



Constitutional Boundaries Islamic law In National Law

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Received: 20 23 - 07 - 22 ; Accepted: 20 23 - 08 - 20 ; Published: 20 23 - 08 - 24

Abstract

Indonesia is a form of nation state consisting of territorial areas and a diversity of ethnicities, races, cultures and religions. Ethnic, cultural and religious diversity requires basic rules that guarantee the rights and interests of citizens in carrying out legal relations with each other for mutual order. The basic rules that guide and guide citizens are extracted from the value system to accommodate all citizens' interests. This value system is expressed in the form of a "collective agreement", in terms of the modern state system, it is called a constitution. The desire of Muslims to make Islam the basis of the state as outlined in the 1945 Constitution is limited considering that the form of the Indonesian state is a Pancasila state which believes in God. Within these limitations, there is a gap in applying Islamic teachings, namely only the substantive values. Method Study This use method study qualitative with use studies descriptive as design his research . Type research used _ in study This is study literature or library research , . For obtain correct and precise results _ in analyzed the data, author use technique analysis content. Analysis content (*Content Analysis*). The constitutionalization of Islamic law into the national legal system can only be carried out through a political-legal approach that is substantive, not formalistic. Opportunities to implement Islamic law as mandated in the 1945 Constitution can be carried out at the level of legislation or presidential instructions. This approach emphasizes that indirectly universal Islamic teachings such as the protection of human rights have been included in the Indonesian constitution, even though they do not use religious language.

Keywords: *Islamic and Constitutional Law*

Abstract

Indonesia is one of the nation states that consists of territorial areas and diversity of ethnicity, race, culture and religion. The diversity of ethnicity, culture and religion requires basic rules that guarantee the rights and interests of citizens in conducting legal relations with each other for mutual order. The basic rules that guide and guide citizens are extracted from a value system that accommodates all the interests of citizens. This value system is outlined in the form of a "collective agreement", in the terms of modern



state governance systems called the constitution. The desire of Muslims to make Islam the basis of the state as outlined in the 1945 Constitution is limited considering the form of the Indonesian state is a Pancasila state with a deity. Within these limitations, there is a gap in applying Islamic teachings, which is limited to the substance value only. This research method uses qualitative research methods by using descriptive studies as its research design. The type of research used in this research is library research. To obtain correct and precise results in analyzing the data, the author uses content analysis techniques. The constitutionalization of Islamic law into the national legal system can only be done through a legal political approach that is substantial, not formalistic. The opportunity to apply Islamic law as mandated in the 1945 Constitution can be done at the level of legislation or presidential instruction. This approach emphasizes that indirectly universal Islamic teachings such as the protection of human rights have been included in the Indonesian state constitution, even though it does not use religious language.

Keywords: *Islamic and Constitutional Law*

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A. INTRODUCTION

In system constitutionally , Indonesia is one of them the form of a nation state consisting of from region territoriality and diversity ethnicity , race , culture and religion. Diversity ethnicity , culture and religion require rule guaranteed basis _ rights and interests internal citizens _ do connection law One The same other For order together . Rule the basis becomes guidelines and guidelines citizens exhumed _ from system mark accommodate all over interest Megara residents . System mark This poured deep form of “ agreement together ” , in the term modern state system is called constitution . Constitution works limit power so as not to arbitrary organize power , so guaranteed rights natural citizen _ compound .¹

In Indonesia, form agreement together the poured to in five principles base together that is Pancasila . History records , Pancasila made the basis of the state is results discussion long even become the polemic that occurred between Indonesian citizens consisting of from different religions.must recognized ,

¹ Soetanto Soepladhy , *Redesign Constitution* , (n.d.: Kepel Press, 2004), p . 23



diversity ethnicity , culture and religion by each citizens do not regardless from exists interest For carry out teachings his religion each at a time make religion into National principle .

