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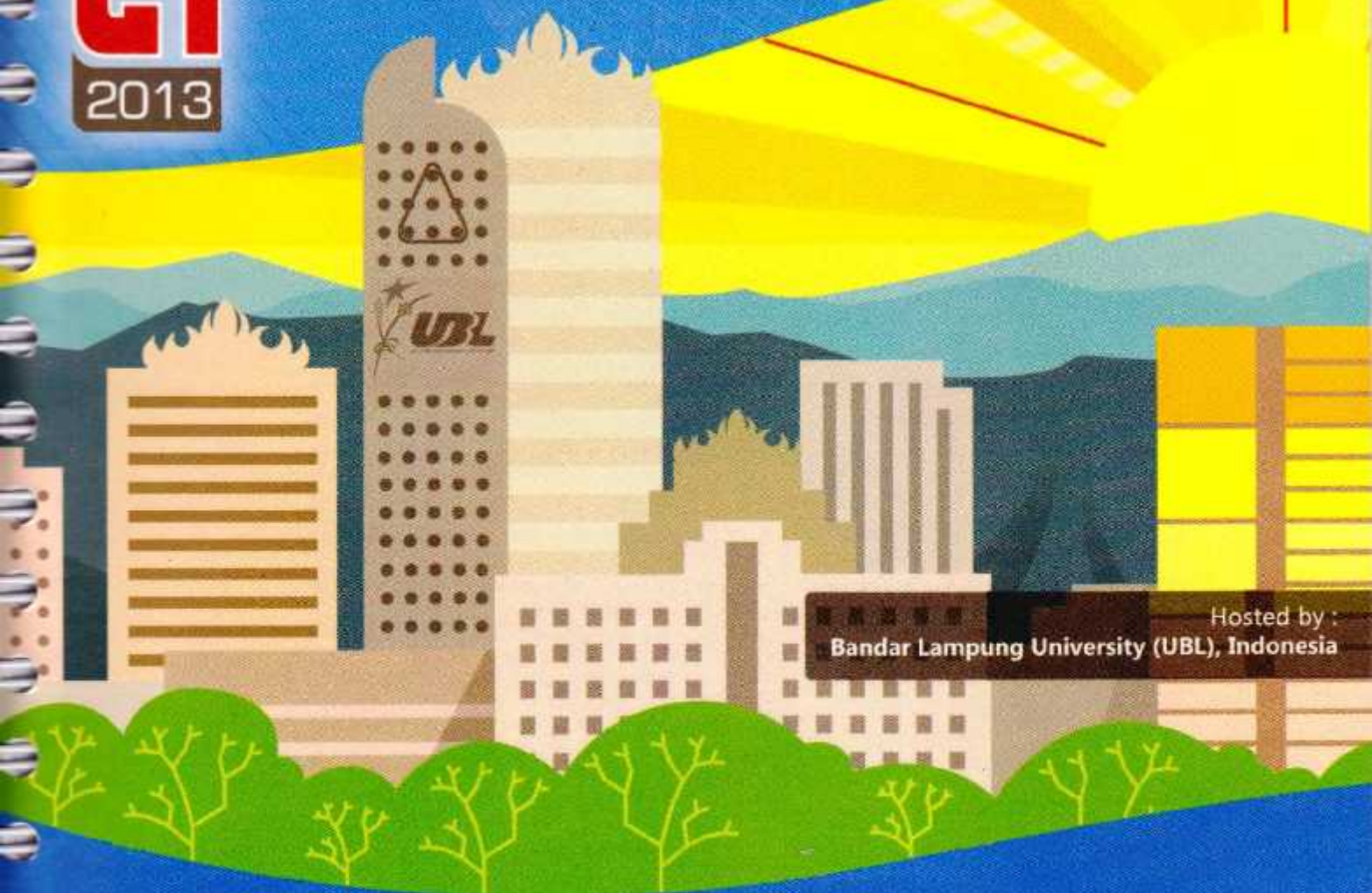
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THE FIRST
INTERNATIONAL CONFERENCE ON
**LAW, BUSINESS
& GOVERNANCE**

23-24

OCTOBER 2013
BANDAR LAMPUNG
UNIVERSITY (UBL),
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PREFACE

The Activities of the International Conference are in line and very appropriate with the vision and mission of Bandar Lampung University (UBL) to promote training and education as well as research in these areas.

