

## The Existence of Religion Norm in the Political Law Struggle in Indonesia

Sirajuddin M.

Student of Doctor Program in Jurisprudence, Law Faculty,  
Brawijaya University, Malang, INDONESIA.

### ABSTRACT

*The academic problem of this research was why religion norm must be the material source of local regulations. Meanwhile, it is known that Indonesia is a nation-state based on Pancasila and UUD 1945 (Constitution of 1945). To answer these problems, this study examined the significance, position and function of religious norms for the regulation of religion. The results showed that the religious norms have important significance in the formation of local regulations because this process is part of the political process of law in Indonesia, so that although Indonesia is not a religion state, but this Pancasila state has accommodative policy towards the existence of religious norms as one material source of positive law, as stated in the first principle of Pancasila and the 1945 Constitution Article 29. In Hans Helsen's theory, religious norm as a source of substantive law in the area of regulation is constitutional.*

**Keywords:** Religious Norms, Constitutional and Politics Law

### INTRODUCTION

In political reality, Indonesia as the Pancasila state is constitutionally not a religion state, but this state often adopts the norms of religion in the formation of legislation. Therefore, the Pancasila state cannot be called as religion state (in a sense of a particular religion) and also cannot be called as a secular state (in the sense of a country which does not deal with religion at all). The Pancasila state has given particular attention to the norms of the religions professed by the citizens as far as in accordance with the principles of fairness and civility. In the unique attention format, the religious people have the opportunity and freedom to impose their religious norms. At the same time, religious communities in Indonesia have a bond and obligation to obey and enforce the national law (laws procedural legalized by the representative people council). Some of the leaders of the religious people in 1945 and 1950, in BPUPKI, PPKI and Constituent had tried to fight for the formalization of certain religious norms (read: Islamic law) through the legal-formal to make religious norms as the state principle, but the final decision about the state principle and constitution which were decided did not accept the idea of a religious state or obligation to run a total of religion law for its adherents. The founders and decision makers about the state of Indonesia have set this country as a state and national unity with Pancasila as its principle to accommodate the plurality of religion or culture. In the course of law in Indonesian politics, the ups and downs occur. In the early days of the New Order state is secular, but by the last half of the New Order regime started building accommodating stance towards religious norms, such as the enactment of Law No. 1 of 1974 which regulates marriage and other even though at that time the State was centralized and authoritarian character. Although essentially, the Constitution

of 1945 precisely embraced Unitary State that recognizes plurality, good local knowledge, customs, local democratic atmosphere, local wisdom, and the capacity of the government. The birth of Reform Order which gave autonomy to the regions has given a significant change to the state / government system of Indonesia generally and local government particularly.

The decentralized system has provided the freedom and independence to local communities in the planning and decision-making process, especially concerning the interests of local communities, so that the significance of decentralization often becomes the trigger in the formation of local regulation which have nuances of wisdom or religion, so it is as if the system can reduce the sense of justice for the wider community. Whereas the purpose of granting regional autonomy is to enhance the role and function of local legislative committee to empower, foster the people's initiative and creativity .

Due to the paradigm shift from centralized government system (New Order) to a decentralized government system (Reformation Era), it is also affect the rights, obligations and authority of each government structure, both at the central and regional levels which one of the vision in the social and culture area is to "build social harmony while maintaining local values that are considered conducive".

In the decentralized era, there are various norms affecting the way a person to act and behave. Norms developed in Indonesia is customary/traditional norms, religious norms and moral norms. Those norm differences can be seen, for example in the norms of customary law in Indonesia. Customary norms are always applied in accordance with the custom of the community, for example in the tradition of inheritance that follows matrilineal system in Minangkabau region. Similarly, religious norms have experienced rapid development after decentralized systems which are marked by the birth of a number of religious regulations in a number of areas.

The birth of religious local regulations could not be separated from the conducive political climate as set forth in the amended Article 18 paragraph (6) of the Constitution of 1945 regulating the authority of local regulations establishment and the mandate of law No. 12 Year 2008 regulating on the implementation of effective local governance by paying attention of the principles of democracy, equality, justice, and rule of law in the system of the Republic of Indonesia. Nevertheless, the ubiquitous emergence of a number of local religious regulations in some areas has led to fears to some members of 56 members of Republic Indonesia Parliament. They worry if religious regulations can make this country as a religion state. However, the rule of law still applies as well as the theory of Hans Kelsen.

## **RESULT AND DISCUSSION**

In order to explore the evolving law in the society, the application of French law regarded as a progress and development in the West, must also be applied to the application of religious / Islamic law as part of the progress and development, not regarded as a setback and underdevelopment as perceived by some people who do not like the Islamic law application / legislation in the national legal system.