People Islam as majority citizens _ have desire Indonesia 's foundation is Islam . Struggle people Islam make Islam as the foundation of the Indonesian state has always been experienced " failure ". At least there is two period It's important to mark people Islam in fight for Islam as National principle . *First* , in 1945 with _ the birth of the 1945 Constitution as state constitution . Moment This people Islam Not yet succeed make Islam as the basis of the country, will but get confession operate law Islam is stated in Jakarta charter . the Jakarta Charter formulated in preamble to the Constitution ratified by BPUPKI. A number interests and considerations that Indonesia is not an Islamic country , but a Pancasila country , then existence inner Jakarta charter preamble the abolished by PPKI to become the opening of the 1945 Constitution , namely Almighty Godhead _ Esa .

Second , in 1955-1959 with _ victory election people Islam return fight for the basis of the state through assembly constituent. period I also experienced this failure make Islam as National principle . Consequence from struggle people Islam at the time This give birth to Decree President July 5 , 1959 at once disbanded constituent . With thereby the 1945 Constitution comes into force exist return as Indonesian state constitution .²

Failure people Islam make Islam as The basis of the country is only on business make Islam as teachings base in constitution . Temporary implementation law Islam in a Pancasila country precisely get acknowledgment and guarantee protection from the constitution of the 1954 Constitution of the Republic of Indonesia as listed in article 29 paragraph 1. Only course , implementation law Islam in a way hierarchy limited to the statutory level . Legally and formally, the values contained in teachings Islam birth a number regulation legislation , not at the constitutional level . Presence law private accommodate values teachings Islam , like Constitution about Marriage Number 1 of 1974, compilation law Islam in form Presidential Instruction Number 1 of 1991.

Whereas law public arrange interests of many people No held based on teachings of a particular religion , but rather refers to the system law national .

²Ahmad Syafi'I Ma'arif , *Islam and Problems Statehood : Study in Matchmaking Konstitusnte* , (Jakarta: LP3ES, 1985), p . 176 .



Except Aceh Province is suitable with autonomy special given _ government ; one of them there is authority apply law public Islam . And justice Sharia Islamic (court syar'iyah) which was expanded authority its jurisdiction .³

Desire people Islam make Islam as the basis of the state is outlined in the 1945 Constitution is become limited remember the form of the Indonesian state is a Pancasila country that believes in God . Deep limitations there is _ gap apply teachings Islam , that is limited mark its substance just .⁴ Studies This want to explain Why law Islam No Can made base constitution and to what extent permitted limitations _ in business apply teachings Islam as teachings majority Indonesian citizens . For respond surrounding issues _ enforcement law Islam in Indonesia, discussion will focused on concepts constitution , source law national , as well form strategy people Islam in effort apply law Islam in framework law national . Objective from studies This is explained opportunity constitutionalization law Islam into the system law national in accordance with draft nation- state constitutions based on ideology Pancasila . Description furthermore with use descriptive-analysis-responsive in accordance with theme central to become focus discussion study .

RESEARCH METHODOLOGY

This research method uses qualitative research methods using descriptive studies as the research design. This method observes objects, explores and discovers new knowledge during the process of further and more in-depth research. Therefore, the aim of the researcher is to try to find out, understand, analyze and explain and describe the Constitutional Limits of Islamic Law in National Law.

The type of research used in this research is library research, namely research carried out by collecting data or scientific writing aimed at research objects or library data collection, or research carried out to solve a problem which is basically focused on critical and in-depth review of relevant library materials.

³ Base juridical implementation Sharia Islam in Aceh is based on Constitution Number 44 of 1999 concerning Maintenance Privileges Aceh , Law Number 18 of 2001 concerning Autonomy Special and Statutory Number 11 of 2006 concerning Aceh Government , Al Yasa Abubakar, *Implementation Islamic Sharia in Aceh: Efforts Drafting Fiqh in the Nation State* , (Banda Aceh: Dinas Aceh Islamic Sharia , 2008), p . 2; Moh . Fauzi , *Legislation Implementation Islamic Sharia in the Province Nanggroe Aceh Darussalam: Struggle Sosto-Politics and Review Constitutional law* , IAIN Ar-Raniry Banda Aceh Postgraduate Program Dissertation , 2009, p . 15-16.

