

# TRANSFORMATION OF ISLAMIC LAW ON THE NATIONAL LEGAL SYSTEM IN INDONESIAN CONSTITUTIONAL PERSPECTIVE

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## **Abstract**

*Law is the accumulation of rational ideas in response to community development that was born based on the idea of universality and morality. The idea of universality provides a justification for the enactment of basic human freedoms and recognition of basic human rights in the life of the country. Similarly, the idea of morality is that moral principles are general and can be analyzed by human reason. The second idea is the essence of it is used as a basic idea about the nature of the formulation of law and justice as a legal the flow law functional purpose in looking at the law more focused on the facts of a field, social, cultural, political, and religion as factors that need to be a consideration in seeking legal solutions. Both streams are still evolving and are applied in various countries around the world. With regard to the transformation of Islamic law in national legal systems, it cannot be separated from these two streams of law that is through a systems approach and the approach to legislation.*

*Keyword: Transformation of the law, politics of law, national legal system, System of national law*

## **I. Preface**

In the history of legal thought, currently growing are at least 2 (two) quite prominent schools of law, i.e. the legal of positivism and the legal of functionalism (functional Jurisprudence).<sup>1</sup> The legal positivism in general regards the law as the decisions of the organs of power, either the organs of power that have the authority as lawmakers or judicial organs of power in the realm of the judges. The way it works is enforced through the application of

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<sup>1</sup> W., Friedman, *Legal Theory*, 5<sup>th</sup> Ed (New York: Columbia University Press, 1967), 253. See also Hari Chand, *Modern Jurisprudence* (Kuala Lumpur: International Law Book Services, 1994), 1-12 and 65 -66.

sanctions, so that the community's compliance with the law arises out of such forced system. While the functional school's view of the law gives more emphasis on the facts of a field: social, cultural, political, and religious as factors that need to be considered in seeking legal solutions. Law in the functional flow is in line with the social dynamics, economics, culture and politics, so that the value of law is inherent in the value developing in the community concerned. These two streams are still evolving and are applied in various countries around the world. The development of law in Indonesia is also inseparable from the two schools. With regard to the transformation of Islamic law in national legal systems, it cannot be separated from these two streams of law that is through a systems approach and the approach to legislation that technically could be in the form of legislation and regulation through the courts. Thus, the transformation of Islamic law through a system approach is the convergence of law and legislation of the two schools.

Islam encourages and enjoins mankind to obey God's will, so learning to know God's will is a must. A discipline employed to define religion is monotheistic under the *Shariah* or Islamic law. For scholars and experts in Islamic law, the revelations of God and the examples of Prophet Muhammad SAW are the basis to consider and implement the will of God in every aspect of life.<sup>2</sup> Within a few centuries after the passing away of Prophet Muhammad, Muslims have codified their way of life. Devout Muslims are concerned for the Muslim government's uncontrolled power and also infiltration and uncritical assimilation of foreign practices, trying to provide a picture of God's law in order to capture the true path of Allah, and limit the power of the Caliphs. Based on the *Qur'an* and the examples of the Apostle as well as customs and the use of reason, experts think the birth of Islamic schools of law (*fiqh*) is scattered in many major cities of Islam: Mecca, Medina, Damascus, Baghdad and Kufa. Islamic law provides an ideal blueprint for society according to Islam. Therefore, the *Shariah* or the Way of Allah (*sabilillah, sabililhaq*) is a series of public principle, direction and values revealed by Allah to build the

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2 Bustanul Arifin, dalam, *Prospek Hukum Islam dalam Kerangka Pembangunan Hukum Nasional di Indonesia, sebuah kenangan 65 tahun Prof.Dr. H. Bustanul Arifin, SH* (Jakarta: Pengurus Pusat Ikatan Hakim Peradilan Agama, 1994), 35.

rules and the ways in which a detailed judgment is in turn applied by the judge (*Qadi*) in the judiciary.<sup>3</sup>

The scope of Islamic law is very complete, including the rules governing the religious services and providing limits of social norms of society which are formulated in the five pillars (pillars of Islam). Those five pillars are individual responsibility, social consciousness or collective consciousness, or membership in the broader Islamic community combined. In a social perspective, the law is covered in a series of norms that govern family, criminal, contract and international law. Here in particular can be seen the influence of Islam on the lives of both individual and community. The full set of regulations govern marriage, polygamy, divorce, property inheritance, theft, adultery, drinking alcohol and the problems of war and peace.<sup>4</sup>

Islamic law has a fundamental unity. It reflects the diversity of geographical contexts, and also differences concerning the interpretation or human judgment. Islamic law is not so rigid and closed, but actually embodies dynamism, flexibility and diversity in the hands of the lawyers who serve as advisers in some legal issues that arise; the law remains responsive to the new environment. Their interpretation (*fatwa*), both in matters concerning the law as well as new things, is able to guide even the judge in giving judgment to the court's decision.

## II. Islamic Law in Historical Perspective

In historical perspective, in the 10<sup>th</sup> century Muslim jurists concluded that the key points of the law of God had been adequately described in the legal texts. Islamic legal issues and changes became a major issue in the 19<sup>th</sup> and 20<sup>th</sup> centuries, when Muslims responded to the influence of modernization and development. Islamic civilization presented suitable system, as well as the attitude and outlook on

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3 Arifin, *Prospek Hukum Islam dalam Kerangka Pembangunan Hukum Nasional di Indonesia*, 36-38.

4 A. Wasit Aulawi, *Sejarah Perkembangan Hukum Islam, dalam Bustanul Arifin, Prospek Hukum Islam dalam Kerangka Pembangunan Hukum Nasional di Indonesia, sebuah kenangan 65 tahun Prof.Dr. H. Bustanul Arifin, SH* (Jakarta: Pengurus Pusat Ikatan Hakim Peradilan Agama, 1994), 78 – 80.

life that has given life meaning and direction to the followers of Islam for twelve centuries. However, in modern times (19<sup>th</sup> and 20<sup>th</sup> centuries) Islam seemed to face the toughest challenges both politically and ideologically. The history of Islam in the early half of the 21<sup>st</sup> century was dominated by two themes: European imperialism and the struggle to secure independence from colonial rule. The theme of European colonialism and imperialism, its impact in the past and its legacy prevail in the Middle East politics and Islamic world from North Africa to Southeast Asia. The emergence of nationalist movements intertwined with the colonial government and the Muslims who fought for independence. European colonialism and imperialism threatened the historical and political identity and cultural region of Islam. The impact of governance and modernization of the West raised new questions and challenged the beliefs and practices which have always been upheld. With the dawn of European domination on the Islamic world, the image of Islam - if not always true - as a world expansive power collapsed.

Movement for independence from European colonialism in the Islamic world acquired the intellectual roots from Islamic thought renewal movement of the 19<sup>th</sup> century.<sup>5</sup> The nature of the reform movement in response to the progress of thought and European colonialism varied. First, European colonialists were regarded as infidels and enemies of Islam. In this case the stance taken by Muslims was neither to fight against the infidels nor to perform *hijra* as exemplified by the Prophet's when facing the pagan in Mecca, but by refusing to affiliate with the colonial people both with their schools and their institutions. This was due to the fact that the fight would not work given the superior military power of Europe. Second, most Muslim rulers turned to the West for military, administrative, economic and political reform to "modernize" the Islamic community as taking place in the Ottoman Empire, Egypt and Iran. The basis of traditional Islam and the legitimacy of Muslim community were slowly changing in line with the increasingly secularized ideology, law and state institutions in accordance with Western models. The third was the responses of a group of Muslim reformers who seek to bridge the gap between traditional Muslim people with secular reformers. The reformers drew the community's

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5 Rifyal Ka'bah, *Hukum Islam di Indonesia – Perspektif Muhammadiyah dan NU* (Jakarta: Universitas Yarsi, 1999) 51 – 66.

attention to the resurrection of the 18<sup>th</sup> century with the need to respond to the threat of European colonialism and to the demands of modernity.