On behalf of the First International Conference on Law, Business and Governance (Icon-LBG 2013) organizing committee, we are very pleased with the very good response especially from the keynote speaker and from the participants. It is noteworthy to point out that about 67 technical papers were received for this conference.

The participants of the conference come from many well known universities, among others : International Islamic University Malaysia, Utrech University, Maastricht University, Unika ATMA JAYA, Universitas Sebelas Maret, Universitas Negeri Surabaya, Universitas Jambi (UNJA), Diponegoro University, Semarang, Universitas 17 Agustus 1945 Jakarta, Universitas Bandar Lampung, Universitas Andalas Padang, University of Dian Nuswantoro, Semarang, Universitas Terbuka, Universitas Airlangga, Bangka Belitung University, President University, Tujuh Belas Agustus University Jakarta, International Business Management Ciputra University, Surabaya, University of Indonesia, Business School Pelita Harapan University, STIE EKUITAS, Bandung, STAN Indonesia Mandiri School of Economics Bandung, Lampung University.

I would like to express my deepest gratitude to the International Advisory Board members, sponsor and also to all keynote speakers and all participants. I am also gratefull to all organizing committee and all of the reviewers who contribute to the high standard of the conference. Also I would like to express my deepest gratitude to the Rector of Bandar Lampung University (UBL) who give us endless support to these activities, so that the conference can be administrated on time

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THE POLITICS OF ISLAMIC CRIMINAL LAW IN INDONESIA (A CRITICAL ANALYSIS)

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Abstract

Indonesia is well known as the country where Muslims are the majority. However, never has Islamic law become the priority especially after the Indonesian independence. Therefore, the uproar calls for the application of Islamic law are still echoing until today. Though the state has answered those calls and successfully applied Islamic law as part of the national legislation as seen, for example, in marriage law, Islamic banking law, law on hajj etc, it still fails to acknowledge the Islamic penal law to some extent. The paper would elaborate the problem of the politics of Islamic penal law in Indonesia. By analyzing the politics of Islamic penal law critically, this paper hopes to expose the problem behind the phenomenon. For this purpose, Islamic methodology through “*maqashid syari’ah*” (purposes of Islamic syariah) is needed in order to see how Islamic law should work in the modern era and contextually stand side-by-side with the local need.

Key words: Politics of law, Islamic criminal law, *maqashid syari’ah*.

1. BACKGROUND

Indonesia is well known as the country which is inhabited by most Muslim people as the majority. The huge population of Muslim throughout this country has made Indonesia as the house of the biggest Muslim population in the world. So Islamic life (style) are easily found in this country, with the exception of Irian Jaya that is identical to Christianity, and Bali that with Hinduism, though it is also very easy to find Muslim people in these areas.

Though Muslims are the majority in population in Indonesia, never has the Islamic law become the priority soon after the Indonesian independence. The system of Indonesian law is not strictly based on Islam. Rather, it is grounded on common goals based on unity in diversity. Indonesia is not a religion state. Yet it is merely a Pancasila-based state.

At the earliest time of Indonesian Independence, the demand of the application of Islamic law came from Islamic movements later labeled as radical wings of Islam. In Soeharto’s era, Islamic movements kept silent under authoritarian policy. However, soon after the Soeharto’s resignation, the authoritarian regime was replaced by more democratic one, and the freedom of speech was acknowledged, many parties took this opportunity to revive the Islamic interest, i.e. to reinforce Islamic law in Indonesia, within two ways; Islamisation and legislation.¹

Under the era of Reformation, the idea to re-implement Islamic law in Indonesia was represented by not only the Islamic movements and organizations, but also by the Islamic parties. This has made the position of Islam was stronger, both in parliament and in social life. In the era of freedom, Islam in Indonesia seems to get great advantages through Islamisation and *syariatization*, though it is still subject to democratic government.

