup> Otje Salman, 1993, *Kesadaran Hukum Masyarakat tentang Hukum Waris*, Alumni, Bandung, pp. 2-3.

<sup>20</sup> 2000-2004 National Development Program Act (Act No. 25 of 2000).

<sup>21</sup> *Ibid.*

<sup>22</sup> Rasyidi, et al., 1993, *Hukum Sebagai Suatu Sistem Nilai*, Remaja Rosda Karya, Bandung, p. 129.

<sup>23</sup> Ratno Lukito, 2013, *Tradisi Hukum Indonesia*, IMR Press, Cianjur, p. 48.



submitting itself to the religion of Islam is called a Muslim, a person who submits itself to God (Allah). For a Muslim, religion and law has an inseparable connection seeing as Muslims are obliged to abide by all the laws given by Allah in the Islamic revelations.

From the historical understanding of the origin of Islam in Indonesia (Nusantara), Indonesian Muslims have always viewed the religion of Islam as a sacred law. This would further implicate in the implementation of the laws by an Indonesian Muslim, where on one hand they try to implement the Islamic laws (derived from Islamic teaching) and integrate this with Indonesia's wider corpus of law.<sup>24</sup> From this, it is apparent that Islamic law in Indonesia is the result of efforts to insert Islamic law teachings in a newer context, namely the context of Indonesia, where the situation and conditions are very different to the situations and conditions where Islamic Law itself have originally derived from. Thus, Islamic Law in the Muslim society in Indonesia holds a important role in their lives, namely to solve the disputes amongst them.

Legal history tells us that Islamic law has stood independently for quite some time. In the *Reglement op het beleid Regeering van Nederlanhschi* (RR) in the Dutch *Staatsblad* 1885 No. 2 Article 75(2), it is stated that Indonesian judges should implement religious laws and customs of the Indonesian people. Article 78(2) of the RR further states that if there arises a civil dispute between Indonesians or equivalent to Indonesians, then they must comply to decisions of religious judges or the head of their communities in accordance with religious laws or applicable customs.<sup>25</sup> It is these provisions which invokes debate on the existence of Islamic Law in Indonesia, as it is hard to not recognize that Islamic legal has been entrenched in

Indonesia for quite some time. This recognition does not come solely from the Indonesian society, even colonies and law scholars since the Dutch colonization period have recognized the existence of Islamic Law in Indonesia. L.W.C. van den Berg, a western legal scholar who held important positions in the Dutch colonization period serving as an advisor on Eastern language and Islamic Law, had given a theory on Islamic and Adat Law called theory "*receptio in complexu*", showing further recognition of Islamic Law in Indonesia.<sup>26</sup>

The essence from the theory above is that the law applicable to a native Indonesian is Islamic law, as the law applicable to a native should follow the laws in which their religion have set out. This would purport that a person must faithfully abide by the laws of the religion he/she chooses to follow. According to this theory, if a community chooses to follow a certain religion, then the Adat Law applicable to this community is the laws of their religion. Conditions that are contradictory from the law of religion are regarded as exceptions from the religious laws which is *in complex gerecipeerd*. Van den Berg's theory was further recognized by the Dutch government in Indonesia,<sup>27</sup> where they sought to recognize the force of law and applicability of Islamic Law in Indonesia. This support by the Dutch government was shown within *Staatsblad* 1992 No. 152 on the Formation of Religious Courts in Java and Madura.

Subsequently, history shows that Van den Berg's theory received many challenges and critiques from legal scholars in that era. Christian Snouck Hurgronje, an expert on Islamic Law and advisor to the Dutch government in Indonesia on Islamic Law refused to accept van den Berg's theory by offering an alternative theory called theory *receptie*.<sup>28</sup> Snouck, in his attempt to refute van den Berg's theory, resulted in a theory which

<sup>24</sup> *Ibid.*, p. 84.

<sup>25</sup> Syahrinal, 2004, *Hukum Adat dan Hukum Islam di Indonesia*, Yayasan Nadiya, Lhokseumawe, pp. 159-160.

<sup>26</sup> Soerojo Wignjodipoero, 1990, *Pengantar dan Asas-Asas Hukum Adat*, Haji Masagung, Jakarta, p. 29.

<sup>27</sup> A. Qodri Azizy, 2002, *Eklektisme Hukum Nasional, Kompetisi Antara Hukum Islam dan Hukum Umum*, Gama Media, Yogyakarta, p. 154.

