ISLAMIC LAW IN THE PANCASILA STATE

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Abstrak: ***Hukum Islam di Negara Pancasila.*** Menurut al-Mâwardî dan Ibn Taymiyyah, konsep asal penerapan hukum Islam terletak pada kemestian adanya negara Islam. Tetapi, kenyataannya konsep negara Islam itu sendiri bervariasi dari waktu ke waktu. Maka, konsep yang final dan nyata tidaklah jelas wujudnya. Dengan kata lain, dapat dikatakan bahwa dalam praktiknya hukum Islam dapat diterapkan di manapun selaras dengan konteks sosio-kultural serta perkembangan dan kemajuan. Republik Indonesia adalah contoh yang baik bagaimana hukum Islam dapat diterapkan. Meski negara secara esensial tetap dalam kondisi sekuler, ide tentang penerapan syariah tidaklah secara ekstrem dilarang. Yang perlu dicatat adalah ide tersebut haruslah diperdebatkan dalam ranah publik, sehingga secara alamiah diketahui bahwa negara Pancasila memiliki batasnya sendiri untuk dapat mengakomodasi syariah di satu pihak, dan di pihak lain syariah sendiri merasakan keperluan adanya batasan tersebut dengan memperhatikan konteks Indonesia.

Kata Kunci: Pancasila, *khilâfah*, sekuler, perdebatan

Abstract: ***Islamic Law in the Pancasila State.*** According to al-Mâwardî and Ibn Taymiyyah the original concept of applying Islamic law lies on the existence of Islamic state. But, the concept of the Islamic state varies from time to time. Thus, the final and real concept always remains unclear. It can be said that in practical sense, Islamic law can be implemented anywhere in accordance with the socio-cultural context and its progress and development. The Republic of Indonesia is a good example of how shariah can be applied. Despite the State remaining relatively secular, in essence, the idea of the application of shariah is not strictly excluded. Nevertheless, these concepts should be debated in public until it is widely known that the Pancasila state is limited in accommodating shariah on the one hand and how shariah can be practised freely by the Indonesian Islamic society on the other.

Keywords: Pancasila, *khilâfah*, secular, debate

Introduction

The discussion of the role of religion in the Pancasila State, the central function of Pancasila, the Constitution of 1945 as a social and national consensus, and their compatibility with Islam as well as the position of Islamic law within the framework of secular and national law is a never ending debate. It involves historical tensions between Islam and the ideology of nationalism, the continuing debate on the basis of the Indonesian state and the following competing interpretation of the function and role of Pancasila as the source and framework in the aplication of national law. These interpretations and frameworks are viewed differently by people who have an Islamic orientation on the one hand and those come from purely secular view point on the other.

This article will review those points. It starts from the root of Islamic political thought on the supremacy of shariah, debate on the basis of Indonesian state, the contextualization and reinterpretation of Islamic legal principles of state and ends with options and future possibilities of mutual harmony.

The Issue of *Khilâfah* and Nation-State

In the post-colonial era, the emergence of the nation-state concept in early twentieth century caused the Islamic world to reinforce and nuture the concept of *Khilâfah*. There are at least two main reasons of such phenomenon: (a) dogmatic and historical arguments of internally within Islamic society itself; and (b) the external reasons which are more of a situational response to the challenges of socio-political environments faced by the Muslim community in general.

Regarding the internal dogmatic and historical roots of Islam, there are at least four reasons for discussion**.** First, compared with patterns of thought of non-Semitic prophets, Semitic prophets' thought patterns were focused on efforts to accentuate and actualize the prophetic mission to the reality of history (history-oriented accentuation). This orientation in turn inspires

a constant effort to bring the ideals of religious social ideals into various places and time of the real history of humanity.[1] One of the very effective tools for the process of upholding the ideal goal is the legal tool.[2]

Second, similar to the categorisation of Moses and David, Prophet Muham-mad was categorized as 'armed Prophet'. In geopolitical terms, the expansion and penetration of Islam took place vey rapidly. Within about 30 years after Islam was first introduced by the Prophet Muhammad in Mecca, and then Medina shortly afterwards, almost the entire Arabian Peninsula had been subjected under the banner of Islam.[3]

Arguably such rapid expansion resulted in a variety of risks, socio-political and cultural tensions. To minimize those risks and also to build a great, strong and sturdy empire, the development of a number of socio-cultural mechanisms were necessary to enable the standardization of normative-constitutional references and the homogenization of an imperial jurisdiction. These objectives were accomplished quickly once a vocabulary and nomenclature of law was introduced.

Third, not long after the death of Prophet Muhammad there were bloody conflicts and internal frictions among the Companions. This friction culminated with the emergence of political strife between the faction of Companion 'Utsmân ibn 'Affân (died/killed yr. 35 *Hijriyah*/656 M) and the faction of Companion of 'Alî ibn Abî Thâlib (killed yr. 40 H/661).

In the early stages, the conflict was essentially secular with alliances and political competition based on kinship lines and then sharpened by geographic polarization. Not long ater the conlict had started important religious symbols started to emerge. During this period, doctrines and the systematization of Islamic legal thought patterns formed as a result of missions that picked and chose those who could be called 'true Muslims', leaving the rest for classification as wrong Muslims (in-out-grouping process).