The reformers of Islam in response to European colonialism were influenced by their perception of “Western success”. Western nations are strong and successful nations, Muslims are weak and not independent. Colonialism in the eyes of Muslims is a threat to Muslim identity and faith.

The independence movement was essentially the endeavor of Muslims to liberate themselves from the grip of the 20<sup>th</sup> century Western colonialists who had imposed structural and cultural pressure over the lives of Muslims so that Muslims underwent the process of spiritual and intellectual impoverishment and economic and political marginalization and had their resources depleted. Colonialism in the Islamic world is not of the same level of depth. First, colonialism, which only exerts intellectual and economic influence on Islamic countries and, second, that which imposes cultural and structural pressures due to its extensive political and military domination over the Islamic state.

The final settlement of the independence movement differs from one country to another. This was influenced by such factors as: first, the thinking patterns of the prominent figures who dominate the movement, second, the position of Muslims quantitatively amidst non-Muslim groups, third, clear-cut boundaries that existed between Muslim and non-Muslims. The more explicit the borders between Muslim and Non-Muslims are, the more reinforced the position of Islam in the ideological structure of the newly independent country will be. Muslims as meant in the context of the movement are those who are inspired by Islamic ideology in undertaking the struggle for the independence of their nations.<sup>6</sup>

The challenge that prevails in the relations between Islam and the state has always been a major issue faced by the newly independent Muslim nations. The problem that arises is whether Islam and the state must be organically linked in a political system or ideology or Islam will only be made subordinating to the political system and

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<sup>6</sup> Aulawi, *Sejarah Perkembangan Hukum Islam*, n. 4 at 82 - 97

ideology that exist so that the country is always acting for and on behalf of interest of the nation above everything. In the latter case, religion is treated as a personal concern or to the farthest extent it is treated as family matters and in managing the affairs of state it does not provide a normative basis. Before the 20th century, the pattern of Islamic political movements in Indonesia was still communal basis with mechanical solidarity. Social solidarity is growing in an agrarian society and is usually centered on a charismatic figure. This means that the concept of nationalism is limited to the concept of cultural ethnicity. For example, the Acehese resistance to colonialism of the 19<sup>th</sup> century was believed to be a nationalist movement to break away from colonial bondage. At present such a motion will be referred to as the local movement.

The role of Islam in Indonesia, sociologically, culturally and politically was highly influential in the movement for independence in Indonesia. This was because Islam was empirically able to become the glue and the driving force in various movements against Dutch colonialism. In the perspective of Indonesia, then (1) Islam is the basis of consciousness that has formed the ethos and world view. Islam has become the decisive factor of whether or not something is legitimate. Islam also determines the mode of interpretation of the situation around itself. Interpreted as such, (1) Islam is channeled as the normative desire and a knowledge of structurally objective reality that have given birth to the various patterns of behavior, (2) Islam is a basic bond of solidarity among communities of followers, (3) Islam is a universal religion; Islam is cosmopolitan without being confined to political and cultural ties by providing pattern of international community. Thus, adopting inspiration or ideals of Islamic thinking in other parts of the world is not viewed as an act of impersonation. Amid the cultural and structural pressures, transformation issue of Islamic law is confronted with the issue of public law. Indistinctness of conception of public law by Muslim jurists does not very much preclude the need for classification of certain aspects of *Shariah* into the nature of public law or civil law. In this book, the public law of *Shariah* will be used as a generic term for applied aspects of *Shariah*, or its application was presumed in the public life of Muslim society, until it was replaced by a secular public law during the nineteenth and early twentieth century. There were two patterns of legal reforms established in the Islamic world over the past century: First, *Shariah* was slowly getting overlooked

in the everyday practice as in commercial law, criminal law and to finally follow the rules whose origins were mostly foreign applied by the secular justice system. Second, even in the domain of family law that is considered sacred (most states observing it are regulated by the *Shariah* courts), a number of very significant changes were made by interpreting and applying the law of the family. The replacement of *Shariah* by European law was made with the paradigm of five concentric circles. By using that paradigm, we see that the laws of trade lie in the farthest circle, revealing that the earliest and the most complete part of *Shariah* law replaced by the European law has occurred in the sphere of trade law.

Foreign influence and *Shariah* replacement are followed in sequence by the criminal, land, and contract laws. Family law and inheritance law, which are in the closest circle, are the least exposed to the influence of European law. The presence of a psychological reason behind the replacement of *Shariah* suggests that Muslims prefer to maintain the integrity and perfection of *Shariah* in theory, although it may not be applied in practice. It seems that Muslims had better pretend not to violate *Shariah* as the only law that has fundamental authority and avoid practicing it by pulling in the direction of the doctrine of necessity (emergency) than trying to adapt the law to the various problems and contemporary needs of life.

Islamic resurgence at present and its demands to update the transformation of the *Shariah* in all fields of Islam show that many people are not satisfied with the logic of necessity. After all, proponents of *Shariah* claim that it is now not necessary to make concessions on the pressure and demands of modern life. This pretext of urgency, no doubt, has weakened the image of Islam in this era of self-determination, freedom and independence in politics and economics of today. Muslims are no longer able to maintain a sense of pride and self-esteem, while they ignore the obligation to submit to the commandments of Islam. However, *Shariah* public law raises very serious moral problem practically. Tensions between religious commitment to Islamic law and some aspects of the manifestation of the inadequacy of the law in the form of *Shariah* are crucial issues.

One major factor requiring and conditioning the process to adapt and adjust to contemporary life is the reality of modern nation-state. Although theoretically there is a unity of Muslims and the

consequent universal application of *Shariah* in the Islamic world, now Muslims are organized in nation states - and probably will remain so in the future. This form of political organization has effectively been established in the Islamic world after the entry of European colonialism in the late nineteenth and early twentieth century, bringing to the region the power structure and the concept of legislation it has. Especially if the nation should be adjusted to the standards of modern constitution, it must ensure the equal rights of citizenship for all its inhabitants, like the government in their own country. In addition, - the nation state should provide all the laws and other resources necessary for sustainable development and fulfillment of individual and collective identity in line with a transformation of values that are believed by the majority of citizens. It is right here that the substantial opportunities in the institutional transformation of Islamic law avail as specified in the *Qur'an* and *Sunnah*.

In the historical and political perspective, legal pluralism in Indonesia became apparent when the Dutch East Indies government enacted *Indische Staatsregeling* (Articles 131 and 163), which is the basis of grouping people and laws applicable to Indonesian community groups (Dutch East Indies).<sup>7</sup> Therefore, the debate about legal pluralism in Indonesia has been going on for a long time since the days of the Dutch colonial rule. The central issue under debate was the choice that had to be made by the Dutch colonial government, namely, integrating or splitting up that colonial society.<sup>8</sup> Within the framework of the law, it involves one law for all segments of the population or the pluralistic law for a diverse group as well. The first view tends to create a kind of colonial state, and the second view tends to only create a system of administration in the colony. These two options have their respective legal consequences. The first view tends to approach the legal unification, because the power of the state requires the endorsement of the law. While the second view does not need to approach legal unification, it only requires management of the colonies (administration system). The Dutch East Indies was not a state but the state administration under the

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7 Sayuti Thalib, *Politik Hukum Baru - Mengenai Kedudukan dan Peranan Hukum Adat dan Hukum Islam dalam Pembinaan Hukum Nasional*, (Cet. Pertama, Bandung : Binacipta, 1987) 63.