<sup>28</sup> *Ibid.*

suggests that there exists an unharmonious relationship between Adat Law and Islamic Law. This then implicated in a political decision made by the colonial government to remove Islamic Law from the Dutch legal system in Indonesia. The decision caused the Indonesian natives to dislike the Dutch colonist even more, where in 1950, provoked by Hazairin, sought to refute Snouck's theory by calling it the theory of the Devil.<sup>29</sup>

Since the emergence of Hazairin's theory in response towards Snouck's *receptie* theory, people became much more driven to support the use of Islamic Law in the national law. This movement was initially started by Hazairin's students in Universitas Indonesia where a noted example, Sajuti Thalib,<sup>30</sup> formulated the *receptive a contrario* theory. This theory gives that Adat Law would only be applicable if it was firstly accepted by Islamic Law. The positive developments in the recognition of Islamic law's existence in Indonesia<sup>31</sup> resulted in the emergence of a number of theories in regards to the existence of Islamic Law in Indonesia besides the aforementioned. These legal theories, though some refusing the idea of Islamic Law as a living law followed by the majority of people, shows one particular characteristic of Islamic Law as a law that has continuously grown in Indonesia, and socioculturally (anthropology) held firmly and practiced by a majority of Indonesian natives.

It was also found that the applicability of Islamic Law in Indonesia comes into reality not only in the Islands of Java and Madura (as enumerated within Staatsblad 1882 No. 152 on the Formation of Religious Courts in Java and Madura) but has also started to develop in other regions in the year 1957 with the issuance of Government Regulation No. 45 on the Formation on Religious/Syariah Courts outside of Java and Madura. The implementation of this regulation

provided Religious/Syariah Courts as a first-instance court and Regional Religious/Syariah Courts as the second-instance court/court of appeal (1957 Indonesian State Gazette No. 99) for all Indonesian provinces outside the territory of Java, Madura, Kalimantan Timur and Kalimantan Selatan. Furthermore, in this particular Government Regulation, it was explicitly stipulated that the applicability of Islamic law is "pursuant to the living law decided by Islamic Law."<sup>32</sup>

Based on the explanations above, it can be understood that the Islamic law existence in this country derives from the realization and belief held by a majority of Indonesians. Therefore, any development or reform of national law must also encompass development of Islamic law. In all our efforts to reform our legal system or combating modern crimes, we cannot afford to dismiss Islamic law and its pivotal role in developing a national legal system which will reign supreme in our governance. Various Indonesian legislations have adopted Islamic law into national laws. The existence of Religious Courts as a relic of the use of Islamic law since the Dutch colonial era serves as historic evidence of the embodiment of Islamic law. Seen from an empirical-juridical perspective, the practice of Islamic law in the community has also been growing and has expanded to sectors which previously was not regulated by Islamic law. Sharia economics and banking, local regulations on alms (*zakat*) and several religious decrees (*qanun*) in Aceh serve as example.

In other regions in Indonesia, legal products in relation to the recognition of Islamic Law in Indonesia could also be found in the form of Regional Regulations. These regulations that are inherently Islam could be found, among others, in regulations on *zakat*, prohibition on alcohol, and the use of head scarf for women. This has also spread to the field of education, so that awareness

<sup>29</sup> *Ibid.*, p. 158.

<sup>30</sup> *Ibid.*, p. 159.

<sup>31</sup> Teori otoritas penataan hukum dan teori eksistensi. See Syahrinal, *Op.cit.*, p. 160-187.

<sup>32</sup> A. Qodri Azizy, *Op.cit.*, p. 158.

and expertise on Islamic law has also expanded with time. Such development of Islamic Law shows that Islamic Law is in line with the culture and social reality of the society. Because of this, if politics in the development of the national legal system adopts the norms of Islamic Law, it is believed that this would not create problems as Islamic Law acts a living law in the midst of the plurality of Indonesia.

The application of Islamic Law in specific fields could now be said to have its own standing. In Islamic civil law –sharia economics– for example, several regulations relating to Muslim economics have been issued: The Alms Act (Act No. 38 of 1999), the Hajj Act (Act No. 13 of 2008), and the Endowment Act (Act No. 41 of 2004). Even since 1992 Act No. 7 of 1992 on Banking as amended by Act No. 10 of 1998 has accommodated the existence of Muamalat Banks (BMT and Sharia Banks), acknowledging the existence of sharia based banks as well as conventional banks. This has been followed by the revised Act No. 10 of 1998, Government Regulation No. 72 of 1992 on Profit Sharing Banks, and finally by the issuance of Act No. 21 of 2008 on Sharia Banking. Additionally, with the issuance of Act No. 5 of 1960 on Basic Regulations on Agrarian Principles and Act No. 1 of 1974 on Marriage, land and marriage law in Indonesia provides the applicability of Islamic law within it.

