

INTEGRATION OF ISLAMIC SHARIA IN NATIONAL LEGAL SYSTEM

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Abstract: The purpose of this study is to answer the formulation of the problem of how is the objective condition of Islamic law in the politics of law in Indonesia and to find a concept to integrate Islamic law into State law. The research method is qualitative with a normative, philosophical and sociological approach. Substantially, the idea of formalizing Islamic law in Indonesia cannot be maximized without adaptation and reform to Islamic law, namely through *ijtihad* and *maslahat*. Every text of the Al-Qur'an and hadith that contains the law must contain *maslahat*. So that *maslahat* is an attempt to explore the meaning of the text of the Al-Qur'an. *Maslahat* is operationally manifested in the form of *ijtihad* theories, for example; *qiyas*, *maslahah mursalah*, *istihsan*, *syad al-zdari'ah* and *urf*. Likewise, *maslahat* affirmation of laws that are not contained in the Al-Qur'an and hadith, can be confirmative and can also be negative. The identification of *maslahat* as the essence of *maqashid al-sharia* is based on 1) the texts of the Al-Qur'an, the majority of which are in the form of *amar* and *nahyu*, (2) *Illat* and wisdom found in al-Quran and hadith, (3) *al-Istiqra'*.

Keywords: Islamic Sharia; *maslahat*; *ijtihad*; *maqashid sharia*; state law

Abstrak: Tujuan penelitian ini untuk menjelaskan kondisi objektif syariat Islam dalam politik hukum di Indonesia, dan upaya menemukan konsep untuk mengintegrasikan syariat Islam ke dalam hukum Negara. Penelitian ini menggunakan metode kualitatif dengan pendekatan normatif, filosofis dan sosiologis. Hasilnya, ide formalisasi syariat Islam di Indonesia secara substansif tidak dapat maksimal tanpa adanya adaptasi dan reformasi terhadap syariat Islam yaitu melalui *ijtihad* yang mengutamakan *maslahat*. Setiap teks al-Quran dan hadis yang berisikan hukum, pasti mengandung *maslahat*. Sehingga *maslahat* merupakan pijakan utama untuk menggali makna teks al-Quran dan hadis. *Maslahat* secara operasional termanifestasikan dalam bentuk teori-teori *ijtihad*, misalnya *qiyas*, *maslahah mursalah*, *istihsan*, *sadd al-dzari'ah* dan *urf*. Begitu pula dengan penegasan *maslahat* terhadap hukum-hukum yang tidak terdapat dalam al-Quran dan hadis, bisa bersifat korfirmatif dan bisa juga bersifat afirmatif. Upaya integrasi harus dimulai dari identifikasi *maslahat* sebagai inti dari *maqashid al-syariah* berdasarkan pada ayat-ayat al-Quran, terutama yang berbentuk *amar* dan *nahyu*; lalu *illat dan hikmah* yang terdapat dalam al-Quran dan hadis, kemudian *al-Istiqra'* dengan tetap memperhatikan dinamika masyarakat modern di Indonesia.

Kata kunci: Syariat Islam; *maslahat*; *ijtihad*; *maqashid syariah*; hukum negara

Introduction

The efforts to integrate Islamic law into state law in Indonesia have become a tradition that adorns every Order. Starting from the Old Order, the New Order, to the current Reform Order. This is still carried out as one of the

agendas for the struggle of Muslims, both in the political, legal, economic, and social order. In its struggle, it also experienced a very dynamic condition. Although Indonesia is known as the largest country with the largest Muslim population in the world, the

direction and steps of its adherents are also different, there are those who want Islamic law to be implemented based on the Al-Qur'an and hadith, this group is called a group that emphasizes normative-ideological idealism. There are also groups who want the absorption of the values of the teachings of Islam, without emphasizing the mere symbols of the text, but how Islamic teachings can embrace all levels of society as a religion of *rahmatan li al-alamin*.

From a historical perspective, the spirit to fight for Islamic law to become positive law is old issue. Since the time of the Companions until now there have been movements, organizations and understandings that want Islamic law as positive law. Figures such as Hasan al-Banna, Sayyid Qutb, al-Maududi, and Abu Bakr Al-Baasyir are a handful of figures who want Islamic law as state law.¹

The emergence of the religious spirit of some Muslims by continuing to fight for Islamic sharia to become state law is something we should be grateful for. However, there should be no assumption that "only" is true Islam. Because Islam actually came down not to a social vacuum, Islam pays close attention to the values of the existing locality. This is evidenced by the existence of a cause that underlies the decline of a verse and the emergence of a hadith. Observing some of the issues raised by Islamic formalists, there are suspicions that their movement is more towards the "institutionalization and formalization" of existing Islamic teachings rather than reforming and exploring new laws that pay attention to local values or have Indonesian nuances.