⁴ Moh Mahfud MD, *Building Political Law , Enforcing Constitution* , (Jakarta: Raja Grafindo Persada) , p . 284.



⁵To obtain correct and precise results in analyzing data, the author uses content analysis techniques. *Content Analysis* is research that is an in-depth discussion of the content of written or printed information in the mass media. The strategic steps in content analysis research are as follows: *First* , determining the research design or model. *Second* , search for main data or primary data, namely the text itself. *Third* , search for contextual knowledge so that the research carried out does not exist in a vacuum, but is seen to be linked to other factors.⁶

RESULTS AND DISCUSSION

Constitution: A Definition

The origin of the word constitution comes from the French word *Constituer*, meaning to form or compose, declare a state. Meanwhile, in English the term constitution is used. In Latin, constitution comes from two words, namely *cume* (together) and *statuere* (to stand, establish something). The singular form of constitution is to determine something jointly, and *constitutiones* as the plural form means everything that has been determined.

In the Big Indonesian Dictionary, the constitution is all provisions and rules relating to state administration, such as the Constitution, which serve as guidelines for the state in exercising its powers. Meanwhile, constitutional refers to acts or actions carried out by every citizen and ruler that are not in line with the basic principles in the constitution. Constitutionalism is an understanding regarding the limitations of power and guarantees of citizens' rights through the constitution. In technical terms, constitutionalism is a state ideology that emphasizes guaranteeing the protection of human rights while limiting state power to state institutions to protect human rights.

There are two main elements that must be present in constitutionalism. First, protection of human rights along with a detailed explanation of the types of human rights in a constitution. Second, the state government system and state institutions that are authorized to protect human rights are in accordance with clear boundaries of power and authority.

The meaning of constitution in the sense of forming or compiling shows that the definition of constitution is taken from French which refers to a "process" of establishing and recognizing a state or government organization. This definition seems simpler because the meaning of constitution here emphasizes

⁵ Anwar Sanusi, *Methodology Study Business* , (Jakarta: Salemba Empat, 2016), p.32

⁶ Afifudin, Et.al, *Qualitative Research Methodology*, (Pustaka Setia: Bandung, 2012), p.165-168.



aspects of the formation process, so it is not known who formed it; individual or society. More specifically, the definition of a constitution from Latin focuses on efforts to draft a constitution carried out jointly, not by specific individuals. These two definitions still look simple and are subject to multiple interpretations. In contrast, the meaning of constitution contained in the Big Indonesian Dictionary refers to technical terms, namely that all rules relating to state administration are outlined in the Constitution as guidelines or instructions in running the government system. The constitutional criteria contained in the Big Indonesian Dictionary are written rules, so it can be understood that a rule is said to be a constitution that must meet written requirements. Consequently, any unwritten rules are not included in the constitutional criteria. Sri Soemantri acknowledged this understanding, equating the constitution with the Constitution as written rules.

In the Netherlands, the term constitution is not the same as the Basic Law. The Constitution in Dutch is called *Gronwet*. In Indonesian, *grond* means basic, while *wet* is law. For LJ Van Apeldoorn, the Constitution is a written part of the constitution. He expanded the meaning of the constitution to not only contain written regulations, but also unwritten regulations. It seems that the definition of constitution put forward by Van Apeldoorn accommodates the form of constitution adopted in countries that use unwritten law as a constitution, such as England and Israel.

Nevertheless, the substance of the constitution can be known from the experience of constitutional practice. This fact can be traced from the description put forward by Jimly Asshiddieqie, the British constitution is a building of rules, customs, habits that determine the composition and power of state organs and regulate relations between state organs and the relationship between state organs and citizens.