Fourth, it was inevitable that a series of verses in the Quran itself revealed (*qath'î al-wurûd wa al-dalâlah*) those missions to bring about change, not least changes in the field of law. Although the legal verses contained in the Quran only numbered around 500 verses, the style of language and juridical implications expressed a normative substances in candid, firm and even axiomatic manner. In other words, it is almost as if those verses were to assert the existence of legal certainty.[4]

Indications of the juridical imperative within the verses also can be interpreted positively. That is, the Quran carries messages that are fundamental to legal constructs, such as: upholding the rule of law (legal Supremacy); all people are equal before the law (equality before the law), ethnocentric and tribal relative bonds are subjected to principles of legal certainty; and there is no crime unless there is a sanction and punishment.[5]

That said, it doesn't seem surprising that the fu-ture direction is the victory of the Islamic legalists: Islamic thoughts about morality, power systems and procedures are defined within the boundaries of Islamic law. In the *Sunnî* tradition, these thoughts are represented by two ideas of governance and moral authority of Islam; the thoughts of al-Mâwardî (975-1058) in his work, namely *al-Ahkâm al-Sulthâniyyah,* and ideas of Ibn Taymiyyah (1263-1328) in his work, namely *al- Siyâsah al-Syar'iyyah*.[6]

In summary, both assert the supremacy of Islamic law over political leadership. The political leadership (*Caliphate/Imamate*) was implemented to replace and maintain the prophetic function of religion (*al-khalifah mawdhû'ah li harâsuhal al-dîn*.[7] As such, political leadership's role is to uphld the principles of the shariah.

Entering into the curent era of the nation-state, strong interrelationshps and metamorphosis between political power and shariah is still ongoing. The emergence of the terms *Dâr al-Islâm* (Islamic state), *Dâr al-Harb* (state of war), and *Dâr al-Salâm* (peaceful state) for example, are direct or indirect manifestation s of the symbolic continuity of thoughts and works realised by al-Mâwardî and Ibn Taymiyyah.

By the early twentieth century and in line with the weakening of the Islamic intellectualism ethos and the strengthening of penetration of cultural, economic and political challenges brought about by new European trade missions and imperialism, the Ottoman empire which carried the spirit of pan-Islamism (caliphate)

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[1] Marshall G.S. Hodgson, *The Venture of Islam*, (Chicago: The University of Chicago Press, 1974), Vol. 1, p. 117-118; Nurcholish Madjid, *Islam: Doktrin dan Peradaban*, (Jakarta: Paramadina, 2000).

[2] Compare, Lawrence M. Friedmann, *The Legal System: A Social Science Perspective*, (New York: Russel Sage Foundation, 1975); Compare, Lawrence M. Friedmann, *Law and Society*, (New Jersey: Prentice Hall, 1977); W. Friedmann, *Legal Theory*, (London: Steven & Sons, 1953).

[3] Ahmad Hasan, *The Early Development of Islamic Jurisprudence*, (Islamabad: Islamic Research Institute, 1988), h. 5: Joseph Schacht, *The Origin of Muhammadan Jurisprudence*, (Oxford: Clarendon Press, 1953), p. 15.

[4] Wael B. Hallaq, *A History of Islamic Legal Theories*, (McGill Institute for Islamic Studies, 1998), p. 5-15.

[5] Wael, B. Hallaq, *A History of Islamic Legal Theories*, h. 5-15.

[6] See, Montgomerry Watt, *Islamic Political Thought*, (Edinburg University Press, 1980); Bassam Tibi, *Ancaman Fundamentalisme: Rajutan Islam Politik dan Kekacauan Dunia Baru*, (Yogyakarta: Tiara Wacana), p. 3-7; 20-24.

[7] Muhammad al-Zuhaylî, *Târîkh al-Qadhâ fi al-Islâm*, (Damascus, Dâr al-Fikr al-Mu'âshir, 1999), p. 423-436; Colin Imber, *Ebus Suud: The Islamic Legal Tradition*, (Edinburg University Press, 1997), p. 3-64; Subhî Mahmassanî, *Falsafah al-Tasyri fi al-Islam*, transl. Farhat J. Ziadeh, (Leiden: EJ.Brill, 1961), p. 39-46.

collapsed and its decline was a turning point (in 1922 M).[8]

The collapse of the Islamic caliphate system and the extreme difficulty in resurrecting such a system - despite various attempts - immediately raises two issues: (a) from geopolitical perspective, the collapse of the Islamic Ottoman caliphate system was the beginning of the caliphate antithesis under the spirit of geographical patriotism concepts within Islamic society itself; (b) this geographical patriotism gradually transformed into a spirit of nationalism and national sovereignty vis-a-vis the sovereignty of foreign countries (colonial). Under the theme of nationalism, the Islamic community will resort to the symbols, the contract and a new consensus within the nation-state as the antithesis of religion, or as the antithesis of nation-states which are bound by rigid Islamic law.

Under the nation-state ties, communities inevitably prefer define themselves by a sense of solidarity or with a sense of national communalism and sacrifice as part of the geographical patriotism bond. In a nation-state, the symbols of primordial ethno-religion ways are restricted to the level of life that are private and are not allowed to manifest in the public domain (public sphere).[9]

In the real-praxis of the Islamic community after the caliphate system, this situation has serious implications[10]. Among those implications is the growing marginalization of the actualization of shariah in public life, the more alienated feeling of communal religiousness and sense of lacking collective historical memory about victories of the past great dynasties of shariah (Islamic empire). In fact, such psycho-historical experiences have made the community of Islam feel giddy in the situation and this has urged the necessity of finding a new identity. This new identity results in community members acting in defensive, apologetic and more assertive ways, particularly related to the symbols, glory, and the continuity of the Islamic empire.[11]

Islam versus Colonialism: Islamic Law as a Symbol of Native Struggle

In the context of the shariah implementation in Indonesia, there are two relevant periods during the Dutch colonial period. First, the period prior to 1800, whereby the Indonesian archipelago was heavily influenced by the colonial power trading cartel named *Vereenigde Oostindische Compagnie* (VOC) or the Dutch East India Company. Second, the period of military-political power of the Dutch government after 1800.