The uproar and growing calls for the application of Islamic law are still echoing until today, especially by those of Islamic parties such as *Partai Keadilan Sejahtera* (Prosperous Justice Party/PKS) or Muslim organizations such as *Hizbut Tahrir Indonesia* (Indonesian Liberty Party / HTI). Though the state has answered those calls and successfully applied Islamic law as part of the national legislation as seen in

¹ See Jan Michel Otto, “The Islamisation of Law? Identifying the Main Trend and Responding to It,” in *Jurnal Konstitusi*, Volume 6 Nomor 4, Nopember 2009, p. 7-19.

marriage law, Islamic banking law, law on *hajj* (pilgrimage) etc, it still fails to acknowledge the Islamic criminal law to some extent. Even the two biggest Muslim organizations, namely Nahdhatul Ulama (NU) and Muhammadiyah, are reported to have taken moderate view concerning this phenomenon, thus they are called as and represent moderate organizations. What is meant by moderate views here are the stand of appreciating and acknowledging the application of Islamic law, but with adjustment, and should not contrary, with the national law and philosophy.

It seems that there is a weird problem due to the application of Islamic criminal law. Those who wish to uphold Islamic law, and those who reject it come from the same family, i.e. Muslim. Thus, the real problem lays on Muslims' approach to Islam or syariah. Here, some hold that Islam or syariah can fit contextually with the situation depending on where Islam or syariah is applied. Others hold that it is the situation and the condition that have to fit with Islam or syariah. So, those who wish to apply syariah (Islamic law) in formal legislation replacing secular constitution and or law must come from the last group. The first group tend to be more adaptive with the situation considering that Islam doesn't need legislation, and proposing moral aspects of law rather than formal legislation.

2. A FLASH LOOK AT THE POLITICS OF ISLAMIC CRIMINAL LAW

First of all, I would like to elaborate on what the politics of law constitutes in this paper. Referring to Mahfud MD, the politics of law is defined as legal policy which will be or has been implemented rationally by Indonesian government, covering: *first*, the development of law by making and reforming legal materials in order to be applicable. *Second*, the implementation of law including enforcement of the functions of related institutions and training members of law officers.²

Mahfud, further, elaborates configuration of politics of law. By configuration it is meant a constellation of political interest, and is divided into two, i.e. democratic political configuration and authoritarian political configuration. Democratic political configuration is indicated by its openness to people's participation to actively take a part determining common policy. Authoritarian political configuration is, on the contrary, nothing more than the implementation of the elite's interest.³

Each kind of politics of law produces different character of law. Democratic political configuration produces responsive law, reflecting people's justice and demand. Authoritarian political configuration, in another side, produces conservative/orthodox law which is very ideological and reflects the elite's interest.⁴ Quoting Lord Acton's word "*power tends to corrupt, and absolute power corrupt absolutely*", Jamaluddin Karim affirmed this reality saying that politics of law and power are inseparable.⁵

It is inferred from the definition above that the politics of Islamic criminal law is an idea of implementing, enforcing, and reforming Islamic criminal law. Because Islamic criminal law is divine in nature, however, there will be no more law making as indicated by Mahfud above. Instead of creating a new one, Muslims only need to reform and develop Islamic law through special mechanism named *ijtihad*. The fruit of the *ijtihad* is commonly called *fiqh* (originally, the ulama's thought).

However, it is indicated from the explanation above, the politics of law is the issue of making, reforming, implementing, and upholding law through legislative body. If the politics of law is identical to law making through configuration of politics, than it is the work of legislature and the government (President).