¹ Haedar Nashir, *Islam Syariat: Reproduksi Salafiyah Idiologis di Indonesia*, (Bandung: Mizan Media Utama, 2013), p. 16.

If the above stated that there are groups that want to present Islam in a formal, attributive manner. There are other groups who want to present or fight for substantive Islam.² For this group, the most important thing in practicing Islam is the practice of Islamic teachings or Islamic values. In practice, the most important thing for this group is how Islamic teachings can be practiced in all aspects of life, without having to formally accentuate Islam. The efforts made by this group are by extracting new laws from the text or sharia adapted to the existing context.³

Basically there are three sources of national law; Western law, Islamic law, and customary law.⁴ This proves that Islamic law has a place in the formation of national law. With the recognition of Islamic law as part of the material for making positive Indonesian law, this is an opportunity as well as a challenge for Indonesian Muslims to be able to formulate Islamic law that can be accepted as material for formulating national law. Indonesia, which is a multi-cultural and multi-religious country, is a challenge in formulating Islamic law that can be accepted by all elements.

This study does not intend to assess which model of fighting for Islamic law in Indonesia is the better of the two groups above, but it wants to formulate how Islamic legal efforts become an integral part of positive law or national law.

² Siti Mahmudah, Politik Penerapan Syariat Islam Dalam Hukum Positif di Indonesia, *Jurnal Al-Adalah*, Vol. X, No. 4, 2012, p. 403-414.

³ Masruhan, "Positivasi Hukum Islam di Indonesia Era Reformasi", *Jurnal islamica*, Vol. 6, No. 1, 2011, p. 124-125.

⁴ Alda Kartika Yudha, "Hukum Islam dan Hukum Positif: Perbedaan, Hubungan, dan Pandangan Ulama", *NOVELTY (Jurnal Hukum)*, Vol. 8, No. 2, 2017, p. 157-172.

Research Method

This research is a type of juridical normative or legal dogmatic research, it can also be called a doctrinal law study. The method used is qualitative with a normative, philosophical, and sociological approach.

The ups and downs of Islamic law in Indonesia's political constellation

a. The dynamics of Islamic Law legislation in the New Order Era

Law and politics cannot be separated. The law serves as a guideline for regulating orderly social engineering. Meanwhile, politics functions so that the law can run through recognition and sanctions in the law. So it can be said that the law is determined by political power, because it consists of procedures and a body of laws that are determined or made by political power. Considering that the constitution has the highest legal position, sociological methods were used in its formation.

The history of Indonesian constitutional administration, in its journey often shows the existence of political and legal relations that do not reflect conformity with the mandate of the constitution. In the preamble to the 1945 Constitution it is stated that the Indonesian state is a country that puts sovereignty in the hands of the people. Furthermore, in paragraph three, article one, the explanation of the 1945 Constitution also explains that Indonesia is a state based on law, not only based on power, while its government is based on a system that is not absolute. To build a rule of law is based on four principles; democracy, equality, law, and government that serves the people.

The constitution clearly states that this country is a constitutional state, so that law should play a role in determining all aspects

of life. In the Indonesian context, the rule of law has its own specifications. This is because the state foundation in the form of Pancasila is the reference or source of all laws in Indonesia. The main characteristic of Indonesia as a constitutional state which is a state based on Pancasila law is the guarantee of freedom of religious life.

Although the 1945 Constitution in its explanation uses the term rule of law, what is meant by the constitutional state of Indonesia is different from the formulation of a rule of law according to Western conceptions. The concept of a rule of law in Indonesia has unique characteristics, namely that it does not separate state and religion, guarantees freedom of religion, does not justify atheism, does not justify communism. So that Indonesia as a rule of law has several main elements, namely Pancasila, the constitutional system, equality, and law enforcement.

The next period was the Old Order, these basic principles did not work as they should. Where the sovereignty should have been in the hands of the people, but in reality the sovereignty was in the hands of the president. The law is not enforced properly, in fact law becomes the subordination of power. There is an unbalanced relation between law and politics, so that it does not place law as commander, but puts political power as commander.

The next period was the New Order in 1966. This order was determined to correct all abuses and deviations committed by the Old Order, and to improve the pattern of life as a nation and state based on Pancasila. The achievements in this period were quite visible, in particular putting the legal and political relations back under the implementation of Pancasila and the 1945 Constitution.

However, in the course of time this Order was stuck with the pragmatism interests of development. Where measuring the success of development is only based on quantitative calculations. That is, justification is based solely on political teleology, not emphasizing principles based on law and the constitution.