In the first period, the VOC's political stance toward the shariah exhibited these characteristics: First, Dutch tolerance of Muslim faith resulted in a relatively large space for the practices to thrive amongst several kingdoms of the archipelago. Second, the Dutch were slowly trying to understand the precise the nature of Islamic law and customary law. Third, the agenda and process of legal westernization. Above all, the implementation or influence of shariah was undertaenken gradually and where possible did not affect the interests of trade between the Dutch and the natives.[12]

By the time of the second period, Dutch attitudes towads Islam chaned drastically. The Dutch colonial government had started to take an aggressive political stace to exclude Islamic law in a more systematic manner in the following way. First, it directly confronted Islamic law with customary law. Second, it increased its westernization efforts even converting natives to Christianity. Third, it intensified its somewhat massive process of colonialism in various fields.[13]

Since legal cases during this time were closely related to daily colonial life, in legal policy terms - particularly with regard to Islamic law - the Dutch colonial governments always searched for an appropriate legal political formula. Thus, its colonial interests were maintained on the one hand while on the other hand, a long-term objective to westernize Indonesian law was also run systematically.

With such framework, there arose two approaches throughout the colonial period above.[14] First, the political approach to law adopted the *receptie complexu* formula. This approach was conceived and implemented, especially in the first period of colonial rule by Solomon Keyser and later enhanced by Christian van den Berg (1845-1927). The purpose of this approach was, particularly in the civil law, for the colonial government to implement a policy that the applicable law of each religion and its followers was not based on customary law. Muslims implemented Islamic law, Christians applied their canon law, and so on.

To enshrine this approach into law, the *Staatsblad* No. 22 Article 13 was enacted, which in essence preserved

[8] Nikki R. Keddie, A*n Islamic Response to Imperialism*, (Berkeley: Berkeley Univ. Press, 1983): Gershoni and Jankowski, "Egypt and the Caliphate Question, 1924-1926" in *Egypt, Islam and the Arabs*, p. 74.

[9] Bassam Tibi, *Ancaman Fundamentalisme,* p. 3-7; 20-24.

[10] Michael F. Laffan, *Islamic Nationhood and Colonial Indonesia: The Umma Below the Wind*, (London and New York: Routledge & Curzon, 2003).

[11] For comparison, see: Talal Asad, *Rethinking About Secularism and Law in Egypt,* (Leiden: ISIM, 2001).

[12] Moh. Koesnoe, "Perbandingan antara Hukum Islam, Hukum Eropa dan Hukum Adat", *Workshop on Curriculum Counseling on Islamic law in universities*, Yogyakarta, 11-12 Januari 1982.

[13] Mohammad Mahfud MD (ed.), *Peradilan Agama dan Kompilasi Hukum Islam dalam Tata Hukum Indonesia*, (Yogyakarta; UII Press, 1993), p. 58.

[14] Sajuti Thalib, *Receptio a Contrario*, (Jakarta; Bina Aksara), 1985, p. 6.

customary or adat law by allowing the govrnment to recognise and consider some aspects of Islam, especially in relation to marriage, division of property inheritance and so on.

Second, the political approach to the law by the *receptie* formula. This approach was conceived by Cristiaan Snouck Hurgronje (1857-1936) and then it was further systemized by C. van Vollenhoven and Terr Haar. The core approach of this formula was that religious law (Islam), especially in the areas of civil law, could only be applied if the law had been absorbed and become customary law. Islamic law which had not become cus-tomary law could not be applied.

Political observers of colonial law state that Hurgronje's conclusion was based on his observations of the applicable law in Aceh. For Hurgronje, applicable law in Aceh was not true of Islamic law but the law of Islam which had been accepted by local custom. Therefore, as that law had been accepted locally as customary law then the Islamic law would be applied.[15]

Hurgonje himself had in the past, served as an advisor to the colonial government. Hurgronje in general also suggested the existence of a basic policy related to Islam. The essence of this policy was that the colonial government should separate the aspects of ritual, social (legal) and political Islam. For pure aspects of Islamic rituals, such as prayer and pilgrimage, the Dutch East Indies government gave freedom to the followers of Islam from among the natives; they were given the freedom to run their worship. In fact, if deemed necessary, the Dutch East Indies government would facilitate the means of the ritual.[16]

Meanwhile, for the activities that were closely related to socio-political activities, the colonial government had to be careful, cautious and selective. Islamic civil laws, for example, could not be applied unless those laws had been absorbed and become customary law. Furthermore, regarding the political aspect, the colonial government could not neglect the overseeing of various activities and limit the agenda of Indonesian Muslims which contained substantial Islamic political content, especially related to the theme of pan-Islamism.

The Dutch policy to marginalize Islamic law was a sharp policy. Resistance against Islam in order not to be a political vehicle seemed a rational decision. Thus, George Mc. T. Kahin explained that Muhammad's religion is not only a chain that ties the social unity, but it is a common symbol of faith (ingroup) against foreign invaders and oppressors who come from other religions.[17] Furthermore, Fred R. Von der Mehden analyzed that Islam is the most obvious means to build a sense of national unity and to distinguish the people of Indonesia from Dutch colonizers. The islands that include the Dutch East Indies never existed as a unified linguistic, cultural or historical whole. The last regions to fall into the Netherland's power never fully subjected to until the early 20th century. Therefore, because it consisted of a variety of historical traditions, linguistic, cultural, and different geographical forms, then the only universal bond available, outside the colonial power, was Islam.[18]

Later history proved that the approach and suggestions of Hurgronje's *receptie* contributed immense influences on the policies and continuity of the Dutch East Indies government in Indonesia, especially in dealing with the issue of Islamic law and politics.

Shariah, Ideological Crystallization, and Antagonism

As evidenced by the history of the nationalist movement in Indonesia, Islam—as mentioned above—played an important role in the process of national integration to encourage the creation of political entities in Indonesia. However, in later development, in line with the dynamic interaction between societal subcultures of Indonesia, the ideological roots and the spirit of anti-imperialism contextually evolved and experienced a metamorphosis. Thus, prior to Indonesian independence, three basic elements of anti-imperialism ideologies emerged: Islam, nationalism, and socialism.[19]

The Islamic ideological defenders aspired to the realization of Indonesia to become an independent state based on Islam. At the same time, defenders of nationalism and socialism hoped that Indonesia's independence could be sustained by their ideology. The debate continued. The landscape of this antagonism polarised people into defenders of Islamism and secularism: Muslim groups insisted on Islamism while the other two groups standing on the logic of secularism.