8 Thalib, *Politik Hukum Baru*, 6

authority of its parent (the Netherlands). The choice of this second view had led to the choice of law and it was this second view which was selected by the Dutch colonial government.<sup>9</sup> Therefore, the Dutch East Indies (Indonesia) was only an administrative region of the Netherlands, leaving the assigned authority in the Dutch East Indies with no authority to establish regulations. In Indonesian constitutional perspective, the politics of law can be traced to the ideas contained in the constitution of the country i.e. *staatsidee* and *rechtsidee*. In addition, they also contained a fundamental norm of the state (*staatsfundamental-norm*) and the basic rules of the state (*staatsgrundgesetz*). If the constitution is understood as a result of the social contract as outlined in a written text (in addition there is also unwritten text - as in Britain), *staatsidee* is the basic idea behind the establishment of a state.

While *rechtsidee* is the normative notion defined as the legal basis for the holding of a country, the state organization as an organization of power run under the rule of law is rooted in the values held by the public / citizens of the country concerned (*Rechtsidee*).<sup>10</sup> Therefore, *Rechtsidee*, excavated from the existing values and developing and believed by people, subsequently becoming the basic / fundamental norm of a state technically will be realized in the body of the constitution and operationally can take the form of a variety of written law (legislation). In historical perspective, there is a tug of war in the relationship between law and power in Indonesia. Legal

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9 Moh. Koesnoe, *Pokok Permasalahan Hukum kita Dewasa ini*, dalam Artidjo Alkotsar dan M. Sholeh Amin, *Perkembangan Hukum Dalam Perspektif Hukum Nasional* (LBH Yogyakarta dan Rajawali, Jakarta, 1989), 106. See also Bandingkan Daniel S Lev, *Hukum dan Politik di Indonesia -Kesinambungan dan Perubahan* (Jakarta: LP3ES, 1990), 440.

10 Roscoe Pound, *An Introduction to the Philosophy of Law* - with a new introduction by Marshal L. De Rosa, (New Brunswick (USA) and London (UK), (1999) - Originally published in 1922 by Yale University Press), 4. See also Rifyal Ka'ba, *The Islamic Law in Indonesia*, (Jakarta, Yarsi University, 1999), 27, which outlines that the Koran is the law according to statutes, decisions and orders that come from God and human legislation that aims to uphold justice in the personal lives, communities and nations. An ordinance from Allah, the divine law of justice entirely contained. An ordinance from legisilasi human, human law must be based on divine law and the highest sense of justice. See also the opinion of David N. Schiff, (1999), *Law As A Social Phenomenon*, in Adam and Christopher J. Podgorecki Welan (editor), *Sociological Approach Against the Law, trans. from, Sociological Approaches To Law* (New York: Literacy Development, 1999), 252-254.

development in Indonesia cannot escape itself from the forms of power emerging along with the various political interests at the time. Legal development, in this case, especially family law, including inheritance law is quite interesting, because since that time on the normative values of society are believed to have been confronted with the values of religion. Sociologically, the people of Indonesia, particularly Indonesian Muslims, explore the legal normative values based on the believed religious values. This is due to the influence of power controlled by the followers of Islam (the empire/sultanate). Many Dutch lawyers held different points of view concerning this and several theories emerged in the formulation of customary law (law of indigenous peoples). One emerging theory is a theory of *receptio in complexu* advanced by LWC van den Berg, who based it on religion as a source of value in the formulation of the law. Substantively, this theory outlines that the law applicable to indigenous people is their religious law.

As the implications of understanding the theory of Receptio in Complexu, the Netherlands Indies Government issued Staatblad 1882 No. 152 on the arrangements to resolve family disputes, marriage, inheritance for indigenous people (the Muslims) for Java and Madura, and then the stb. 1937 No.638 and 639 for the areas of Borneo. From the institutional side, with the issuance of these two Staatblads, there stood Religion Raad in addition to Raad van Justitie which was later known as the religious court. Nevertheless, the political laws of the Netherlands Indies Government law on the law enforcement adopted by the community (indigenous) did not entail the existing whole laws, but was restricted to the civil aspect, and it was related only to family law, marriage and inheritance.

In the perspective of the state constitution of RI (UUD 1945), religion is given a respectable position, since it is expressly stipulated in the Preamble to the Constitution or in the trunk of the body (Article 29). Therefore, in the political and normative constellation, religion has been placed in position as part of the foundation of law formation. This can be traced to Article 29 paragraph (1) of the 1945 Constitution, which highlights that the State is based upon the belief in Oneness of God. While paragraph (2) also affirms that the state guarantees the freedom of each citizen to embrace his or her respective religion and to undertake religious services according to his or her religion or belief.

As the implications of understanding the ideals of law, the provision of Article 29 UUD 1945 can be viewed from two sides, i.e. the persuasive source and authoritative source. Persuasive source is defined as the source whereby the people should be convinced so as to accept it, and authoritative source, is defined as an authoritative source, namely, the source that has power (authority).<sup>11</sup>

The above descriptions reveal that sociological, political or normative aspects in Indonesia show that legal pluralism is unavoidable, due to the diversity of the community, belief, culture and political environment. In the perspective of legal pluralism, the establishment of a law, in addition to referring to the written law, must also explore the values that are believed by the society.

Linking the community with a set of values and norms believed in the legal establishment (*rechtsvinding*) will reflect the value and power of the law itself. Legal establishment can be undertaken by an organ of power which is given the authority to establish laws, as well as by a certain position that is given the authority to establish a law through a legal decision (Judge) in the judiciary. In this connection, the position, function and role of judges are very important, because through a decision of a judge, a legal norm will be able to run, even to be found. Therefore, in the perspective of the judiciary in Indonesia as an institution that has the function of law enforcement and legal discovery, this institute will also still be dealing with legal pluralism. The judiciary in Indonesia is unique compared with that in other countries. The uniqueness is characterized by the emergence of religious courts not recognized in the countries of the world. This condition institutionally shows recognition of the existence of legal pluralism.

World of justice in Indonesia has undergone a formative period until the opening of a four-door system of justice in national law in Indonesia with the enactment of the Law. No. 14/1970 as amended by Law No. 48 of 2009 on the Principles of Judicial Power. One of the courts in the judicial system of the religion in question is set forth in Law no. 7 of 1989 on the religious court and has been amended by Law No. 50 of 2009. In a pluralist society such as Indonesia, judicial reform which specifically accommodates Islamic law in the national legal order is a big leap.

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<sup>11</sup> Pound, *An Introduction to the Philosophy of Law*, 4.

In historical perspective, the reality which reflects Islamic legal practice in the life of the nation did not work out as it had been practiced in the early days of the development of Islam. This is because the nature of the pluralism of a society along with the development of democracy in Muslim-majority country has to greater or lesser extent become a factor, which bears evidence to how difficult Islamic law gained legitimacy of positive law in a country.