The measure used to determine whether a product is used or not should no longer be measured by the period of the birth of the law, because if it is used, it is certainly much longer expiry of legal principles derived from Ancient Roman Law, because the kingdom of

Ancient Rome have existed long before the advent of Islamic law. In fact, the law was developed and then translated into French and Dutch law, and those laws are still undertaken as positive law.

Studying the history of religious law legislation, including the Islamic law, as an essential part of the national legal system has significance because it has become part of the cultural life and the life of the state before Indonesian being independent from the Dutch and Japanese colonization.

In sociological and cultural, religious (Islamic) law have fused and become living law in the community. In some areas, such as Aceh, South Sulawesi, Minangkabau, Riau and Padang, Islamic law has become a way of life and the basis of equal and customary laws or traditions of local ancestors. These conditions can be proofed by the proverb saying that "custom is based on *syara*’, *syara*’is based on *kitabullah*”. Both of them reflect the close interaction between Islamic law with the local custom. Thus, the religious (Islamic) law has basically grown and rooted since the early days into the territory of Indonesia. The development of religious law in Indonesia both conceptually and practically is quite well-developed and dynamic in times of XVII, XVIII, and XIX century.

In the Dutch colonial period, the existence of religious (Islamic) law which came during the Islamic empire had been carried out full-consciously by its adherents as a reflection on the acceptance of Islam as a religion, so that the existence of deep-rooted religious law among its adherents have encouraged the Dutch colonial at the first time they arrived in Indonesia in the 17th century AD, to acknowledge the existence of Islamic law as part of the lives of Muslims. Netherlands issued a policy to the existence of Islamic law, through the office of the Dutch trading VOC (1602-1880 AD), on May 25, 1760, the *Resolutie der Indshe Regeering* law containing a set of rules stating marriage laws and Islamic inheritance law for use in VOC court for the Indonesian people. Historically, this resolution known as the Compendium Friyer legislation recognized as the first Islamic religious law in Indonesia. This can be proofed, in Cirebon area, it has been known a legislation product called Pepakem Cirebon, and previously there has been *Babad Tanah Jawa and Babad Mataram*, which a lot of the contents of the book were adopted from Islamic law. Other evidence of the existence of Islamic law legislation in the Dutch colonial era is by the existence of *Mogharrer* or in a full name, *Compendium der Voornamshe Javaanche Wetten Naukering Getrokken Uit Het Mohammaedaanche Wetboek Mogharrer* which material were taken from the holly book *al-Muharrar* by Imam Rifa’i containing Islamic criminal law and custom, used in the residency of Semarang, Central Java. Dutch colonial politics is actually quite advantageous for the position of Islamic religious law, at least until the end of the 19th century AD, by the issuance of Staatsblad No. 152 year 1882 which both set and also acknowledged the Religious Court in Java and Madura.

During the Japanese colonization, after ruling more or less three and a half centuries, the Dutch government could then be defeated by Japan in only two months which marked the end of the western colonial period in Indonesia. However, the transition from Dutch to Japanese colonization still brought distress and suffering to the people. Japanese policies regarding the implementation of Islamic law in Indonesia did not give any change to some laws and regulations. Similar to the Netherlands in the early days of colonial era, the Japanese regime maintained that "customs" local, practice habits, and religions could not be intervened temporarily, and in the matters related to the affairs of the civilian, social customs

and laws, they must be respected, and special arrangement was needed in order to prevent the emergence of any form of unwanted resistance and opposition. Nevertheless, the influence of Japanese government policy on the development of religious (Islamic) law enforcement in Indonesia was not so apparent. It was because the Japanese invaded Indonesia in a short period, the visible thing was only the institutional structure of Islamic Courts.

Religious (Islamic) law enforcement struggles does not stop at the level of legal recognition of religious law as a legal subsystem living in the community, but also requires the need for legalization of religious law in the state system into positive law, not only the substance. This phenomenon appeared at least simultaneously with the birth of the Jakarta Charter of June 22, 1945 which was marked by the first principle, which reads: "belief in one God with the obligation to run the Islamic shariah for its adherents". Religious law legislation struggle as national law had started downcast since August 18, 1945 where the team success of Islamic religious groups were not able to maintain the seven last words due to a sharp polarization between the founders and minority residents. With the loss of seven words, it was considered by some people that it would cause trouble for legalizing religious law in the framework of the constitution of the State. In contrast to these interpretations, Mohammad Hatta found Pancasila primarily first principle, "Ketuhanan Yang Maha Esa (Belief in the one and only God)" is a guiding principle for the ideal state in Indonesia and is also the basis of the following principles. The loss of seven words is not an obstacle to impose religious norms who live in the community. Pancasila remains as the spiritual and ethical principles that provide good guidance to the people and the nation. By placing principle "Ketuhanan Yang Maha Esa (Belief in the one and only God)" as the first principle, the State has gained a solid foundation.