At the practical level, to realize the socio-political aspirations, Islamic groups were represented by various social organizations and political parties, such as *Syarekat Islam* (SI), *Majelis Syuro Muslimin Indonesia*

[15] John R. Bowen, *Islam, Law and Equality in Indonesia: An Anthropology of Public Reasoning*, (Cambridge (UK) and New York: Cambridge University Press, 2003).

[16] Aqib Suminto, *Politik Islam Hindia Belanda*, (Jakarta; LP3ES, 1985); Harry J. Benda, "Christiaan S. Hurgronje and the Foundation of Dutch Islamic Policy in Indonesia" in *Journal of Modern History*, 30, 1958.

[17] George Mc.T.Kahin, *Nationalism and Revolution in Indonesia*, (Ithaca: Cornell university Press, 1952), p. 38

[18] Fred R. von der Mehden, "Islam and the Rise of Nationalism in Indonesia," Doctoral dissertation, University of California, 1957, p. 34.

[19] Mc T. Kahin, *Nationalism*, p. 38.

(Masyumi) or Indonesia Muslims High Assembly, Muhammadiyah, Nahdlatul Ulama (NU), and others. While the nationalist groups were represented by Budi Utomo movement, and political parties such as Partai Nasional Indonesia (PNI) or the Indonesian National Party and the left-social-democrat groups were represented by *Indische Sociaal Democratic Vereniging* (ISDV), Communist Party of Indonesia, the Indonesian Socialist Party and Others.[20]

In such polarization, it would not be surprise that before and after independence of Indonesia, the debates about the fundamental pillars of statehood and nationhood, such as the basic state constitution, have been also dominated by the theme of Islamism and secularism.

Quantitatively, looking at the proponents for each cause, then the largest constituent of the two groups were almost equally divided between Islamists and secularists. The results of the first General Elections (1955), indicated this; six Islamic Parties obtained 45% of the total number of votes, the Indonesian Nationalist Party (PNI) obtained 22% and the Communist Party of Indonesia obtained 15% votes. The remaining votes were obtained by several smaller parties that were closer to the secular stance (13%).[21]

As briefly mentioned above, among the hotly debated themes before and after independence in *Badan Pe-nyelidik Usaha Persiapan Kemerdekaan Indonesia* (BPUPKI) or the Investigation Agency for Preparation of Indonesian Independence and the Constituent Assembly was a matter of basic state constitution. The debate on this theme, in turn, would largely determine the pattern of the relationship between religion (Islam/ Islamic law) and the state.[22]

The debate about the country's basic theme addressed by the respective ideological proponent was faced with absolute terms and perspectives. In other words, the Islamist groups emphasized the absolute state linked and fused with religion, while on the other hand the secular groups emphasized the absolute state separated from religion. Because each one was at the extreme opposites, the discourse and the formation of the Indonesia state which was based on the spirit of anti-colonialism towards the establishment of a nation-state became exhausting and drained the socio-political energy from each of these groups.

Amid the continuing debate on the basic ideology of the country, before the proclamation of independence, in fact a compromise on the basis of the state already reached. The compromise states that the state is based on five principles: (1) Belief in God Almighty with the oblgation of Muslim adherents to carry out the Islamic shariah; (2) Humanity that is Just and civilized; (3) Unity of Indonesia; (4) Democracy guided by the inner wisdom of deliberation/representation; (5) Social justice for all Indonesian people. The deal was later called the Djakarta Charter.

Although formally the agreement on the Djakarta Charter has been reached, but before the charter was enacted, an objection to the first principle had been raised. The objection was that all "words" following "Belief in Gold Almighty" be removed. Through informal consultations with some Muslim leaders led by Mohammad Hatta, the compromise on the abolition of those remaining words was settled.

The continuing 'negotiation' and interpretation that followed since the settlement of the Djakarta Charter later spawned a variety of polarizations of discourses and even introduced its own complexity, to determine the relationship between Islam and the state model that can be accepted by all groups and children of the nation.[23]

Finally, the 'objectionable' words were deleted with the consensus that after the first General Election (1955), it could be discussed again in the Constituent Assembly which would be formed based on the results of the election.

The debate about the basic state ideology and the Jakarta Charter repeated once again. Furthermore, after the Constituent Assembly met for approximately three years, the country's basic problem was not finished thoroughly.[24]

Bahtiar Effendy describes how the differences in concept continued until the Constituent Assembly (1956-1959):

> "... Islamic groups essentially restated their aspirations of political ideology that they had put on the pre-independence, namely establishing a state that is clearly based on Islam. They proposed that Islam to be the state

[20] Robert van Neil, *The Emergence of the Modern Indonesian Elite*, (The Hague and Bandung; W. van Hoeve, 1960); A.K. Pringgodigdo, *Sejarah Pergerakan Rakjat Indonesia*, (Jakarta; Pustaka Rakyat, 1950); Ruth Mc Vey, *The Comintern and the Rise of Indonesian Communism*, (Ithaca; Cornell university, 1961).

[21] Alfian, *Hasil Pemilihan Umum 1955 untuk DPR*, (Jakarta; Leknas, 1971).

[22] Endang Saifuddin Anshari, *Piagam Djakarta 22 Juni 1945*, (Bandung; Pustaka Salman ITB, 1981).

[23] Deliar Noer, *Administrasi Islam di Indonesia*, Rajawali; Yayasan Risalah, 1983; Deliar Noer, *Partai Islam di Pentas Nasional*, (Jakarta; Pustaka Uama Grafiti, 1987), p. 44-47; Allan Samson, "Indonesian Islm since the New Order" in *Reading on Islam in Souteast Asia*, compiled by A. Ibrahim, Sharon Siddique and Yasmin Hussein, (Singapore; ISEAS, 1985), p. 167; A. Syafii Maarif, *Islam dan Masalah Kenegaraan; Studi tentang Percaturan dalam Konstituante*, (Jakarta; LP3ES, 1987).