In this paper, by the politics of law I mean more than just a process of law making by legislative body/council. I assume that the term politics and law indicates a political interest in framing law. Shortly, it can be said that law is a product of political interest.⁶ In their relation, politics holds independent variable and law is dependent (on politics) in variable.⁷

The politics of Islamic criminal law elaborated below will cope with any political movement by Muslim people both formally in legislature and informally in Muslim organization and social activities.

3. THE POLITICS OF ISLAMIC CRIMINAL LAW; INDONESIAN EXPERIENCE

Historically, Islamic law was implemented in Indonesia in conjunction with local customary law (*adat*) and/or colonial law. In addition, customary law included certain aspects of Buddhist and Hindu

² See Mohamad Mahfud MD, *Politik Hukum di Indonesia*, Jakarta: LP3ES, 1998, p.11.

³ *Ibid.*, p.25.

⁴ *Ibid.*, p. 5

⁵ Jamaluddin Karim, *Politik Hukum Legalistik*, Yogyakarta: Imperium and LP2-AB, 2013, p. i.

⁶ This assumption is also held by Mahfud saying that that law (act) is a mere political product. See Mahfud, *loc.it.*

⁷ See Abdul Halim, *Politik Hukum Islam di Indonesia*, Jakarta: Ciputat Press, 2005, p. 15.

traditions, which had arrived several centuries earlier. In the thirteenth century, Islam came to Southeast Asia and Islamized the traditions. Islamic law developed within the region and was practiced in certain socio-cultural-political situations. It served as an important factor unifying Islamic kingdoms in Southeast Asia.⁸

In line with this, Anthony Reid has also showed that since early 17th century, Islamic law had been strictly applied partially in Banten (West Java) and Aceh, in which amputation, for instance, had been implemented as the sanction for the thief.⁹ Undoubtedly, this severe sanction was indeed derived from Islamic criminal law (*hudud*).

However, as the time passed, Dutch Colonial came and introduced modern system of law derived from European countries. Soon after Indonesian independence, the need to implement Islamic law, as happened before, faced critical problem. Challenges and objection mostly came from non-Muslim parties, but there were many Muslims also share similar position with them. Those last mentioned were mostly the nationalists.

To jump up to Soeharto's era, the Islamic movements wishing to implement Islamic law had to face authoritarian politics performed by Soeharto. Through his policy of making Pancasila the sole base over other ideologies, Islamic political parties and movements was practically vacuum and silent, especially after Soeharto's policy of merging those Islamic parties under one underdog political party, named PPP (*Partai Persatuan Pembangunan/United Development Party*).¹⁰

However, under Reformation era, the call for implementation of Islamic law, once again, strongly, and rather massively, occurred, proposed by mostly ideologist Islamic movements and parties. For the purpose of mapping the politics of Islamic criminal law, I will briefly discuss one by one of those parties and organizations as well as their institutions.

1. *The role Islamic parties.*

Islamic parties held significant role in promoting and brought Islamic criminal law before legislative body. PPP (*Partai Persatuan Pembangunan/United Development Party*), PBB (*Partai Bulan Bintang/Moon-Crescent Party*), and PK (now PKS) or Partai Keadilan (Sejahtera) / (Prosperous) Justice Party¹¹ are three parties who struggled for the application of Islamic law formally in legislature initiating the transformation of First Pillar of Pancasila by reinserting the seven eliminated words.¹² Despite their failure to do so, they were finally succeeded to legislate the Anti-Pornography Law. In the Draft of Indonesian Criminal Code, some Islamic criminal law are likely to be implemented, namely the sanction for adultery for those who are not married in status.