In such a situation, there have been many discussions and studies of how to transform Islamic law into national law within a democratic and pluralistic state. In Muslim-majority Indonesia, this country is supposed to have a national political representation that supports the imposition of Islamic law in national legal order. However, pluralism of understanding and appreciation of Islam among the Muslims and the uneven information about Islamic law have given birth to people who believe in Islam but culturally only a small part of whom accept Islamic Shariah as the law which should be applied in the national legal order.

The same is true to the circles of the national politics. Only a small part of whom have continuity of beliefs, political thought and action that support the imposition of Islamic *Shariah*. The situation of public confidence and appreciation of Islamic law turned out not to have appeared in the culture and national political environment so that it brought about to an almost frozen situation as to the existence of Islamic law in national legal order.

### **III. Legal Pluralism**

#### **A. Sociological Study**

Plurality of Indonesian people is reflected by geographical condition, ethnicity, culture or religion, but politically, it is a mutually complementary unity as symbolized in the state emblem “Unity in Diversity”. Ethnic, cultural and religious plurality can be interpreted as a socio cultural phenomenon. The existence of ethnic diversity, culture and religion affects the legal issues, particularly ones which are related to the issues of codification and unification of law, for the ethnic, cultural and religious plurality also contains the values and norms which are believed and observed by the people concerned.

The debate over legal pluralism in Indonesia has been going on for a long time since the days of Dutch colonial rule. The central issue under debate was the choice that had to be made by the Dutch colonial government, namely, the establishment of an integrated or a split-up colonial society. Within the framework of the law, such situation involved the choice of whether adopting one law for all segments of the population; or compound law for a diverse group as well. The first view tends to create a state of a colonial type, and the second view tends to only create a system of administration in the colony.<sup>12</sup>

These two options have legal consequences. The first view suggests that the law tends to approach the legal unification, because the power of the state requires law endorsement. While the second view does not need to approach legal unification, but only requires management of the colonies (system administration). The Dutch East Indies is not a state but the state administration under the authority of its parent (the Netherlands). The choice of the second view has led to the choice of compound law and it is the second view which was selected by the Dutch colonial government. Therefore, the Dutch East Indies (Indonesia) was only an administrative region of the Netherlands, the designated authority in the Dutch East Indies did not have the authority to establish regulations. The consequences of the law were that the , legal plurality was applied by classifying the population of the Netherlands East Indies, who were subject to the law in accordance with the group they belonged to (IS Article 131 and 163). Legal pluralism was quite understandable, because it was difficult to create legal unification in a pluralistic society. If this had not been put into reality, it would have brought about the impact of shocks on the people who maintained their normative values.

Under the second option, the Dutch colonial government set *beleid Reglement op het Nederlands Indie van der Regeering*, abbreviated Regeering Reglement (RR), which was enacted and issued in

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<sup>12</sup> Daniel S Lev, *Hukum dan Politik di Indonesia -Kesinambungan dan Perubahan* (Jakarta: LP3ES,1990), hal. 440

Staatsblad 1882/152.<sup>13</sup> Article 75 paragraph (3) RR confirms that the Bumiputera (indigenous people) observed religious law. Political decisions (political law) were adopted out of the influence of a theory developed by Willem Lodewijk van den Berg Chritian, namely, the theory of *receptio in complexu*. This theory upholds a stance that the rule of law is based on religious norms.<sup>14</sup> In the political development of law, theory of *receptio in complexu* advanced by Snouck van Vollehhoven Hurgrounye, was deemed inappropriate in addition to being unfavorable to the colonial government. As an antinomy to the theory of *receptie*, there emerged and developed a theory called receptive theory. This theory points out that the laws applicable to the Bumiputera (indigeneous people) community is the traditional law rather than the religious law. Religious law is enforceable if it is accepted by customary law.

Snouck's and van Vollenhoven's opinions were made as the basis for the formulation of the law politics of the colonial government as laid down in the Wet op de Staatsinrechting van Netherlands Indies or Indies Staatsregeling (IS) Stbl. 1929:212. Matter of law by placing religious pluralism as the basis for the formulation of

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13 R. Soepomo, *Sejarah Politik Hukum Adat, Jilid I* (Jakarta: Pradnya Paramita, 1982), 30. See also R. Soepomo, *Political History of Customary Law, Volume I* (New York: Pradnya Paramita, 1982), 30. See also Soepomo in Moh. Yamin, (1959), *Manuscript Preparation Act of 1945*, (Jakarta: Prapanca,, p. 109 of the Session BPUPKI dated July 15, 1945 stating that the Indische Staatsregeling RR as a substitute for the Constitution of the Netherlands. Article 75 paragraph (3) RR The Judge explained that Indonesia ought to be treated religious law (*godsdiestige Wetten*) and the habits of Indonesia's population. Article 78 paragraph (2) RR asserts that "In the event of a civil case between Indonesia's fellow men, or their equivalent with them, then they are subject to the decision of the judge or the chief religion of their society according to religious law (*godsdiestige Wetten*) or the provisions-provisions long they ". See also the opinion of Sayuti Talib who argues that the pluralism of law and legal institutions selected by the Dutch colonial government in the sense of plurality *pembidangan* is not legal, *but* political in the sense that the law concerning the substance of the law that distinguishes law degrees from each other. Distinction degrees who placing of European law (*Netherlands*) is more highest rank compared with the local laws (*pribumi*) showed the nature arrogant Dutch rule who placing Dutch society rank higher than the society Indonesia (*pribumi*). See also Sayuti Talib, *Politics New Law Regarding the Status and Role of Customary Law and Islamic Law in the National Law Development, Cet.Pertama* (New York: Binacipta, 1987), 63.

14 Sayuti Thalib, *Receptio A Contrario-Hubungan Hukum Adat dengan Hukum Islam* (Jakarta: Bina Aksara, 1985), 7.

laws in Indonesia is also developed at the session of the BPUPKI. The results of BPUPKI formula known as the Jakarta Charter put religion as a basis on which the life of society is grounded in setting up the life of the community, especially Muslim Community. In the theoretical framework, the discussion on legal pluralism can be approached from the point of view of natural law. Natural law as one of the streams in legal philosophy having been born is based on the idea of universality and morality. The idea of universality provides a justification for the enactment of basic human freedoms and recognition of basic human rights in the life of the country. Similarly, the idea of morality is general moral principles and can be analyzed by human reason. The second idea is the lifelong essence used as a basic idea about the formulation of nature of law and justice as a legal purpose.

Looking at these two ideas is construed to mean that moral and ethical values are the basis for the legal establishment of justice as perennial fairness. The concept of justice is not formed, but as a result of the workings of nature which are the highest peak of the law. But whether or not justice can be realized by human beings also depends on how the law is formulated and applied. Thus the content of the law in the flow of natural law is justice and morality. Historically, the flow of natural law has developed since the 6<sup>th</sup> century is the legacy of Roman times as a continuation of the Justinian book of law which was the first book of law had ever been written in the Roman era. The contents were extracted from the legal doctrines of ancient Greece, which were excavated from Cicero's thought. According to Cicero, man is the universe community. Law is essentially an expression of common human nature which is universal. In its stage of development, this idea was formulated by Immanuel Kant into the laws of nature as a law, which stems from imperative category (kategorische imperative). The basic concept of Kant's thinking is that the law is the motivation of human action.