[24] Ahmad Syafii Maarif, *Islam dan Masalah Kenegaraan: Studi tentang Percaturan dalam Konstituante*, Jakarta: LP3ES, 1987; Endang Saifuddin Anshari, *Piagam Djakarta 22 Juni 1945*, (Bandung: Oustaka Salman, 1981).

> ideology based on the arguments concerning: (1) the holistic nature of Islam, (2) superiority of Islam over all other ideologies, and (3) the fact that Islam is embraced by the majority of citizens of Indonesia".[25]
> "... Several other groups reject the notion of Islam as the state under consideration possibility to be applied. Considering the fact that Indonesian society is heterogeneous in socio-religious life, they doubt that Islam can serve as an ideological-political world view for the entire community. Meanwhile, the Pancasila, however imperfect, has been proved to be the common ideological basis of the entire people of Indonesia. Other circles rejected Islam as the state on the grounds that they were worried that Islamic laws would apply to all citizens of Indonesia"[26]

The Decree of President Soekarno was issued in 1959 to stop the polemic by asserting the need to return to the Pancasila and Constitution of 1945. The decree also notes that "Jakarta Charter, dated June 22, 1945 animates Constitution of 1945 is an integral part of the constitution".

The enactment of the Decree for the defenders of Islamic ideology was a disappointing political defeat, particularly in relationd to the implementation of the shariah agenda. Symptoms of political discontent was manifested by Kartosuwiryo Movement in West Java, Daud Berueh in Aceh or Kahar Mudzakkar in South Sulawesi for instance, igniting certain shariah based emotional responses as a central theme and focal point of the struggle.[27]

The failure of the implementation of the Jakarta Charter also gave rise to negative sentiment among Muslims against the state. Furthermore, the dialectic, the tension and conflict between the pro-Islamic and counter-shariah continued to occur throughout the Old Order. The collapse of the Old Order regime in 1966 and subsequent rise of the New Order does not remove the map of history at all. So far, it continues until now.

Seeking the Middle Path: the Islamization of Pancasila?

Tensions between Islam and the state in early New Order (1966) did not abate. Each group stays with the current agenda and the interests of each. Islamic groups are adamant in demanding the restoration of the Djakarta Charter, while the power of the state held that the matter does not need to be responded seriously. The State still considered that the agenda of reviving the Djakarta Charter was an agenda to open up pandora's box of old wounds and horizontal conflicts interferring with national integration.

Tension between Islam and the state in the New Order peaked by the eve of the legalization of the Draft Law of Marriage in the 1970's. The spirit of the marriage bill proposed by the government was to place marriage as a civil marriage irrespective of religious law.

The political power of Islam, especially as represented by the *Partai Persatuan Pembangunan* (PPP) or United Development Party, saw the draft as a systematic and serious attempt of New Order to marginalize and erase Islamic law. When the draft was being discussed in the House of Representatives (DPR), there was a massive demonstration of Muslims rejecting it outright.

Although an agreement was later reached with some revisions of the draft law and Law. 1 of 1974 on Marriage was issued, the tension and mutual suspicion between the Islamists and the state lingered. On the one hand, there was a stereotypical impression attached to the government that Muslims are anti-Pancasila, anti-pluralism and national unity. Meanwhile, on the other hand, Muslims have always felt that the government has a hidden agenda to marginalize Islamic law and haunted by the fear of the rise of Islamic forces.

The tension began to ease by the 1980s. In the current period, the regime showed a more accommodative treatment to the socio-cultural and political interests of Islam. According to some observers, this accommodation would not have happened without the emergence and the role of "cultural Islam". "Cultural Islam" is the positive impact of the renewal of Islamic thought in Indonesia that began in the early 1970s under the influence of figures such as: Abdurrahman Wahid, Nurcholish Madjid, KH Ahmad Siddiq, Dawam Rahardjo, etc.[28]

The direct impact of the emergence of cultural Islam is the birth of a new approach to the Islamic development process, especially after the Pancasila was accepted as the basis of ideology and the aspiration

[25] Bahtiar Effendy, *Islam dan Negara: Transformasi Pemikiran dan Praktik Politik Islam di Indonesia*, (Jakarta: Paramadina, 1998), p. 107.

[26] Bahtiar Effendy, *Islam dan Negara*, p. 109.

[27] See, C. van Dijk, *Rebellion under the Banner of Islam: The Darul Islam in Indonesia*, (The Hague: Martinus Nijhoff, 1981); Nazaruddin Syamsuddin, *Pemberontakan Kaum Republik: Kasus Darul Islam Aceh*, (Jakarta: Grafiti Press, 1990); Anhar Gonggong, *Abdul Qahhar Muzakkar: dari Patriot Hingga Pemberontak*, (Jakarta: Grasindo, 1992).

[28] Masykuri Abdillah, *Demokrasi di Persimpangan Makna; Respons Intelektual Muslim Indonesia Terhadap Konsep Demokrasi (1966-1993),* (Yogyakarta: Tiara Wacana, 1999).

to raise the Djakarta Charter and the strengthening of Islamic political parties (Islam yes, Islamic party no!). Within the framework of cultural Islam, Islam or the Muslim community was no longer be viewed as a threat to the existence of the state ideology. Thus, Pancasila could be seen as the practical continuation of interpretation of Islam.

As a result of the emergence of such an atmosphere, the Religious Judicature Act of 1989 was enacted, which gave the Islamic Courts a strong legal position. Furher solidifying the position of Islam in Indonesia, the *Ikatan Cendekiawan Muslim se-Indonesia* (ICMI) or Association of Islamic Intellectuals of Indonesia in 1990, the emergence of a Presidential Instruction to disseminate Kompilasi Hukum Islam (KHI) or the Compilation of Islamic Law was issued in 1991, the manager of zakat or Badan Amil Zakat (BAZIS) was officially appointed in 1993, and Indonesia's first Islamic bank, Bank Muamalat Indonesia (BMI) was founded in 1992.