In practice, executive power is exercised arbitrarily and is untouched by the law or the people's representative institutions. In theory, a state is called a rule of law if the government carries out its duties based on and is responsible for fulfilling the rule of law. Thus, if the government or political power has respected and implemented the law, it is a reflection that that power is in accordance with the will of the sovereign people.⁵

The act of measuring success by only prioritizing quantitative aspects carried out by the New Order meant that it did not pay attention to the principles that had to be upheld, even an attitude that led to arrogance of power. If this is not resolved immediately, it can become an obstacle in realizing the government's commitment to safeguarding and enforcing the constitution, democracy and law. To enforce the law, constitution and democracy it is not enough to rely solely on political will which is rhetorical. More than that, what must be done is a real effort to implement the constitution, maintain and develop democracy as well as build the authority of the law in all aspects of life.

In order to create good governance, it is necessary to have legal institutions and political institutions that support and complement each other in the form of a genuine will in implementing democracy and upholding

⁵ Abdurrahman, *Beberapa Aspek Tentang Perkembangan Hukum Nasional*, (Bandung: Citra Aditya Bakti, 1995), p. 47.

the authority of the law. It all depends on the understanding and responsibility in carrying out the duties of each legal and political institution in accordance with what is mandated by the constitution. This means that the government must implement legal politics properly. The definition of correct political implementation is the fact that there is also the direction of legal development carried out by the state authorities. This means that the law functions as a legal policy that must be enforced and applied nationally in a country.⁶

From a theoretical-philosophical perspective, legal politics is a measure for the realization of legal guidance and development. Meanwhile, from a normative-operational perspective, legal politics means the will or program of the government to achieve the desired society. A philosophical-theoretical perspective means making Pancasila the ideal of law in the Indonesian state. Then the operational-normative perspective emerged in the form of state law.⁷

In terms of Islamic law, usually only the power of the Religious Courts can be imagined. In fact, it is not only that, but it involves various aspects of life, both those related to vertical and horizontal aspects. According to historical records, Islamic law is slowly starting to be eroded. Only the family law remains the power of the Religious Courts. It is unfortunate if the existence of Islamic law, which in reality has contributed to the history of the Indonesian nation, must be ignored. When the faucets of democracy were opened

⁶ Marzuki Wakhid, *Fiqih Madzhab Negara; Kritik atas Politik Hukum Islam di Indonesia*, (Yogyakarta: LKiS, 2001), p. 31.

⁷ Ali Abu Bakar, "Syariat Islam Dalam Tata Negara Indonesia", *Legitimasi (Jurnal Hukum Pidana Dan Politik Islam)*, Vol.3, No. 1, 2014, p. 514-522.

in national politics, Islamic law began to develop in a broader direction.

Basically, the source of differences in the formulation of Islamic law lies in the epistemology of Islamic law. So it can be said that the difference between the schools is actually the difference in *fiqh*. Even though there are differences, in fact these schools do not come out of Islamic law, as long as they are based on the Al- Qur'an and hadith.

In a broad sense, sharia is the entire rule that governs the life of Muslims, including the knowledge of divinity which is often referred to as the main *fiqh*. While sharia in the narrow sense, according to Abdul Wahab Khallaf is the result of one's understanding by using certain methods based on the Al-Qur'an and hadith, which includes worship and muamalah. In its development, this domain is known as Islamic law.

It is time for Islamic law to be more empirically realistic, with its main mission to safeguard the benefit of humanity. What is meant by Islamic law in this context is *fiqh* which is nota bene the product of *ijtihad* *fuqaha* fourteen centuries ago. As a product of *ijtihad*, *fiqh*, thus it is very possible to accept change and can be placed as a form of legal study.

When viewed from the characteristics of Islamic law established through reasoning, there are things that are adaptive that allow Islamic law to be a science that is comparable to general law. The difference lies in the underlying primary source. Islamic law which is based on revelation, includes values and rewards in the hereafter. While general law does not come from God.⁸ Because there

is no connection to *ilahiyyah* accountability of this kind, law becomes dry and prone to interference by political interests. Law is far from justice and honesty, due to the distance from accountability to the divine dimension. It is in this context that Islamic law can be used as material to be formulated into alternative legal findings that have more value.⁹

In history it has been found that since its arrival until now, Islamic law is a living law in the midst of society. Not just a symbol, but also at a practical level. This is not only because the majority of Indonesia's population is Muslim, but because in various regions in Indonesia Islamic law has become an inherent habit in people's lives. The socio-cultural perspective of Islamic law has taken root in various kinds of community life. The main contributing factor is the flexible and elastic nature of the law. This means that although Islamic law comes from God, it is capable of making a transformative-adaptive effort.