Regardless of the differences in the form of a constitution, whether written or unwritten rules, at least the criteria for a constitution are the basic rules or teachings that have been agreed upon by the people governing the rights of citizens, the form and system of government along with the institutions that implement and protect basic rights. citizen. In the Indonesian context, these basic rules are outlined in the 1945 Constitution as the highest law in force in Indonesia. Thus, the constitutional criteria referred to here are guided by the constitutional criteria in written form. These criteria are used in accordance with the constitutional system adopted in a country.



Islamic Law as a Subsystem of National Law

Indonesia as a nation state has a constitution that regulates universal teachings as contained in the 1945 Constitution. In this Constitution, it is emphasized that the form of the Indonesian state is a legal state that guarantees the protection of the rights and interests of its citizens in implementing the law, formulated in a state basis, namely Pancasila, which is constitutionally referred to as the state. Pancasila. Pancasila as a source of law is derived from the noble values of the Indonesian nation which aims to regulate the basic principles of life for citizens without distinction of ethnicity, race, culture and religion.

These noble values come from ethnic, cultural and religious diversity which regulate public interests which are then formulated in the national legal system. Islamic law as one of the laws originating from one of the religions in Indonesia also plays an important role in the development of the national legal system by making Islamic teaching values part of the national legal system. This effort is not to make Islam the Pancasila state constitution because Indonesia as a modern nation and state inherits fundamental philosophical values which are enforced on the basis of constitutional norms, namely the 1945 Constitution. a noble desire of the nation to live freely and orderly towards prosperity.

Such a philosophical and constitutional mandate is imperative (binding, forcing) all those within the territory of Indonesian legal authority (sovereignty) to be loyal, uphold, practice, civilize, inherit and preserve; including the obligation to defend the country. So, there is not a citizen, not even state institutions and their products, even state officials and leaders who are not bound (to be loyal) to the philosophical and constitutional mandate since Indonesia's independence and forever.

Pancasila as the main source of law for all Indonesian society is oriented towards providing a sense of justice and legal awareness in society in accordance with the philosophy of life and personality of the Indonesian nation. The general rules created and formulated must always refer to and comply with the basic principles contained in Pancasila which are oriented towards protecting Indonesian society and ensuring social justice. In accordance with the general principles above, Pancasila as a source of national law gives birth to rules or limitations to be guided by in the context of developing and developing national law.



First, the laws made are directed at national integration both territorially and ideologically. This principle comes from the formulation contained in the 1945 Constitution, namely "protecting the entire Indonesian nation and all of Indonesia's blood." Second, the laws that are developed must be in line with the principles of democracy and monarchy through procedures and mechanisms; transparent, accountable in accordance with the basics of legal philosophy. Third, the law formulated must guarantee a sense of social justice in the sense of providing protection to "weak" communities in facing "powerful" communities. Fourth, guarantee religious freedom that upholds the values of religious tolerance. The state guarantees freedom in the sense of protecting the religious freedom of every community as regulated in legislation, rather than enforcing certain religious laws.

Freedom of religion in a Pancasila legal state has a positive meaning, namely, there is a guarantee of freedom to carry out religious orders, and protection for citizens who practice their religion. Freedom is not meant to be like freedom in America, namely allowing atheism and anti-religious propaganda.

Islamic Law: From Religious Norms to Legal Norms

The Islamic teachings that Allah revealed to mankind are not only aimed at Muslims, but can be useful and provide value for all mankind. This can be seen from the existence of universal teachings (rahmatan lil 'alamin) which can be said to be part of the main ideals of Islamic law. This legal ideal in the discipline of Islamic legal philosophy is known as the principle of benefit, namely a principle or teaching oriented towards beneficial values for the benefit of humanity based on development.