Islamic Legal Logics to Accept Pancasila

The State is often concepualised as the highest organization formed, established and jointly safeguarded and maintained by people in an area that has a common goal. At the legal level, the necessary conditions for the establishment of a state are: (a) There are people; (b) There is a geographic region; (c) There is a reign; (d) There is an international recognition.

These requirements are minimal and formalistic. However, those formal requirements cannot necessarily be realized without a common desire for continuous struggle that is integrated and maintained as a social consensus (consensus/social contract). Thus, some experts say that the subject matter of a country that can not be denied is the existence of a common "social contract". In the spirit of "social contract", basic norms (*grundnorm*), technical norms and intermediary norms will be formed: a vision, constitution, rules, and other commitments bonds. It is probable—and certain—that a "social contract" often cannot be made once and for all. On the contrary, its formulation undergoes the process of attraction, fluctuation and sometimes steep streets that lead to violence and physical conflicts. The debate about the basic ideology of the state (as discussed above), the accompanying excesses and the resulting psycho-political frictions are some of the main examples and illustrations.

In the Islamic concept a definite and fixed concept of nationhood is not found. Therefore, there are many views, perspectives and opinions about how it should develop the model and form of the state, such as the interpretation of the caliphate mentioned above. All opinions and views are intrinsically *ijtihâdî* (rational effort); it can be adjusted, modified and formatted in accordance with the principle of the temporal and local benefits.[29]

As such, the nature of the relationship between Islam and the State in Indonesia is essentially dynamic. Islam remains autono-mous and independent, as a religious doctrine. The state also remains autonomous and independent as a social organization that shares a common thread with all its citizens indiscriminately. However, although both are autonomous with the tasks and their res-pective regions, the dynamics of history, the idea of interaction (social contract), the constellation of ideas and political and sociological require them to be, like it or not—an entity that can not be separated diametrically and antagonistically: dealing or negate each other.

In other words, based on the experience of statehood before the founding of the Republic of Indonesia (NKRI) and after independence (partly as already mentioned above), then the Unitary Republic of Indonesia cannot become the Religion State, and at the same time might not be a Secular State.[30]

Why is it that Indonesia cannot becomee an Islamic state? There are several reasons, among them. First, Islam itself is not explicitly and rigidly (*qath'i*) gives an indication of the definitive form of the state. Second, some countries that have declared themselves formally as religion states (Islam), in fact in many practices of such states as well as legal systems, political, and their economic values are far from Islam itself. Instead of being a pilot and Islamic state models, they actually become countries filled with the dirty law practices and politics. Third, the wisdom of the history of the Muslim nationalists who became the founders of Republic of Indonesia (founding fathers) have provided a good grounding for future generations that continue the struggle of Islam per se and can not only carry the name of Islam (form) but more importantly need to fight for the content (substance). Not just a flag for Islam but resolving real

[29] Compare, Majid Khadduri, *Mafhûm al-'Adl fi al-Islâm*, (Dâr al-Hashd, 1998).

[30] See and compare, Moh. Mahfud MD, *Hukum dan Pilar-pilar Demokrasi*, (Yogya: Gema media, 1999); Moh. Mahfud MD, *Demokrasi dan Konstitusi di Indonesia*, (Yogya: Liberty, 1993); *Konstitusi dan Hukum dalam kontroversi Isu*, (Jakarta: Rajawali Pers, 2010).

issues and finding concrete solutions. Fourth, by giving the name of an Islamic state (as in some countries), Islam is often only used as a political tool and not a frame of reference for ideal rights, morals, practices of social norms and state. The virtues of religion are often contaminated with pollutants and vested interests that are not noble. Thus, acute internal conflicts arise precisely because they are burdened with the hijacking the name of religion. In fact, sublime values, norms and behaviors should be the main mission.

Why is Indonesia unlikely to remain a secular state? There are several reasons, among them. First, the historical, social, juridical aspirations from a country (state) are a continuation of the historical, social, juridical aspirations at the level of the community (society). In other words, if what is alive in the minds and souls of the people/society (*volksgeist*) is not embodied in the state rules, then the country will not survive for long or the country stands on the principle of dictatorship and totalitarianism. If the growing aspiration and mainstream is the aspiration of Islam, then the state should be in light of Islamic values. Thus, if the Muslim community can be well organized, that will automatically give birth to an Islamic 'social technology'. Second, social and legal character of Indonesian society is religiously true. Therefore, once the people of Indonesia are drawn into the secular extreme pendulum, then the collective response of this nation will come up with extreme religious language. Thus, the present secular extremism will only provoke religious extremism. Third, the global trend is moving towards spiritual awakening. Universally, there are indications that humans are increasingly recognizing the needs for and strengthening the spiritual dimensions in life. Fourth, there is a juridical bond which is layered like a spiral and staircase (*stufenbau*) in the system of the government and Indonesia is not possible to be secular. That is starting from the Constitution (article 29 of the Constitution of 1945), and other related articles, until the technical rules to accommodate and ensure institutional aspirations of Islam (the Ministry of Religion, Religious Courts, Law on *Zakâh, Waqf*, Islamic Bank), etc.

The Model of Integrating Islamic Law in Pancasila State

The existence of the Republic of Indonesia with the philosophy of Pancasila, the Basic Law (Constitution) of 1945, the motto of Unity in Diversity, is an agreement that binds all elements of the nation. Therefore, it is obligatory for Muslims, who happened to be citizens of the majority, to keep the deal from the efforts of treason and secession (separatism).[31] This is the conclusion of almost every sesiion of dialogue between Indonesian Muslims and National Leaders.