2. *Islamic organizations*

It is also important to mention Islamic movements that contributed more significant roles in struggling for the implementation of Islamic criminal law. Among others are *Majelis Mujahidin Indonesia* (MMI)/Indonesian *Mujahidin* Forum, *Hizbut Tahrir Indonesia* (HTI)/Indonesian Liberty Party, *Front Pembela Islam* (FPI)/Islamic Defender Front, *Komite Persiapan Penegakan Syariat Islam* (KPPSI)/Preparation Committee for the Implementation of Islamic Law.¹³

It is not a coincidence that those parties and Muslim organizations proposing Islamic law are labeled as radical, left-wing, exclusive, even fundamentalist ones because of their ambitions to transform

⁸ Kamaruzzaman Bustamam-Ahmad, "The Application of Islamic Law in Indonesia, The Case Study of Aceh," in *Journal of Indonesian Islam*, vol 01, Number 01 June 2007, Surabaya: IAIN Sunan Ampel, p. 136.

⁹ Wahyudin Halim, "Gerakan Formalisasi Syariat Islam melalui Instrumen Negara: Refleksi Kritis atas KPPSI," paper presented at Annual Conference Postgraduate Programs State Institute for Islamic Studies (IAINs) and State Islamic Universities (UINs), Organized by Postgraduate Program of UIN Alauddin Makassar, Confort Hotel Makassar, 25-27 November 2005.

¹⁰ See Taufik Adnan Amal & Samsu Rizal Panggabean, *Politik Syariat Islam dari Indonesia hingga Nigeria*, Jakarta: Alfabet, 2004, p. 62.

¹¹ Of the three parties above, PKS is the most consistently and eagerly to uphold *syariah*, both in parliament and in social life. PKS has set special Islamic ideology rooted from the *Ikhwanul Muslimin* (Muslim Brotherhood) of Egypt, and holds regular training to disseminating this Islamic ideology. For further information about this, see M. Imdadun Rahmat, *Idologi Politik PKS, dari Masjid Kampus ke Gedung Parlemen*, Yogyakarta: LKiS, 2008.

¹² Taufik Adnan Amal & Samsu Rizal Panggabean, *loc.cit.*

¹³ Haedar Nashir, "Gerakan Islam Syariat, Reproduksi Salafiyah Ideologis di Indonesia," in *Maarif*, vol. I. No.02 November 2006, p. 29. See also *Ibid.*, p. 71.

Indonesia become an Islamic state. Some of them are struggling in legislature and actively work in political movement. The rest are working in ideological and Islamisation movement.¹⁴

In the early year of 2000, the call for *syariah* movement became very massive and widely spread within the country. However, Aceh, Banten, and South Sulawesi stood in *avant-garde* promoting *syariah* in their respective province through their regional regulations, though only Aceh which was granted special autonomy in this matter based on the Law Number 18 Year 2001. The specialty of this province is the imposition of the Islamic law on the Special Autonomy for the Province of Aceh Special Region. The law is then followed by the establishment of *Mahkamah Syariah* in Aceh under a Presidential Decree Number 11 Year 2003 Concerning the *Syariah* Court and Provincial *Syariah* Court in the Special Province of Nangroe Aceh Darussalam.¹⁵

To conclude, however, there were two major ways in politically implementing Islamic law in Indonesia, formally by legislation and informally by Islamisation/syariatization. In legislative council, the bill of Islamic law was proposed and discussed in the legislature, thus became a law as in the Law of Pornography.¹⁶ Partly, Islamic criminal law was also hoped to color the Draft of Indonesian Criminal Code. That's the way of the politics of law in legislature worked. Islamisation and *syariatization* took more significant role, especially in upholding Islamic law as far it is concerned with economic and private law, and Islamic law concerning more personal matters, i.e. *ibadah* matters.¹⁷

Criminal law, however, as it is a public law, is more, if not impossible, to apply. That's because Islamic criminal law have been mostly represented and reflected in Indonesian criminal law, except few parts of its sanction. Since it was proposed or promulgated, Islamic criminal laws seem to have been not working properly as they are wished.¹⁸ With respect to criminal law, it seems that majority of people are happy with and prefer national laws to the Islamic ones.