These universal teachings include teachings about justice (QS an-Nisa': 135), deliberation (QS al-Syuara: 38), recognition and protection of human rights (QS al-Isra': 70), equality before the law (QS al-Hujurat : 13), peace (QS al-Baqarah: 208), tolerance (QS al-Baqarah: 217), trust (QS an-Nisa': 58), prosperity (QS al-Ma'arij: 24-24). These teachings are basic teachings or basic teachings that must be present in a basic government or constitution. These basic principles are still normative as religious or moral norms, not as positive legal norms that have sanctions. For this reason, it is necessary to shift religious norms to legal norms by reformulating general principles based on theory and fiqh rules. The results of this formulation are called middle norms (intermediate norms) as a link



between religious norms and concrete legal norms. As an example of the principle of justice in Islamic inheritance.

The next step is to link these intermediate norms into concrete legal norms as contained in legislation. The change in religious norms into legal norms is accompanied by legal sanctions contained in positive legal norms. This is necessary so that the legal rules made are binding on all citizens and also to obtain firmness in legislation.

Political Negotiations: Strategies Towards Constitutionalization of Islamic Law

Efforts to implement Islam as a legal norm recognized in Indonesian legislation provide a new nuance to the struggle of Indonesian Muslims as a majority Muslim community. The desire to make Islam the basis of the Indonesian state is currently impossible considering that the debate about state ideology was "finished" in the early era of independence. Apart from the form of the state, it is a Pancasila state which adheres to a diversity of cultural, racial and religious systems and also supports Indonesian Muslims in choosing different ways. The consensus of this diversity is the application of three legal systems adopted by Indonesian society in accordance with the classification of the Indonesian people. The three legal systems are Islamic law, customary law and western law. As a form of compromise of the three legal systems that apply in Indonesia, A. Qodry Azizi offers a way to combine the three legal systems that apply in Indonesia, namely Islamic law, customary law and western law. Moh. Mahfud MD, offers a legal political approach that can be used as an alternative solution for Muslims who want to implement Islamic teachings in Indonesia.

Moh. Mahfud MD gave an argument for the importance of Muslims participating in conveying ideas or aspirations through the political system in Indonesia in accordance with Islamic teachings which teach its followers to play politics. First, Muslims live in an organization or government system as a forum for expressing their rights and beliefs as citizens. Second, Islam as a religion whose kaffah regulates the lives of its people is not limited to matters of mahdhah worship alone, but also ghiru mahdhah worship (muamalah in the broadest sense) covers all aspects of life, including political aspects. Third, Islam is a universal religion that commands its followers to do good and evil which can provide benefits for the whole of nature. (rahmatan lil alamin).



The three arguments put forward by Moh. Mahfud MD above can at least provide an illustration that the desire to apply Islamic teachings through a political approach leads to efforts to indigenize Islamic teachings. The forerunner to the birth of the political approach required for Muslims is the Islamic religious command to implement *amar ma'ruf nahi munkar*. According to Fazlur Rahman, the ideology of *amar ma'ruf nahi munkar* aims to create a just society. This command forms a moral obligation for Muslims which is used as a bond of shared responsibility. On this basis, different views emerged in understanding the substance of understanding the command to uphold *amar ma'ruf nahi munkar* among Muslims, especially Indonesian Muslims.

On the one hand, efforts to uphold *amar ma'ruf nahi munkar* are understood to require the existence of power with the aim of implementing *amar ma'ruf nahi munkar* to be carried out well. The consequence of this view is that the presence of the state as a symbol of power is deemed necessary as their formal basis for upholding religious orders. Meanwhile, on the other hand, Muslims understand the implementation of *amar ma'ruf nahi munkar* not with state power which is identically formalistic, but rather with the spirit of the substantive values contained in *amar ma'ruf nahi munkar*. These values emphasize universal teachings (*rahmatan lil alamin*).