Motives of human action are distinguished in two respects, namely, if the motives of human actions are internal (for himself), they fall under the category of moral, but if they are external, they are categorized as law. External actions are categorized as law for the reason that such action may affect or be followed by others. In relation to religion, religious principles saturated with moral values

and justice can be understood as the principles consistent with the principles and content of natural law. Therefore, legal pluralism is very likely in a pluralistic society like Indonesia, and religion can be placed as a source or a basic norm as the reference in the formulation of the law. Politically and normatively, it was once imposed in Indonesia, namely, first during the administration of the Dutch East Indies and the second, in the reign of the unitary state of Indonesia as stipulated in both the Jakarta Charter and in Article 29 of the 1945 Constitution.

## **B. Religion as a Source of Law Reform**

In the political and normative constellation, religion has been placed in position as part of the foundation of law formation. It can be traced to Article 29 paragraph (1) of the 1945 Constitution, which states that the State is based upon the belief in God Almighty. While paragraph (2) also affirmed that the state guarantees the independence of each citizen to embrace their respective religions and to worship according to his religion or belief. Understanding the 1945 Constitution, especially the provisions of Article 29 is inseparable from the debate that emerged in the formulation beginning with the formulation of the Jakarta Charter. Jakarta Charter is a national consensus that was born as the climax anticipation of the long struggle of the Indonesian nation. It is designated as a national consensus because the Jakarta Charter was born by an institution established in the Japanese colonial era (by Dai Nippon), namely The Agency for the Investigation of Preparation Efforts of Indonesian Independence or BPUPKI (Dokuritsu Zyunbi Tyooskai). In the session commencing on May 29, 1945 which addressed the Constitution, there arose a fundamental question about the State Foundation (*weltanschauung*). BPUPKI consisting of 62 members could be grouped into 2 (two) classes: the secular nationalists and Islamic nationalists.<sup>15</sup> Both groups held very sharp differences on the basis that one party wanted Islam as the state while the other as a nationality. At its meeting on

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<sup>15</sup> Endang Saifuddin Anshari, *Piagam Jakarta 22 Juni 1945* (Bandung : Pustaka - Perpustakaan Salman Intitut Teknologi Bandung, 1981), 26. See also Bandingkan William G. Andrew, *Constitutions and Constitutionalism*, 3<sup>rd</sup> Ed (Van Nostrand New Jersey, 1968), yang menyatakan bahwa Konsesnsus bersandar pada 3 (tiga) elemen pokok; (1) The general goals of society or general acceptance of the same philosophy of government; (2) The basis of government); and (3), The form of institutions and proscedures

June 1, 1945, Sukarno came up with the basic idea of the state to be founded, known today as Pancasila. In addition to Sukarno's speech, previously featured other members of their ideas about the basis of both countries Soepomo, Muhammad Yamin and other members. To formulate flourishing ideas, Formulation Team of 9 people (Committee of 9) was formed which gave birth to the formulation of the Charter of Jakarta (Jakarta Charter), which is also a gentlemen's agreement.<sup>16</sup>

The load of the Jakarta Charter's formulation contained political aspect, human rights, and *rechsidee staatidee*. There are five basic ingredients at the heart of the Jakarta Charter contained in paragraph 4, which go as follows:

*“...Afterwards, to establish a Government of the Republic of Indonesia, which shall protect all the Indonesian people and the entire homeland of Indonesia, and to promote the public welfare, to enlighten the intellectual life of the nation and participate in the establishment of a world order based on freedom, abiding peace and social justice, Indonesia's independence was then drafted in a basic law of the State of Indonesia, which is formed in an arrangement of the people's sovereignty spirited Republic of Indonesia based on the belief in God, with the obligation to observe the Islamic Shariah for followers, on the basis of a just and civilized humanity, the unity of Indonesia and democracy led by the inner wisdom of deliberations of representatives, and the realization of social justice for all Indonesian people.”*

Formulation of the Committee of 9 (nine) garnered a strong reaction from members of the BPUPKI especially regarding the formulation of the belief in God, with the obligation to observe the Islamic *Shariah* for its followers. This strong reaction raised heated debate for the secular nationalists and some members of the Islamic nationalists. The formulation exerted political implications and was feared to split the nation. After the disputing parties received a

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<sup>16</sup> Anshari, *Piagam Jakarta 22 Juni 1945*, 27.

lengthy explanation given by the Islamic nationalist group sitting in the Committee of 9, the Jakarta Charter was unanimously approved as the preamble of the Constitution on July 14, 1945.<sup>17</sup>

Viewed from the side of the state administration, what are the implications of the formula (those five formula) of the Jakarta Charter? In this connection, this can be seen from two sides i.e. from the political implications and legal ideals. First, the political implication means that the formula does not necessarily mean that the state is based on Islam or the state to be established is an Islamic state. Therefore, the 7 (seven) the words should be interpreted as an assertion that Muslims need to organize or have their freedom protected in the conduct of Islamic *Shariah* does not have to be introduced into customary law, but Islamic law stands alone and is only intended to arrange for the religious life of the adherents of Islam.

*The formulation of Deity* with the obligation to observe the Islamic *Shariah*- for its adherents has implications for the state in the material sense. If it becomes part of the fundamental law of the state, there shall automatically come up an Islamic state. Such view is mistaken, because, according to Sunny,<sup>18</sup> the formula is preceded by a *staatsidee* formula, which is a basic law of Indonesia formed in an arrangement of the people's sovereignty-spirited Republic of Indonesia. The state to be established under the Charter of Jakarta is a unitary state with sovereignty vested in the people and not an Islamic state. The people's sovereignty-spirited state should be based on the five principles contained in the formulation of the Jakarta Charter as cited above. Sunny further argued that there was actually no need to debate the formulation of the Jakarta Charter at length, so that misunderstandings arose and there was no need to abolish the seven words following the word *Deity*, but simply substituted 7 (seven new words), so that it reads: "the obligation to observe religions for their respective followers."<sup>19</sup>

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17 Anshari, *Piagam Jakarta 22 Juni 1945*, 31.

18 Ismail Sunny, *The status of Islamic law in the state system of Indonesia, the Central Board of Religious Courts Judges Association, Prospects of Islamic law in the context of Legal Development in Indonesia - A 65-year memory of Prof. Dr. H. Busthanul Arifin, SH* (Jakarta : PP - IKAHA, 1994), 195.

19 Sunny, *The status of Islamic law in the state system of Indonesia*, 195.

With the new formulation, it implies that the adherents of Islam must observe the law of Islam and the followers of Christianity must comply with the law of the Christian religion and so on. Second, the implications for the understanding of the ideals of law, the formulation of the Jakarta Charter can be viewed from two sides, viz. the persuasive source and authoritative source. Persuasive source is defined as the source of which the people should be convinced to accept and authoritative source is defined as an authoritative source, namely, the sources that have power (authority).<sup>20</sup> Jakarta Charter as of the day it was signed and ratified the session of the BPUPKI until the issuance of the Presidential Decree of July 5, 1959 fell under the category of persuasive source so that the position of the seven removed was also in the persuasive source. After the Jakarta Charter was put as the continuum of the 1945 Constitution, the Jakarta Charter became an authoritative source. This means that Islamic law reflected in the revoked seven words has a binding force for its followers, or become an authoritative source of constitutional law in Indonesia. Thus, the legal position of Islamic Law was no longer received into customary law as provided by the Indische Staatsregeling (IS), but it stands alone and may be enforced by the state to its adherents.