In the Old Orde, the position of religious law is no better than the Dutch colonial period. Sukarno's view of religion is very secularistic although at the beginning of the formation of the State of Indonesia, in BPUPKI convention, Sukarno accepted and agreed to the existence of the Jakarta Charter, but Sukarno then be realistic about the condition of the plurality of Indonesian society that not only Muslims, but also there are Buddha, Hindu, Christian and Catholic religion, so he then took the middle road. Even so, it seems unfair to not mention some form of religious law developments in this era. At least the Ministry of Religious Affairs was established on 3 January 1946 became a milestone along the road of religious law (Islam). By the formation of the Department of Religion, the authority of the Religion Court has been transferred from the Minister of Justice to the Minister of Religious Affairs.

New Order government had started since the release of Warrant Eleven (Supersemar) in March 1966. This administration regime since the last half, began to make accommodations attitudes towards religious aspirations, especially Muslims. The presence of the Marriage Act of 1974 is the historical evidence that the religious law (Islam) climbed a new phase, the phase *taqin* (enactment), Law No. 7 of 1989 on the Religious Courts, a judicial institution specifically earmarked for Muslims who have strategic value, because its existence provoke the birth of new regulations as a complement, namely Presidential Decree No. 1 of 1991 which contains about Compilation socialization of Islamic Law (KHI), the National Education Act, the birth of ICMI, Law No. 7 of 1992 concerning banking, which implicitly allows the establishment of Sharia Banks. These all are evidences of the development of religious law and religious laws thinking products increasingly place religious principle and existence as one of the material in the formation of a national law.

During the Reform Era, demands for imposing religious norms were stronger after Indonesia treading a new era in nation life, namely the transfer of political power from the New Order government to the transitional government BJ Habibi. The suit got a positive response from the reform era government at that time, so was born a number of attempts to impose religious law norms / Islam in the level of positive law in Indonesia. Some legislation can serve as a proof of legal legislation religion (Islam), of which Law No. 38 Year 1999 on the management of zakat, and Law No. 17 of 1999 on the organization of Hajj as well as Law No. 3 of 2006 on the amendment of Act 7 of 1989 on the Religious Courts. Meanwhile in the field Muamalat, Law No. 10 of 1998 on the amendment of Law No. 1992 on Banking. This law became one of the Government's policy in the Habibi BJ improve Indonesia's economic crisis.

Further more, religious norms that have been conducted in the community could no longer be called religious norms because there has been acceptance from the community, so that it is considered and used as a day-to-day customs. This is then known as *Reception Theory*(*Receptie Theory*). Meanwhile, Van Den Berg and friends think the deviation is still religious norm, because what is conducted is religious norms, then it was known as the "Theory of following religion"(*Receptie in Complexue*). In the subsequent developments, the Dutch scholar Snouck theory captured the idea of various and the different foundation's view of thinking. Cornellis Van Vollenhoven states that the inheritance law in force in Indonesia is customary law, not religious norms. This idea is supported by other leaders of customary law, including Tar Haar and Indonesian people who were in Leiden, the Supomo. Therefore, until 1989, reception theory is applicable in accordance with what is stated by Van Vollenhoven, Tar Haar and Supomo, not as described by Snouck. Van Vollenhoven further considered that the religious norm of is not a law, but Snouck judge that religious norm is law, only the religious norms can be applied if it can be accepted and become part of people's daily life.

Religious norms affected a lot of thought and spirit of independence and the establishment of the Republic of Indonesia. By the Proclamation of Indonesian Independence on August 17, 1945, the position of religious norms generally is not changed and still serves as a special legal system of Indonesia in a particular field. That position is realized through the provision that the Republic of Indonesia is a country based on the principle "Ketuhanan Yang Maha Esa (Belief in the one and only God)". Principle contained in the Preamble and Article 29 paragraph (1) of the 1945 Constitution in accordance with the Charter of the Jakarta June 22 1945 Article 29 Paragraph (1) of the 1945 Constitution followed by Paragraph (2) which reads, "Negara menjamin kemerdekaan tiap-tiap penduduk untuk memeluk agamanya masing masing dan untuk beribadat menurut agamanya dan kepercayaannya itu (The State guarantees the freedom of each citizen to embrace each religion and to worship according to their religion and belief)". Constitution of 1945 outlined that Indonesia is not a secular state as the West and the Communist State. Indonesia is not a country or state religion of Islam as some Middle Eastern countries. In accordance with the principle "Ketuhanan Yang Maha Esa (Belief in the one and only God)", Indonesia adopts a state law that gives exposure to the applicability of the norms of religion, culture and customs.