The sociological reality shows that Muslims have increasingly disposed to the application of Islamic law. This means that there exists a conscience within Muslims to amend the current laws and legal system by adopting materials from Islamic law. This fact is supported by at least two surveys which show the high or growing disposition of the Muslim society to apply Islamic law in certain branches of law as well as their desire to return to the Jakarta Charter (Piagam Jakarta).<sup>33</sup> The first survey, conducted

by a senior researcher named Nurrohman from UIN Sunan Gunung Jati Bandung,<sup>34</sup> by taking samples from various Islamic boarding schools in West Java. The findings show that 78,1% of all respondents deem it necessary to advocate the Jakarta Charter as Indonesia's constitutions, while 98,1% of respondents consider that regional regulations upholding sharia must be supported, because they (91,5%) believe that Indonesia will become just and prosperous with the enactment of Sharia.

The second survey is conducted by CSRC UIN Syarif Hidayatullah Jakarta,<sup>35</sup> by taking samples from various mosque congregations in the Special District of Jakarta. In this survey, 45% believe Muslims are obliged to support the Jakarta Charter, while 28% of respondents want sharia norms and legislation to become the official rule in Indonesia. 31% of Respondents want Indonesia to enact Sharia based criminal law. Both surveys show that Indonesians hope for the enactment of various legal policies (Acts, Government Regulations in lieu of Laws, Government Regulations, Regional Regulations etc.) which are infused with religious values for the sake of humanity. This includes the tendency for them to come back to Piagam Jakarta, where such action is triggered by the increase of crimes and violations in the government and society, seen in the prevalent cases of corruption, fidelity, and abusive use of narcotics. They genuinely believe that the enforcement of syariah/Islamic values (law) can solve the aforementioned social problems. Islamic values is furthermore trusted to protect the society in its moral decadence.

In achieving these aspirations, legal politics is an 'ace' for Muslims, whether by those in Islamic political parties or outside of it, as well as high ranking Muslim bureaucrats and judges at all stages and types of courts. The problem is how to infuse Islamic law into our legal system

<sup>33</sup> Nasaruddin Umar, "Umat Menengok Piagam Jakarta", *Harian Fajar*, 5 August 2012, p. 26.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*



within the framework of Indonesia's legal politics or how it may be decentralized within the framework of regional autonomy.

To answer the following questions, it is necessary to argue the case constitutionally and in reality. Article 18(5) of the second amendment of the 1945 Constitution states that "The regional government will function with the widest autonomy, except in governmental affairs regulated by laws to be determined as the business of the Central Government." Article 18(6) of the 1945 Constitution goes on to emphasize that "the regional government has the authority to issue regional regulations and other regulations to conduct their autonomy and in support of the Central Government". Furthermore, Article 18A(1) of the 1945 Constitution states that "the relations of authority between the central government and provincial, regency or municipal governments or between the provincial and regency and municipal governments, are regulated by considering the regional specialty and diversity." 18A(2) goes on to further clarify that "the State acknowledges and respects customary law communities and their traditional rights, so long as they still exist and are in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, regulated in laws."

Based on the previous provisions, it could be understood that the 1945 Constitution acknowledges and respects legal plurality in the community; even though the national court system is structured in the framework of national laws, the substance of laws which could be used by judges could be developed in wide diversity, including religious principles, so long as it does not jeopardize the existence of the Unitary State of the Republic of Indonesia. It is true, that according to *lex superior derogat lex inferiori* then legal norms in a lower hierarchy cannot contradict higher norms. However, *lex specialis derogat lex generalis* also applies, which means the specific legislation could override general regulations.

Islamic law holds importance to add a new horizon to the national legal system, of whom many aspects are only still envisioned. Thus the question lies on whether a choice exists whether to integrate Islamic laws into legal products to bind all citizens or should it stand as a separate legal product which applies solely to the muslim society.