#### **IV. Transformation Principle of Rule of Law and the Constitution**

##### **A. The Constitution and National Legal Systems**

State law (Rechtsstaat or the Rule of Law) is an idealized concept of the state by the founders of the nation to discuss and formulate the 1945 Constitution, as further set forth in the description of the 1945 Constitution before the amendment. Affirmation of the state of law was reinforced in the 1945 after the amendment to Article 1 paragraph (3), which reads “Indonesia is a State of Law”.<sup>21</sup>

As a state law, the law must be understood and developed as an integrated system. As a system, the law consists of the elements (1) institutional, (2) the formula of rule (instrumental), (3) the behavior of the law- subjects who hold the rights and obligations which are determined by the norms of that rule (subjective and cultural elements).

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<sup>20</sup> Sunny, *The status of Islamic law in the state system of Indonesia*, 197.

<sup>21</sup> Article 1 paragraph (3) *this* is the result of the Fourth Amendment of the 1945 Constitution.

These three elements of the legal system include (a) the activities of law-making, (b) activities of law enforcement or application of law (law administrating), and (c) activities of the law courts for law violations (adjudicating law) or commonly referred to as the rule law in the strict sense (law enforcement). Besides the activities mentioned above, there are several other activities that are often overlooked, namely (d) extensive dissemination and education of law which also include (e) law information management). The second activity is an activity that has increasingly important contribution to supporting the national legal system. The five activities in the legal system are usually divided into three areas of state power, namely (i) the functions of legislation and regulation, (ii) the executive and administrative functions, and (iii) judicial or judicial functions.<sup>22</sup> Legislative organ is the parliamentary institution executive organ is of government bureaucracy, while the judicial organ is the bureaucracy of law-enforcing apparatus that includes police, prosecution and courts. All the organs have to be connected with each hierarchy starting from the highest to the lowest, which is associated with the apparatus of the central, provincial, and district/ city level.

Nowadays there is still a tendency to understand law and the development of law partially, restricted to only certain elements and being segmental in nature. *One element in the national legal system is a rule. Regulation in the form of legislation can only be regarded as a rule of law in a national legal system if their validity can be traced directly or indirectly to the constitution.*

It is all the elements, components, hierarchy and those aspects that are systemic and are interrelated to each other that the understanding of the legal system is covered that should be developed within the framework of the Law State of Indonesia under the 1945 Constitution. If the dynamics with respect to all aspects, elements, hierarchy and the device does not work in a balanced and synergistic way, the law as an integrated system cannot be expected to materialize as it should. Currently, there is still a tendency to understand the law and legal development partially on certain elements and sectoral in

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<sup>22</sup> Montesquieu, *The Spirit of the Laws*, trans by Thomas Nugent, (London: G. Bell & Sons, Ltd., 1914), Part XI, Chapter 67.

nature. One element in the national legal system is the rules of law. Those rules of law are regulation in the form of legislation which can only be said as a rule of law in a national legal system if its validity can be traced either directly or indirectly to the constitution.<sup>23</sup>

The rule of law, as the personification of the state, is a hierarchy of legislation that has a different level. Unity of the legislation was drafted by the fact that making laws is determined by the lower laws of greater worth.<sup>24</sup> Legislation in Indonesia as a national legal system is also arranged hierarchically. Hierarchical relationships are interwoven as a whole and culminated in the constitution that the state law known as the principle of constitutional supremacy.

## **B. Implications of the 1945 Amendment to the National Legal System**

As a consequence of the supremacy of the constitution and the hierarchy of legislation in a legal system, any change in the constitution requires amendment to legislation in the legal system, and the exercise by the authorities.<sup>25</sup> Similarly, the changes in the 1945 Constitution which are somewhat basic and include almost all of the provisions contained therein, must be followed by changes in the legislation under it and its implementation by the competent organ. The provisions of the existing legislation that stem from certain provisions in the 1945 Constitution prior to the amendment

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23 Hans Kelsen, *General Theory of Law and State*, trans by Anders Wedberg, (New York: Russell & Russell, 1961), 115 and 123-124.

24 Kelsen, *General Theory of Law and State*, 124. Some authors claim that the theory of hierarchy of norms is influenced by the theories of Adolf Merkl, or at least Merkl has written than the first theory of Hans Kelsen, who disebut Jelić the “*stairwell* structure of legal order”. Merkl theory is about the legal stage (die Lehre vom der Stufenbau Rechtsordnung), namely that the law is a hierarchical system of rules, a system that conditioned and conditioned norms and legal action. Norms that condition contains the conditions for the manufacture of other norms or actions. Preparation of this hierarchical regression manifested in the form of a system of higher law to the legal system of the lower. This process is always a process of concretization and individualization.

25 Law can be categorized into four groups of legal sense and can be seen from the creation and establishment of laws, namely the State Law (The State’s Law), Law of Peoples (The People’s Law), Doctrine (The Professor’s Law), and legal practice (The Professional’s Law). See also Lihat Jimly Asshiddiqie, *Hukum Tata Negara dan Pilar-Pilar Demokrasi* (Jakarta; Konstitusi Press, 2005), 4.

must be reviewed for its compliance with the amended provisions of the 1945 Constitution.

Immediately after the constitutional reform is successful, we need to continue with the agenda of legal reform (*establishment and legal reform* of law). If we look at the provisions of the 1945 Constitution after four-time amendments, there are 22 items that state “regulated by law” or “shall be further regulated by law”, the 11 items of provisions which state “governed by law” or “shall be further regulated by law”, and 6 items of provisions state “defined by law.

These provisions clearly mandated the need for legal reform as a form of implementation of the 1945 Constitution. Areas of law that require formation and renewal can be grouped according to the required fields, for example fields of politics and government, economics and business; social welfare and culture, and structuring system and legal personnel. As a unified system of law, efforts to change legislation to conform with the changes made in the 1945 Constitution are an integral part of the overall development of national laws.

Therefore, changes in the legislation should be well planned and participatory in the program of national legislation while at the same time functioning as a legislative review. The purpose of the national legislation program which should be developed first and foremost is to implement the provisions of the 1945 Constitution. Under the provisions of the 1945 Constitution, legislation to be made in the national legislation program in political, economic, and social spheres can be elaborated.. In addition, citizens can also apply for a constitutional review to the Constitutional Court against the Act which is considered detrimental to their constitutional rights in the 1945 Constitution as amended.<sup>26</sup> Communities can also apply to the Supreme Court for a judicial review against the legislation under the Act which is deemed to be contrary to the Act.

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<sup>26</sup> Under Article 50 of Law Number 24 Year 2003 regarding the Constitutional Court, the Constitutional Court the authority of constitutional review is limited to the Act which established the first change after the 1945 Constitution. No verdict yet in case. 04/PUU-I/2003 Article 50 of Act of 2003 set aside by the Constitutional Court, because they reduce the authority of the Constitutional Court under the 1945 Constitution.