Since the reform era, the current imposition of religious norms, including the norms of Islamic law, Christianity norms and Hinduism norm, have been increasingly widespread. This suggests that religious norms have an important role in the formation of laws and regulations,

including regulations which are stricken / localistic legislation. However, local regulations emerged prevalently since the reform era was considered problematic by the government because of the presence of some regulations that were exclusive and elitist, not populist. In fact, local regulations born in a democracy should be general and cover all the interests of the community in the area. One example of religious regulations / *qanun* of which regulations are based on the norms of Islam, Hindu and Christian as follows:

*Peraturan Daerah Kabupaten Lampung Selatan Nomor 4 Tahun 2004 Tentang Larangan Perbuatan Prostitusi, Tuna Susila, dan Perjudian Serta Pencegahan Perbuatan Maksiat Dalam Wilayah Kabupaten Lampung Selatan* (South Lampung Regency Regulation No. 4 of 2004 on the Prohibition act of prostitution, prostitutes, and immoral acts Prevention And Gambling In South Lampung regency). Prohibition of misconduct is based on the norms of Islam, so that the action described in the terms "weigh" as follows, that the despicable act contrary to religious teachings, customs and values of Pancasila as the basis for National Development.

*Qanun Provinsi Nanggroe Aceh Darussalam Nomor 13 Tahun 2003 Tentang Maisir (Perjudian)* ( Province of Aceh Qanun No. 13 Year 2003 on Maisir (Gambling) ).The scope and purpose and the prohibition and prevention contained in some Article 2 states that *maisir* (gambling) is all forms of activity and / or conduct and the circumstances that led to the betting and can lead to harm to those who bet and people / institutions involved in the bet.

Religious laws based on Hindu religious norms are also contained in the Bali Provincial Regulation No. 03 Year 2005 on Spatial Planning of Bali Province from the Governor of Bali which states that development in the area of Bali which has grown rapidly, especially in the field of tourism and small industry , has spawned a number of large-scale change and cause significant deviations, so that the regional government of Bali to adjust the dynamic spatial layout in one unified environment based on Balinese culture imbued Hinduism, while maintaining environmental sustainability in accordance with the philosophy of Tri Hita Karana for realizing just and prosperous society as the implementation of Pancasila through the Spatial Plan resolution. In Article 19, paragraph (4), the Hindu regulation establishes criteria of shrine area.

The law based on religious norms of Christianity in Manokwari, *Peraturan Daerah Kabupaten Manokwari Nomor 5 Tahun 2006 Tentang Larangan Pemasukan, Penyimpanan, Pengeedaran dan Penjualan Serta Memproduksi Minuman Beralkohol* (The Manokwari Regency Regulation No. 5 of 2006 on the Prohibition of Importation, Storage, and Distribution of Alcoholic Beverages Producing And Sales). Consideration of the legalization of the Christianity regulations is based on the consideration of religious norm that says that Manokwari as the first entry of the Gospel in Papua, and which is now regarded as the City of the Gospel and City Civilization Papuans.

## CONCLUSION

The birth of the religious laws becomes indicator that religious norms have significance in the formation of local regulations. The imposition of religious norms of the positive law is also part of the process of democratic political policy. Although Indonesia is not a religion state, but the State of Pancasila, it still recognizes the existence of religious norms as one of the sources of positive law, as stated in the first principle of Pancasila and the Constitution of 1945 Article 29. Therefore, the position of religious norms as a source of substantive law in

the local regulations is constitutional. In terms of its function, local regulations derived from religious norms will have a behavior power that is more effective and efficient for the community because they believe they have run their state legal obligations and religious obligations at the same time.