In the study of continuity and validity of a value in society, it is taught that a value (including religious values) will remain in force and be a guide, when the value has four actual relevant grounds: philosophical, sociological, juridical, and historical grounds. The rule of value applies philosophically, when it is relevant and in accordance with the ideals of law as the primary value of the highest world views (*Weltanschauung*). The rule of value applies juridically, if the determination is based on the principle on higher level (*stufenbau*) or formed on a predetermined basis. The rule of value applies sociologically, if there is a recognition of the community of the rule (Sociological Jurisprudence schools) and/ or the enactment of rule is imposed by the authorities referred to, although it is not accepted by the citizens of the community (the theory of power). The rule of value applies historically, when it is in accordance with the functions and roles of this rule that has been fused and integrated within a historical collective memory.[32]

In the context of Indonesian society, if studied in depth, in order that the value can function well then every rule must meet the four pillars of relevance as mentioned above, because: (1) when it applies only philosophically, it is likely that legal rule is something that is only aimed (*ius constituendum*); (2) if the rule applies only juridically, then there is the possibility that the rule is the dead rule; (3) If it only applies a sociological theory in the sense of power, then the rule becomes the enforced rule; and (4) when it applies only historically, then the rule probably does not fit the context and development of Indonesianness *(keindonesiaan)*.

Historically and philosophically, the role of Islam in Indonesia cannot be denied. As discussed in the previous pages, the historical role of Islam in founding and establishment of Indonesia is very large. Anti-colonialism doctrine, philosophy of life to eradicate the tyranny and oppression of the imperialist contributed in raising the spirit heroic sacrifice through the movement of various organizations, and society.

On the other hand, sociologically and juridically, Islam as a source of value and the law has become a fact and reality. Thus, it seems reasonable if Mohammad Daud Ali in clarifying article 29 of the Constitution of 1945 paragraph (1) of the Republic of Indonesia that

[31] See and compare, K.H. Maruf Amin, *Harmoni dalam Keberagamaan: Dinamika Aktual Relasi Agama-Negara,* Dewan Pertimbangan Presiden Bidang Hubungan Antar Agama, 2011.

[32] Reza Banakar and Max Travers (Editors), *An Introduction to Law and Social Theory*, (Oxford-Portland Oregon: Hart Publishing, 2002); Richard A. Posner, *Frontiers of Legal Theory*, p, 1-318, (Harvard University Press, 2004).

is based on the Belief in God Almighty, is interpreted as follows: First, in the Republic of Indonesia (NKRI) shall not occur or apply anything contrary to the rules of Islamic law for Muslims, or are contrary to the principles of Christianity for Christians, or are contrary to the rules of the Hindu-Bali for the people of the Hindu-Balinese, or contrary to morality Buddhism for Buddhists. That means in Indonesia there may not be applicable or enforced laws that are in conflict with the norms (laws) of religions and morality of Indonesia.

Second, Unitary State of Republic of Indonesia (NKRI) shall execute Islamic law for Muslims, Christian law for Christians, and Hindu-Balinese laws for Hindu-Balinese people. In order to run the Shari'ah it requires the mediation of state power. The significance of this second interpretation is: NKRI shall provide to the law of the religions professed by the Indonesian nation can be accomplished throughout the implementation of religious laws that require the aid of power or state officials. That is, the state is obliged as organizers to run shariah (religious laws) that is embraced by the Indonesian people for the sake of religion concerned.

Third, shariah (religious laws) does not require the help of state power to implement and maintain it, and therefore it can be run solely by every religion is concerned, as it becomes a personal obligation to God for every person practising their faith according to their respective religions. This means the law of a recognized religion in the Republic of Indonesia that can be run solely by their respective faiths in question (eg laws relating to worship, the law that generally manage the relationship with God) allows the adherents of that religion alone to carry it out according to their religious beliefs.[33]

Related to the phrase "the State guarantees its citizens the freedom to run the service in accordance with the faith and belief"as set out under Article 29(2) of the Constitution, in the chapter entitled 'Religion', a few observations should be made. First, Mohammad Hatta (the first Vice President) when explaining the meaning of the word "faith" contained in paragraph (2) Article 29 of the 1945 Constitution, declared in 1974 that the meaning of the word "faith" in the forementioned article is a religious belief. The key is the word "it" contained at the end of paragraph 2 of Article 29. The word "it" refers to the word "religion", which is before the word "faith". This explanation is quite logical because the word religion and faith are bound up in one sentence and placed under Chapter Religion.[34] Bung Hatta's description above, corresponds exactly with the description of H. Agus Salim, who stated in 1953 that at that time formulated the Constitution of 1945, no one among us who doubt that the basis of Belief in God Almighty was faith, religious beliefs.

Second, when giving an explanation of paragraph (1) Article 29 of the Constitution of 1945, in order to return to the Constitution of 1945 in advance of 1959, the Government of the Republic of Indonesia stated that paragraph (1) Article 29 of the Constitution of 1945 is the basis of the legal life of the religious field.

Third, in 1970, the words of Belief in God Almighty stated in Article 29 of the Constitution of 1945 is used as the basis and source of law in achieving justice in the Republic of Indonesia. According to Article 4 of Law 14, Year 1970 in Indonesia justice must be done for the sake of justice based on the Belief in God Almighty.[35]

Based on the description and explanation above, it can be assumed (and has become a reality) that Islamic law is constitutional and legal power in the Republic of Indonesia that can grow and develop and is sustained and accommodated in the "framework of shared social contract"/consensus Pancasila and 1945 Constitution. It was then elaborated through the Law No. 1 of 1974 on Marriage, Law No. 7 Year 1989 on Religious Courts, Law Number 38 Year 1999 concerning Zakat (Charity) Management. Law no. 3 of 2006 concerning amendments to Law No. 7 Year 1989 on Religious Courts of Law. 50 of 2009 concerning the change of Law Number 7 Year 1989 on Religious Courts. Law no. 21 of 2008 on Islamic Banking. Likewise, some government instructions relating to the addition of Islamic law, also the emergence of Islamic Law Compilation which become guidelines for judges in special courts (Religious Courts) in Indonesia. It was referred to an aura of legal norms as stipulated in Article 29 of the 1945 Constitution._

Furthermore, in relation to Human Rights provisions entrenched in the Constitution of 1945, article 28 J states:

> "In exercising the rights and freedoms of each person shall be subject to the restrictions set by law solely for the purpose of securing due recognition and respect for the rights of freedom of others and to meet the demands of justice in accordance with considerations of morality, religious values, security and public order in a democratic society".