## C. Some Forms of Legal Transformation

### 1. During the Dutch Colonial Government

In historical perspective there has been a tug of war in the nature of the relationship between law and power in Indonesia. Legal development in Indonesia could not escape the forms of power that emerged with the various political interests at the time. Legal developments, especially in the family law, including inheritance law are quite interesting to note, because since that time on the normative values observed by the society have been confronted with the values of religion. Sociologically, the people of Indonesia especially Indonesian Muslims explore the legal normative values based on religious values complied with. This is due to the influence of power that is controlled by the followers of Islam (the empire). Many Dutch lawyers held different points of view in this respect and there emerged several theories in the formulation of customary law (law of indigenous peoples). One of the emerging theories is *receptio in complexu* (complex reception) advanced by LWC van den Berg, who advocated religion as a source of value in the formulation of the law. Substantively, the theory underlines that the law applicable to the natives is the law of their respective religion. This suggests that for those who observe Hinduism, its law is applicable to them, and for those who embrace Islam, the Islamic law is enforceable to them. The question is why Van den Berg dared to put forward his theory which provides opportunities for indigenous people to carry out their religious beliefs?<sup>27</sup> In answering this question, two-

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<sup>27</sup> See C. van Vollenhoven, *Penemuan Hukum Adat, terj. De ontdekking het adatrecht* (Jakarta: PT. Djambatan, 1987), 4-5 dan *Het Adatrecht van Nederlands Indie I*, (Leiden, E.J. Brill, *discovery of Customary Law*, trans. *De ontdekking het adatrecht*, (Jakarta: PT. Oxford University Press, 1987), 4-5 and *Adatrecht van Het Nederlands Indie I*, (Leiden, EJ Brill, 1933), 150-15, suggests that elements of the law (adat) includes elements of the philosophical values of life in society and believed that the guidelines and sociological elements that is, the values of life and are believed to be adhered to for guidance in social life among members of society. But the Ter Haar argues bring the two elements is not enough and must be coupled with the institutional elements of power-namely, that the values of life and obey (the main philosophical and sociological elements) have gained legitmasi of power (legal functionaries). See also Lihat B. Ter Haar, *dalam, Asas-asas dan Susunan Hukum Adat, terj. Begisnselen en Stelsel van het Adatrecht* (Jakarta: Pradnya Paramita, 1987), hal. 1-6.

side approaches should be taken into account: first, in terms of legal substance. The view is acceptable, considering that the law can also be interpreted as the fabric of values held by people who are able to drive man to fulfill his desires / needs.

Second, judging from the political (legal) perspective, the implications of understanding the theory of *Receptio in Complexu* (reception in Complex), the Netherlands Indies Government issued Gazette 1882. No 152 on the arrangements to resolve family law disputes, marriage, inheritance for indigenous people (the Muslims) for Java and Madura, and then the STB. No. 1937. 638 and 639 for the areas of Borneo. From the institutional side, then with the second Staatblad, standing beside Raad Raad van Justitie Religion is so well known to the religious court. Nevertheless, the political laws of the Netherlands Indies Government law enforcement adopted by the community (indigenous) does not entailed the whole law, but was restricted to the civil aspect, and it was related to family law, marriage and inheritance. This was understandable because this law was politically easier to control, as well as sensitive in political terms. If this is not regulated or controlled, and (of course with a variety of approaches in accordance with the political will), it will easily end up in turmoil. For this reason, the Dutch East Indies government properly anticipated although limited by providing a place or indigenous law instituting the religious aspects of bases in a Gazette.

During its development, the Dutch East Indies government law politics changed in 1929, namely that indigenous law is based on religion (Islam) may only be valid if accepted or required by customary law. The changing views on the advice of Snouck Hurgronje, known as Theory reception. This period is known by Ismail Sunny with a period of acceptance of Islamic law by customary law.<sup>28</sup> Snouck Hurgronje opinion is then given a legal basis in the statute Basic Dutch East Indies, known to date are: Wet op de Staatsinrichting van Nederlands Indie- an abbreviated Indische Staatsregeling (IS). In IS, legislated in STBI. No.1929. 212, Islamic Law repealed the laws of the Netherlands Indies environmental governance as outlined in Article 134 paragraph (2) the read: "In the event of civil cases among Muslims will be resolved by a judge of Islamic customary law if

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<sup>28</sup> Sunny, *The status of Islamic law in the state system of Indonesia*, n. 18 at 194.

they so desire and so far it does not otherwise specified ordinance with something.”

Furthermore, after the events described above, the Dutch East Indies government narrow down again authority of the Religious Court which had been in force since the mid-year of 1882 by issuing in 1937, Gazette No. 116, which essentially revoked the authority of Religious Court in dealing with inheritance law. The reason given was that the Islamic inheritance law had not yet been accepted by customary law nor had yet been received into customary law.

## **2. The Government of Indonesia in the Post-Independence**

This paper will present a brief example of the transformation form of Islamic law in national law which is limited to the religious judicial laws and *Shariah* Banking Act of 2008. Religious Judicature Act became a milestone in the implementation of Islamic law on the judiciary because religious law of Islam is used as a source of substantive law which is not written, and hence written material law is *Shariah* Banking Act. In addition, there have been several legal products published in the form of legislation, namely, in the field of charity, pilgrimage and *waqaf*, but the presentation will be limited to two (2) laws i.e. the Religious Law and *Shariah* Banking Law.

### **A. Religious Judicature Act**

In the annals of justice in Indonesia, religious courts have a unique history compared with other justice agencies. After a long struggle, the promulgation of Law no. 7 Year 1989 on the religious court was finally signed on December 29, 1989.<sup>29</sup> Religious court was, from

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<sup>29</sup> Long struggle within the period of 1882-1989 (107 2008), and after 54 2008 after the independence of Indonesia, the Religious and political legitimacy of the legal basis since the inception of Law. 7 Year 1989 on the Religious. Previously, an agreement on the composition, powers and judicial procedure within the religious court set up in various provisions, namely: (1) Rule of the Religious in Java and Madura (*Staatsblad* Year 1882 Number 152 is connected to the *Staatsblad* Year 1937 Number 116 and 610), (2). Regulation of the density and the density of Qadi Qadi Great for most resident of South Kalimantan and East Kalimantan (*Staatsblad* Year 1937 Number 638 and 639), (3). Government Regulation Number 45 Year 1957 on the establishment of the Religious/Syariah Court outside Java and Madura (State Lembarabn 1957 No. 99).

the beginning, designed as a specialized judiciary, because the space of authority that it attaches to is a special authority, so that both the subject and the object are of specific nature. This restriction is possible, because the historical background and , sociological and political demands for the existence of religious courts is to resolve certain issues that occurred among Muslim people, namely on the question of marriage , inheritance, wills, endowments and *Sadaqah* under the Islamic law. Indeed, religious courts had a fairly high political sensitivity since the government of the Netherlands East Indies to the heyday of the New Order Regime.

In the perspective of the 1945 Constitution, the existence of religious courts as a judiciary entity is expressly stated in Article 24 paragraph (2) of the 1945 Constitution, which states: “The judiciary power is vested in the Supreme Court and judicial bodies below it in the spheres of the general courts, religious courts (*bold letters by the author*), military courts, administrative courts, and is also exercised by a Constitutional Court.”The assertion signifies that religious court is the name of the entity assigned independently by the 1945 Constitution, so that automatically the level of constitutionality is beyond doubt and undebatable, thereby having the consequences of further arrangement in a separate Act. Logical and legal consequence is that all the substance set forth in Law No. 7 of 1989 on the religious court jo. Law No. 3 of 2006 on the Amendment of Law No 7 of 1989 on the religious court is constitutional, because it is a delegation of the 1945 Constitution. Accordingly, *litis objectum* authority of religious courts is the one as provided for in Article 49 paragraph (1) letter a, b, and c.