It has been regularly expressed that in the historic trail in which the Indonesian legal system is developed, socio-legally, Islamic law has always been integrated as a norm in the society's lives, particularly in the field of family law. This can be seen in the practice of marriage and inheritance laws. It can be said, that religious law and adat law in these particular areas of laws applies in tandem and further strengthens each other. In marriage for example, the covenant of marriage is done in accordance with the laws of the religion whilst the wedding reception is carried out according to the customs and cultures existing in that particular society. This also applies in inheritance law, where joint assests of the deceased will be divided in accordance to the religious law, whilst assets that are communally owned (*harta pusaka*) and passed down through generations will be divided in accordance with the customs (*adat*) that they follow. For the future, perhaps an inheritance law would be enacted, bilateral in nature, which will consider religious aspects besides local values.

If Islamic law is to be contained in independent legal products, then its contents must only apply internally to its believers and its regulations should be service-oriented, in that it cannot be forced upon believers. For example, Presidential Instruction No. 1 of 1991 on the Compilation of Islamic Law, encompassing matters on marriage, inheritance and endowment, applying internally for Muslims. This is the case for other similar legislations such as the aforementioned Hajj Act and Alms Act. On the other hand, the use of Islamic criminal law (*jinayah*) must be dealt with carefully as the convicted criminals (*jarimah*)

will be faced with stoning (*rajam*), whipping and equal retaliation (*qishas*), which have been implemented in embryonic forms in Aceh based on the Nanggroe Aceh Darussalam Governance Act (Act No. 11 of 2006) jo. Act No. 18 of 2001 on the Special Regional Autonomy of Aceh jo. Nanggroe Aceh Darussalam Qanun No. 10 of 2002 on Sharia Court System. One of the basis for considerations usually espoused for the use of positive Islamic law is that the majority of Indonesians are Muslims. We cannot be hypocritical of the position Islamic law plays in Indonesia's legal system, except if we are in collusion with *C. v. Vollen Hoven* and *Snouck Hurgronje*, as in their times Islamic law was expelled altogether from the Dutch colonial legal system.

According to Moh. Mahfud,<sup>36</sup> the struggle for some Muslims to enact Islamic law as the foundation of the state and as law has long been conducted, and has led to a compromise in the form of Pancasila, which has become the *modus vivendi* (agreement) of Indonesians which may be difficult and possibly impossible to be replaced. Therefore, in the context of creating a national law under Pancasila, Islamic law (*fiqh*) becomes a source of national law besides other sources, being western laws and customary laws.

Moh. Mahfud opines that,<sup>37</sup> even though Islamic law has become a source of national law together with other laws (Western and Customary), it does not mean that Islamic law will become a formal law with its own exclusive form, except for those laws only meant as a recourse for service (not for imperative use) for acts which already exists in daily life and is governing in nature.

Based on the above explanations, it may be understood that Islamic law as a source of law must be considered as a source of material law in the sense that its substance may be used for formal sources of law, which are binding and hierarchically enacted. Therefore, substantial values of

Islamic teachings must be fought for, as they cannot be denied by those outside of Islam. Values such as justice, honesty, democracy, good leadership, human rights, guaranteeing unity, security and civilization; these values are compatible for all people, and are universal.

As values of Islamic teachings, these values may be made into sources of law in coordination with the other legal sources (Western and Customary) to create national laws. According to Moh. Mahfud,<sup>38</sup> this is what is meant by Islamic Law in accordance with Pancasila, and in line with Indonesian legal politics.

### C. Conclusion

A legal system contains within it the elements of legal structure (legal apparatus, institutions, organizations and lawmaking mechanism, as well as legal infrastructure and superstructure), legal substance and legal culture. The development of the Indonesian legal system encompasses the conservation, reform and creation of law. Legal politics is the activity of choosing which laws (legal policies) are applicable in the course of state affairs. In constitutional discourse regarding the 1945 Constitution, Islamic law is an inseparable part of the Indonesian legal system, and is a source of law complementing the other sources (Western and Customary). In the minds of most Indonesians who are familiar with Islamic values, their dispositions allow them to easily give support for norms which are in accordance with Sharia. If legal norms which are enacted come from outside this social understanding, its implementation would surely be hindered. A theoretical and empirical development towards the adoption of Islamic law into the national legal system has become wider and more open, rendering it the material source of law. Politically, it may be realized in the formation of various legal products in accordance with the available legal mechanisms.

<sup>36</sup> Moh. Mahfud, *Op.cit.*, p. 247.

<sup>37</sup> *Ibid.*, p. 245.

<sup>38</sup> *Ibid.*, p. 248.

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