4. ANALYSIS AND ASSESSMENT

Of two kinds of Islamic laws, private law and public law, Islamic criminal law is the most difficult to apply. During its proposal, debates among Muslim communities have arisen resulting in conflict and tension among them. So, it is reasonable if its legislation was controversial, even in the eyes of other

¹⁴ For further information about radical movements and their agenda, see for example, M. Imdadun Rahmat, *Arus Baru Islam Radikal, Transmisi Revivalisme Islam Timur Tengah ke Indonesia*, Jakarta: Airlangga, 2005. See also, Endang Turmudi & Riza Sihbudi, *Islam dan Radikalisme di Indonesia*, Jakarta: LIPI Press, 2005.

¹⁵ Following Aceh, some provinces in Indonesia, though without special autonomy, enforced religious norms, such as District Regulations Sawahlunto / Sijunjung No. 1 of 2003 on Liability Smart Reading Al-Quran for School Aged Children, Employee / female employee and Prospective Bride, South Lampung Regency Regulation No. 4 of 2004 on Prohibition of Acts prostitution, prostitutes, and Gambling Prevention And Deeds *Maksiat* In Region South Lampung regency, Gorontalo Provincial Regulation No. 10 of 2003 on the Sin Prevention. See www.djpp.depukumham.go.id.

¹⁶ This law was brought before the parlement in February 14, 2006 by three political party, namely PBB (*Partai Bulan Bintang*/Star-Crescent Party), PKS (*Partai Keadilan Sejahtera*/ Prosperous Justice Party), and Partai Demokrat (Democratic Party). As the controversy rose due to its potentially undermining woman and freedom, many parties, organization, NGOs, even personal figures, expressed their objections and hasiations leading their demonstrations. However, these objections were also couterattacked by other massive demonstrations supporting the bill of law. As long as the supporters of the bill are concerned, they mostly come from the left wings of Islamic movements such FPI, MMI HTI and PKS were the proponents standing in front line. The voices of supporting were stronger than the objection, especially after the MUI (Majelis Ulama Indonesia / The *Ulama* Council of Indonesia) issued a religious verdict (*fatwa*) showing its endorsment to the anti-pornography bill. See id.wikipedia.org/wiki/Undang-Undang_Pornografi.

¹⁷ Islamisation and *syariatization* can be seen from their religious expressions in using dress and other activities symbolizing their Islamic adherences. However, their political power will show up in demonstration either for supporting or for banning. Such power can be seen, for example, in the demonstrations in giving spirit for Palestinian Freedom, condemning American ideas and anti-Israel, enforcing moral deeds like mostly showed up by FPI, and banning Miss World now being held in Indonesia. Uniquely, PKS is also familiar with its mobilization. For this, Muhtadi wrote that as a social movement, PKS has made use of three approaches in disseminating its agendas. They are political opportunities, mobilizing structures or resources mobilization, and framing process. Burhanuddin Muhtadi, *Dilema PKS Suara dan Syariah*, Jakarta: KPG Gramedia, 2012, p.20.

¹⁸ One of the biggest problem is the contrary between the philosophy of Islamic law and the Human Rights which is also ratified by the state. Alfritri has elaborated the conflicts between Islamic criminal law and human rights law in his writing "Konflik Hukum Antara Ketentuan Hukum Pidana Islam dan Hak-Hak Sipil? (Telaah Konsep HAM dan Implementasi Ratifikasi ICCPR dan CAT di Indonesia)" in *Jurnal Konstitusi*, vol.7, Nomor 2, Jakarta, April 2010, pp. 99-133.

Muslims themselves. Indeed, this phenomenon looked weird. Therefore, a careful explanation is needed so that this problem becomes clear.

First of all, Indonesia is law-based state. That means Indonesia should protect its entire people and put them at the same quality and the same treatment known as “equality before the law.” Based on this notion, all kinds of law that will be legislated or implemented, so that will be imposed to all people, have to objectively follow the nature of Indonesian state. The failure of proposing Islamic criminal laws reflected the failure of their proponents to understand this situation. Those proponents seemed to hardly understand this national situation. Instead, they insisted in doing transformation of Indonesian state wishing to change the national ideology in to Islamic one.