In practice, this effort displays two implementation models, namely a formal implementation model and a substantive implementation model. First, the political approach is formal-structural. Moh. Mahfud MD in his book *Building Legal Politics, Upholding the Constitution* argues that the struggle of Muslims through a formalistic-structural political approach is more directed towards efforts to uphold an Islamic state as well as the Constitution as the official constitution of an Islamic state. The existence of an Islamic state is used as legitimacy as a condition for implementing *amar ma'ruf nahi munkar*. Second, a substantive-cultural political approach is an effort to internalize Islamic values into written legal norms in a number of laws and regulations in the Indonesian legal system. The cultural aspect emphasizes the cultivation and dissemination of substantive values of Islamic teachings without having to wrap them in formal Islamic symbols.

In the reform era, the desire to implement substantive teachings into the Indonesian legal system, especially Muslims, was carried out through political organizations, religious mass organizations, academic strengthening and a number of legally-formally implemented regulations, all of which are still within



the Indonesian legal system. Meanwhile, the cultural approach prioritizes the basic values contained in Islamic teachings themselves. This cultural approach provides wider opportunities to apply the values of Islamic teachings, both private and public.

The application of Islamic law with a cultural approach becomes more meaningful if the legislative formulation contains the substantive values of Islamic teachings which are normative-cultural religious teachings which are believed to be reflected in the daily attitudes of the Indonesian Muslim community. The substantive values of Islamic teachings may include private law (law that is *diyani* in nature) and public law (*qadha'i* in nature). These two legal dimensions that are taken or incorporated into the national legal system are only the substantive values.

The scope of Islamic law that wants to be implemented in the national legal system becomes broader, not just limited to one aspect, namely the private aspect. However, issues involving individual interests, if regulated in legislation, can certainly curb individual freedom and burden society. Such as issues of formal worship such as prayer and fasting, moral issues such as rules of greeting in public places, how to enter public places, procedures for visiting guests, as well as issues of belief, not forcing one's will, and other personal issues do not need to be regulated by the state (law).

Individual aspects in Islam can only be regulated by the state if issues of worship, morals and personal beliefs involve the rights and obligations of other people. For example, the issues of zakat and hajj need to be regulated by law because both involve the management of public funds; regarding excess funds; fund raising; distribution of zakat funds to those who are entitled (*mustahik*) and other issues that can give rise to legal problems.

Meanwhile, legal aspects that regulate public interests such as criminal matters, banking, trade, waqf, health, relations between citizens and between countries, and public issues require a ruler, so that in their implementation they have binding legal force. Without implementing regulations in legislation, there will be difficulties and even a lack of proper and effective respect in society.

If viewed from the perspective of authority or division of duties, without intending to separate religious power from state power, legal issues concerning individuals (laws of a religious nature) fall under the authority of the Indonesian Ulema Council (MUI) in carrying out its duties professionally. Likewise, issues involving the public interest are the authority of the government - in this case -



the judiciary decides cases based on applicable laws and regulations. In other words, currently issues that are considered to be an individual aspect (diyani) may one day become public issues that require the intervention of the authorities (qadha'i in nature). Just as the issue of apostasy was originally a private area, it is possible that the issue of apostasy will become a public area if it disturbs the stability of the state (government).

CONCLUSION

The constitutionalization of Islamic law into the national legal system can only be carried out through a political-legal approach that is substantive, not formalistic. The substantive application of Islamic law opens up opportunities to incorporate universal values from Islamic teachings. This approach emphasizes that indirectly universal Islamic teachings such as the protection of human rights have been included in the Indonesian constitution, even though they do not use religious language. Derivation of these human rights can be carried out at the legislative level such as the Marriage Law, Religious Courts. Meanwhile, the desire to make Indonesia an Islamic country does not receive recognition in the constitution, considering that the Indonesian state is not an Islamic state, but rather a legal state based on Pancasila which always accommodates the diversity of cultural, racial and religious value systems of all Indonesian society.

Opportunities to implement Islamic law as mandated in the 1945 Constitution can be carried out at the level of legislation or presidential instructions. At this level, efforts to incorporate Islamic teaching values appear to be more easily accepted than at the constitutional level.

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