## ACKNOWLEDGEMENTS

This article is dedicated to civitas academica of Brawijaya University. They have already contributed significantly to this article

## REFERENCES

- [1]. Halim, A. (2004). *Peradilan Agama dalam Politik Hukum Islam di Indoensia*, Raja Grafindo, Jakarta, 2000.
- [2]. Halim, A. (2008). *Politik Hukum Islam Di Indonesia*, Badan Litbang dan Diklat Depag RI, Jakarta.
- [3]. Rafiq, A. (2001). *Pembaharuan Hukum Islam di Indonesia*, Gaya Media, Yogyakarta.
- [4]. Maarif, A. S. (1985). *Islam dan Masalah Kenegaraan: Studi tentang Percaturan dalam Konstituante*, LP3ES, Jakarta.
- [5]. Himawan, A. H. (ed), (2002). *Epistemologi Syara': Mencari Format Baru Fiqh Indonesia*, Pustaka Pelajar, Yogyakarta, 2002.
- [6]. Suminto, A. (1996). *Politik Islam Hindia Belanda*, LP3ES, Jakarta.
- [7]. Azymadi, A. (1994). *Jaringan Ulama Timur Tengah dan Kepulauan Nusantara XVII-XVIII*, Mizan, Bandung, 1994.
- [8]. Bernard L Tanya, Yoan Simanjuntak, dan Markus Y Hage, (2007). *Teori Hukum: Strategi Tertib Manusia Lintas Ruang Dan Generasi*, CV Kita, Surabaya.
- [9]. Harun, (2009). "Perkembangan Hukum Islam dalam Konfigurasi Politik di Indonesia", *Jurnal Suhuf*, 21(2), Nopember (2009).
- [10]. Jasim, H., et. Al. (2011). *Optik Hukum; Menggagas Peraturan Daerah Yang Responsif Dan Berkesinambungan*, Prestasi Pustakarya, Jakarta.
- [11]. Hamidi, J. (2011). "Paradigma Baru Pembentukan dan Analisis Peraturan Daerah: Studi Atas Perda Pelayanan Publik dan Perda Keterbukaan Informasi Publik", *JURNAL HUKUM Fakultas Hukum UII No. 3(18) JULI (2011)*.
- [12]. Jazuni, (2005). *Legislasi Hukum Islam di Indonesia*, Citra Aditya Bakti, Bandung.
- [13]. Asshiddiqie, J. (2010). *Perihal Undang-Undang*, Rajawali Pers, Jakarta.
- [14]. Hadi, M. M. (2008). "Konsep Negara dan Pengaruh Nilai-Nilai Hukum Islam dalam Sistem Ketatanegaraan Indonesia", *Syariah: Jurnal Ilmu Hukum* 8(1), Juni 2008, Hal.. 104, lihat <http://jurnal.pdii.lipi.go.id/admin/jurnal/810890110.pdf>
- [15]. Indrati, M. F.(1), (2007). *Ilmu Perundang-Undangan: Proses dan Teknik Pembentukannya*, Kanisius, Yogyakarta.
- [16]. Indrati, M. F. (2), (2007). *Ilmu Perundang-Undangan: Jenis, Fungsi, dan Materi Muatan*, Kanisius, Yogyakarta.
- [17]. Marzuki Wahid dan Agus Wahid, (2001). *Fiqh Madzhab Negara : Kritik atas Politik Hukum Islam di Indonesia*. LKiS, Yogyakarta.

- [18]. Mahfud, M. M. D. (1), (2010). *Membangun Politik Hukum, Menegakkan Konstitusi*. Rajawali Pers, Jakarta.
- [19]. Mahfud, M. M. D. (2), (1999). *Pergulatan Politik Dan Hukum Di Indonesia*, Gama Media, Yogyakarta.
- [20]. Mahfud, M. M. D. (3), (2009). *Politik Hukum Islam di Indonesia*, Rajawali Pers. Jakarta.
- [21]. Ibrahim, N.S. d. (1989). *Penelitian dan Penilaian Pendidikan*, Sinar Baru, Bandung.
- [22]. Nazriyah, Ni. H. d. R. (2011). *Teori Dan Pengujian Peraturan Perundang-Undangan*, Nusamedia, Bandung.
- [23]. Lukito, R. (1998). *Pergumulan antara Hukum Islam dan Adat di Indonesia*, INIS, Jakarta.
- [24]. Syahrani, R.(2004). *Rangkuman Intisari Ilmu Hukum*, Penerbit PT Citra Aditya Bakti, Bandung.
- [25]. Yin, R. K. (2003). “Studi Kasus (Desain dan Metode)”. Terjemahan M. Djauzi Mudzakir dari “*Case Study Research Design and Methods*” RajaGrafindo Persada, Jakarta.
- [26]. Soekanto, S. 1998). “*Penelitian Hukum Kualitatif*”, Alumni, Bandung.
- [27]. Sirajuddin, M. (2008). *Legislasi Hukum Islam di Indonesia*, Pustaka Pelajar, Yogyakarta.
- [28]. Suryabrata, S. (1995). *Metode Penelitian*, Cetakan Kesembilan. Raja GrafindoPersada, Jakarta.