Concerning the politics of law, there are four main factors dominantly played significant roles in the application of Islamic criminal law. They are:¹⁹

1. Ideology of Pancasila (the Five Pillars)
2. Vision of the development
3. The relationship between the state and the people
4. The concepts of national legal development, i.e. the concept of archipelago, the concept of nation, the concept of *Bhinneka Tunggal Ika* (Unity in Diversity).

For Muslims Islamic law is collectively divine in nature. However, they also realize that human interventions have also taken parts in producing the so called Islamic law (*fiqh*). Islamic laws do not merely comprise God’s sacred order on human but also man’s understandings on the Devine order. Consequently, Islamic laws are divine as well as profane. If Islamic law is understood as God’s order, than there is no space for arguing but to implement it without any question. However, since human’s intervention is permitted, adjustment and refinement in Islamic criminal law are also legal in Islam.

Under the unitary state of Indonesia, adjustment and refinement have to be made prior to the application and legislation of Islamic criminal law. Adjustment and refinement are set in line with the state Ideology, the state vision of the development, and the concepts of national legal development. I believe that Islam always work in accordance with the situation where it live. Therefore, in Islamic legal theory, it is also known *al-adah muhakkamah* (literally means local tradition is, or may serve as, law). Under the theory of *maqashid syariah*, a notion that Islamic laws have special purposes, namely to protect religion (*hifz ad-din*), protect life (*hifz an-nafs*), protect mind (*hifz al-‘aql*), protect dignity (*hifz al-‘irdh wa al-nasb*), and protect property (*hifz al-mal*)²⁰ Islamic criminal law may work in proper adjusted with the local need.

In order to apply Islamic criminal law, serious *ijtihad* (a serious Islamic legal reasoning taken out from the main sources, namely the Qur’an and Hadits) has to be done before proceeding to legislature. Through the mechanism of *ijtihad*, dialogue between Indonesian philosophy of law and Islamic criminal law may result in a mutual combination creating an Indonesian-Islamic criminal law. For this purpose, methodological objectivism²¹ of *ijtihad* is needed to see of what parts of Islamic criminal law may possibly adjusted, and of what parts that strictly divine fixed (*tsubut*) but may also possibly reoriented before finally inserted in Indonesian law.

Last but not least, as Indonesian people, one has to show his commitment on upholding and defending the state as showed by the founding fathers of Indonesia who are also Muslims.

5. CONCLUSIONS

1. The failure of the application of Islamic criminal law lays on the ideology of behind the political interest of its proponents. The strict and exclusive view on Islamic criminal has contributed significantly on this failure.

¹⁹ Marzuki Wahid & Rumadi, *Fiqh Madzhab Negara, Kritik Atas Politik Hukum Islam di Indonesia*, Yogyakarta: LKiS, 2001, p.183.

²⁰ For details about the *Maqasyid Syariah*, see Yusuf al-Qaradhawi, *Fiqh Maqashid Syariah, Moderasi Islam antara Aliran Tekstual dan Aliran Liberal*, Jakarta: Pustaka al-Kautsar, 2007.

²¹ Methodological objectivism is a methodology that works in philosophy of Islamic law rather than a *fiqh*-oriented. Referring to Kuntowijoyo, by methodological objectivism, Islamic law should work under three steps; 1) internalization of Islamic values; 2) externalization, i.e. the application of Islamic values into personal life (reflected in *ibadah*); 3) and objectivation. As long as the last is concerned, it is an interpretation of internal Islamic values into life. However, instead of personal, objectivation requires interpersonal values in conjunction with social relationship. See Kuntowijoyo, *Islam Sebagai Ilmu, Eistomologi, Metodologi, dan Etika*, Jakarta: Teraju, 2004, for example p.64-65.

2. In order to apply Islamic criminal law serious *ijtihad* has to be done before proceeding to legislature, focusing on how Islamic law can fit the goals of national law development under the ideology of Pancasila and the Unity in Diversity.

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