In addition, this specific nature is an answer to the principles of human rights, namely to respect; to protect; to fulfill human rights (respect, protect and fulfill human rights). The three principles (to respect, to protect and to fulfill) are essentially the freedom guaranteed by the 1945 Constitution as set out in Article 27, Article 28, Article 28A, Article 28B, Section 28C, Section 28D, Chapter 28E, Section 28F, Section 28G, Section 28H, and Article 28 of the 1945 Constitution. Similarly, if related to the nature of religious courts as special courts for special /certain subject , translating to respect, to protect, to fulfill human rights is as stipulated in Article 28 Paragraph (1), and Article 28E Paragraph (1) and paragraph (2)

and Article 28H paragraph (2) of the 1945 Constitution. Article 28D paragraph (1) of the 1945 Constitution states that: “Everyone has the right to recognition, security, protection and legal certainty of fair and equal treatment before the law”; Article 28E Paragraph (1) states: “Everyone is free to embrace and to practice the religion, to have an education, to choose a job, to choose citizenship, and to choose where to live in the country and to leave it and to come back.”

Furthermore, Article 28E paragraph (2) states: “Everyone reserves the right for freedom of holding his or her religion or belief, and of expressing thoughts and attitudes, according to his or her conscience.” Even Article 28H paragraph (2) of the 1945 Constitution reads, “Every person is entitled to ease and special treatment to obtain the same opportunities and benefits for achieving equality and justice. “Today, Indonesia’s commitment to human rights instruments (human rights) relating to the elimination of all forms of discrimination of women and a commitment to advancing women in politics have been realized through the ratification and various government policies. Under the above-mentioned, provisions then the religious court as a special court of justice is a translation of the commands of the 1945 Constitution, which, sociologically, the existence of religious courts has been accepted by the Indonesian Muslim people. Therefore, the religious law courts with its nature of specificity and object of authority which have been formulated in the form of legislation included in this regard *Shariah* Banking Act 2008 is constitutional.

## **B. Law of *Shariah* Banking**

Constitutionally, the afore-mentioned principles serve as the foundation on which the arrangements of *Shariah* banking principles are based *Shariah* as the rule of law in carrying out banking business. As a banking business, the overall *Shariah* banking is based on *Shariah*, both in terms of institutional and business activities, as well as the manner and process of conducting banking business.

In the perspective of national banks, the *Shariah* banking is a special arrangement since most actors (*subjektumlitis*) in the banking business require specificity namely the application of the norms of

*Shariah* law as the basis for its activities. This nature of specificity or exception can be adopted in accordance with the principles of human rights, namely to respect; to protect; to fulfill human rights. These three principle (to respect, to protect and to fulfill) are essentially the freedom guaranteed by the 1945 Constitution as set out in Article 27, Article 28, Article 28A, Article 28B, Section 28C, Section 28D, Chapter 28E, Section 28F, Section 28G , Section 28H, and Article 28 of the 1945 Constitution. Thus, the regulation of *Shariah* banking is essentially translated to respect; to protect; to fulfill human rights as stipulated in Article 28 Paragraph (1), and Article 28E Paragraph (1) and paragraph (2) and Article 28H paragraph ( 2) the 1945 Constitution.

Article 28D paragraph (1) of the 1945 Constitution states that: “Everyone has the right for recognition, security, protection and legal certainty of fair and equal treatment before the law”; Article 28E Paragraph (1) states: “Everyone is free to embrace and to practice the religion, to have an education, to choose a job, to choose citizenship, to choose where to live in the country and to leave it and to come back.” Furthermore, Article 28E paragraph (2) states: “Everyone has the right for freedom of embracing his or her belief, expressing his or her states of mind and attitudes, according to his or her conscience. Even Article 28H paragraph (2) of the 1945 Constitution reads, “Every person is entitled to ease and special treatment and to obtain the same opportunities and benefits for achieving equality and justice.”

In the perspective of human rights, the above provisions are essentially a manifestation of the principles of democratic rule of law, namely:

- Article 1 paragraph (2) of the 1945 Constitution states that sovereignty is vested in the people and exercised according to the Constitution. This suggests that the ultimate sovereignty belongs to the people, thus many activities or activities are based on the principles of equality and equal treatment in securing justice;
- That the principle of people’s sovereignty is a fundamental constitutional principle which not only provides color and spirit of the constitution that determines the form of government, but also can be viewed as morality and the constitution that

give color to the overall nature of the law. Nevertheless, there should be a clear boundary that is, interdiction to violate the principle of popular sovereignty, which can be viewed as a fundamental constitutional principle and cannot be ruled out, because not only is it the basic norm, but more than that it is the morality of the state constitution to all lives of the state and the nation in political, social, economic, and legal domains. The principle should go side by side, and should not invalidate but rather it should uphold human rights and form the basis for human dignity (the dignity of man).

Therefore, the existence of *Shariah* Bank through *Shariah* Banking Act of 2008 is one of the transformations of Islamic law into national law. In this perspective, sociologically, the law is a reflection of the values observed by a society as a system adopted in private life, and in the life of society, nation and state. In this perspective, the law can be used as a reference for community renewal as revealed in Roscoe Pound's concept of law as a tool of social engineering.<sup>30</sup> This means that the substance of the law should be able to capture the aspirations of the people who grow and develop not only are present, but as a reference in anticipation of the social, economic, cultural and political future. Thinking suggests that the law is not just a static norm that gives priority to the certainty and order, but the norms that should be able to manipulate the thinking and behavior facilitate community in achieving its goals.<sup>31</sup>

The above view indicates that the rule of law is essentially inherent in the values held by society. But the power of legal enforceability cannot break away from institutional power, so the law, society and power are an element of a society. Therefore, the law is not merely understood as a norm that ensures certainty and justice but is also seen from the perspective of its utility.<sup>32</sup>

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30 Pound, *An Introduction to the Philosophy of Law*, n. 10 at 4.

31 Bagir Manan, *Menegakkan Hukum Suatu Pencarian* (Cetakan Pertama, Jakarta: Asosiasi Advokat Indonesia, 2009), hal. 164 – 165. See also Lihat pendapat David N. Schiff, *Hukum Sebagai Suatu Fenomena Sosial*, dalam Adam Podgorecki dan Christopher J. Welan (editor), *Pendekatan Sosiologis Terhadap Hukum*, terj. dari , *Sociological Approaches To Law* (Jakarta: Bina Aksara, 1999), 252-254.

32 John Rawl, *Teori Keadilan, Dasar-Dasar Filsafat Politik untuk Mewujudkan Kesejahteraan Sosial dalam Negara* (Yogyakarta: Pustaka Pelajar, 2006), 513-517, terjemahan *A Theory of Justice*, (Cumbride, Massachusett: Harvard University Press: 1995).

## V. Conclusion

Transformation of Islamic law into national law has begun to evolve and take shape by the issuance of some regulations concerning *zakat*, *hajj*, *waqaf* and banking in the form of *Shariah* law. In a political perspective, the BPUPKI-sanctioned formulation known as the Jakarta Charter, which places religion as the underpinning on which the life of society especially Muslim society has been established, so that all public policies which are formulated in the legislation are in line with the spirit of Pancasila, which originates from the divine spirit of God.

The transformation of Islamic law is essentially creative efforts so as to make the substance of the law in the form of laws inherent with the values and beliefs of the community concerned, so that the transformation of Islamic law into national law is an inevitability that does not need to be suspected of, but it should get the proper support instead. This process has already taken place from generation to generation, so the law can be designated as a phenomenon that continues to move, in line with the development of society itself.

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