In Article 23(2) of the Law on Human Rights, it states:

> "Every person is fre to have, express and distribute an opinion ccording to their conscience, orally and/or in

[33] Mohammad Daud Ali, *Asas-Asas Hukum Islam: Pengantar Ilmu Hukum dan Tata Hukum Islam di Indonesia*. (Jakarta: Rajawali Press, 1991), p. 8

[34] Mohammad Daud Ali, *Asas-Asas Hukum Islam*, p. 9.

[35] Mohammad Daud Ali, *Asas-Asas Hukum Islam*, p. 10.

writing through print and electronic media with respect to religious values, morals , public order, public interest, and national integrity".

It can be added also that under Article 31(3) of the Constitution, it is declared that the purpose of education (among others) is to enhance "faith" and "piety". Also stated in article 5 that in the development of science and technology should be fixed in a frame to "uphold religious values".

So, it is not an overstatement to conclude that the validity and strength of the Islamic legal administration in the Republic of Indonesia (NKRI) based on Pancasila and the Constitution is not lost and gone. Thus, it is normal also to say that *Pancasila* and the Constitution conforms and is not contrary to Islam.

Islamism versus Cultural Resistance

Islamic norms cannot be simply understood as moralistic as the philosophical conception of the rules. In other words, in the Indonesian context, Islamic law does not deal only with its content as what ought to be and as what it is written in the holy scriptures (The Quran and The Sunnah). It will never happen what is stated in the holy books applied literally. Despite Islamic law being recognized formally as a source of Indonesian law (as it is stated by some jurists), it should be indonesianized before it can be enforced in a real context and in practice.

The hot debate during the 1970's on the Bill of Marriage Law (later called as Law number 1, Year 1974) between the defenders of religious marriage and secular marriage reflects these concerns. The defenders of religious marriage sharply refused the Bill as a stepping stone towards extreme secularization. On the other hand, defenders of secular marriage accused the former as the proponent of Islamism which would endanger the principle of *Pancasila* state and contradict to the principle of modernity and unity in diversity (pluralism).[36]

In the end, the debate caused the revision of the Bill. The final Bill accommodated the demand of religious marriage proponents. However, as a consequence they will never accept the scriptural understanding of Islamic family law such as, the extreme superiority of husband, the non-restricted and easy polygamy, the unwritten marriage, the refusal of the *Pancasila* system of national law, especially in administrating and governing family law.

Another example of such interplay can be found in the case of Anti Pornography Law.[37] When the law was first introduced, some Muslims and Indonesians hoped and feared that it could pave the way for the enforcement of an Islamic criminal law. However, in fact such hope and fear never eventuated. The core substance of the law is not the punishment for people engaged in pornographic activities. But the main substance is to punish those who intentionally spread pornographic material. Thus, in the case of Cut Yanti and Ilham (Ariel) Peterpan, who engaged in 'illegal' intercourse, the police cannot catch them due to the action.[38]

The Law of *Zakâh* is another example. The law does not regulate and force a Muslim to do *zakâh* on the basis of a religious obligation. But the main substance is to manage and regulate Board of *Zakâh* (*Badan Amil Zakat*) to do the duty based on the principle of good governance: transparency, accountability, trustworthy.[39]

Hence, Islamic law in the *Pancasila* state cannot be perceived as solely a normative and fixed set of rules; its existence is exclusively within the framework and legitimacy of Islamic legal scripture. To be a workable set of norms and legal source, Islamic law must interact and accommodate local wisdom as well as universal values, integrated within *Pancasila*. Any effort to apply Islamic law by emphasizing its scriptural character will be faced and challenged hardly by cultural resistance. The islamization of Indonesian law will not automatically tend towards Islamism. Indonesian democratic culture, its inclusive state ideology (*Pancasila*) and the plural orientation of its society will remain as the strong barrier for refusing Islamism.

Closing Remark

Tracing the original concept of Islamic political vision concerning the promulgation of shariah indicates that the superiority of shariah cannot be implemented without forming Islamic state. However, in reality this concept is illusory and has no empirical evidence of its realization. The creativity of the Indonesian Muslim community to reconcile Islamic doctrine with local wisdom and secular values *(Pancasila)* produces a model

[36] See and compare Busthanul Arifin, *Pelembagaan Hukum Islam di Indonesia: Akar Sejarah, Hambatan, dan Prospeknya,* (Jakarta: Gema Insani Press, 1996); M. Syafii Anwar, Pemikiran dan Aksi Islam di Indonesia, (Jakarta: Paramadina, 1995); Anwar Harjono, *Indonesia Kita: Pemikiran Berwawasan Iman-Islam,* (Jakarta: Gema Insani Press, 1995); Departemen Agama, *Kompilasi Hukum Islam di Indonesia,* (Jakarta: Ditbinbapera, 2002).

[37] Undang-undang Nomor 44, Tahun 2008 tentang Pornografi.

[38] See and compare Yanti Muthmainnah, "UU Nomor 44 Tahun 2008 Tentang Pornografi, sebuah Kemunduran", March 26, 2010; www.komnasperempuan.or.id; Jaksa Tolak Pembelaan Ariel Peterpan, hokum.tvOnenews.tv/berita/view/47278/2011/01/17/jaksa_tolak_pembelaan_Ariel_Peterpan_tvOne

[39] See and compare, Undang-undang Nomor 38 Tahun 1999 Tentang Pengelolaan Zakat; www.dompetdhuafa.or.id, For the new version of the Law, see DPR sahkan RUU tentang Zakat, Infak, Shadaqah (1/11/2011), www.detiknews.com.

of cultural legacy. Hence Islamic law is not to be seen as an antithesis of *Pancasila*. On the contrary, they can interact each other resulting in the interdependent enrichment and development of Indonesian national law. []

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