In the Dutch era, Islamic law was already underway and developed, especially after it was applied as the basis for decisions concerning civil matters. For example, a legal provision in force in the Nias region states that a daughter does not have the right to inheritance or inheritance from her father. However, the legal provisions change when the daughter embraces Islam.¹⁰

It is an advancement that in the perspective of *ius constitutum*, Islamic law in the New Order era shows more of its existence. This is proven by the increasing number of Islamic laws becoming positive law. For example, the issue of marriage through the stipulation

⁸ Mohammad Daud Ali, *Hukum Islam, Pengantar Ilmu Hukum dan Tata Hukum Islam di Indonesia*, (Jakarta: Raja Grafindo Persada, 2004), Cet. ke-11, p. 42-43

⁹ Fathurrahman Djamil, *Filsafat Hukum Islam*, (Jakarta: Logos Wacana Ilmu, 2009), Cet-ke-3, p. 37-39.

¹⁰ S.M Amin, *Kodifikasi dan Unifikasi Hukum Nasional*, (Jakarta: Hudayya, 2008), p. 15.

of UUP No.1 Year 1974. Problems in the Religious Courts through the enactment of Law Number 7 of 1989, as well as issues of juvenile justice through the enactment of Law Number 3 of 1997.

The New Order placed Islamic teachings or Islamic law as part of religion. This can be seen when the government gives authority to the Ministry of Religion to regulate matters of Islamic law. This includes placing the Religious Courts under the auspices of the Ministry of Religion, not the Supreme Court (MA). It is biased if religion is in a secularistic area. For the first time, Islamic law that was enforced by the New Order was a law regulating marriage issues, namely through the promulgation of Law no. 1 of 1974, but it is still classified as general in the framework of religion, not purely Islamic law. This can be seen from the article 10 of Law No. 14 of 1970 which states that the meaning of each religion is Islam with a specialization in the Religious Court.

With the existence of several Islamic laws that have become positive laws above, it shows that many Islamic laws during the New Order era were included as positive laws or part of the national legal structure.¹¹ However, the political will from the state has not maximally obtained the political will from the state. So that Islamic law can be said that there is a crossroads, the area is not so wide, of course this is not comparable to the real capability of Islamic law.

Even though Islamic law during the New Order era had gained a place, it was only limited to legalization. It is not optimal but only partial. Meanwhile, substantially

the legal content, political Islamic law in Indonesia has an autonomous character. Meanwhile, in its function, Islamic legal politics in Indonesia in its implementation has a legitimate character.

The end of the New Order era led to demands from some Islamic groups to formalize Islamic sharia. However, this raises concerns for other Islamic groups, because according to them there are several provisions of Islamic law that are incompatible with democratic values. This difference is due to the existence of the religious model of Indonesian society which includes; first, a group that wants to make Islam an ideology, meaning that this group wants Islamic formalism. Second, the group that wants Islam to only apply morally and ethically, meaning that this group does not want the formal institutionalization of Islamic law. The third group is a moderate group, in the sense that this group supports the formalization of Islamic sharia but which only deals with private law.

The formalization of Islamic law in Indonesia can be said to be a step backwards in democracy and is a step that is less strategic and effective. In the relationship between the nation and the state based on Pancasila, even though there is a regional autonomy law, it does not mean that each group can apply legal politics based on the wishes, tendencies of one particular group or ethnicity.

In order to create a legal structure that has Indonesian characteristics, it is time for Islamic law to be accommodated in a positive legal structure. Such accommodation efforts must be based on an understanding of Islamic law which has special characteristics, namely first, the detachment of Islamic law from a historical perspective, secondly, there must

¹¹ EMK. Alidar, "Hukum Islam Di Indonesia Pada Masa Orde Baru", *Jurnal Legitimasi*, Vol. 1, No. 2, 2012. p. 88-89

be a strong connection to the basis of the literal interpretation of Arabic, third, there is no single authority that can uniform legal decisions in society.

The material for the formation of national law consists of Western law or general law, Islamic law and customary law. But among the three laws, Islamic law has a more strategic position. The significance of Islamic law lies in the emphasis on religious values, namely the element of responsibility to God. Indirectly, this substance automatically becomes the commitment of a judge in deciding a case, namely that there is always a sentence that says, "based on God Almighty". Judging from its historical roots, Islamic law as a source of law is very likely to be included in law.¹²

b. Dynamics of Legislation of Islamic Law during the Reformation Period

1. Legislation of Law Number 17 of 1999 concerning the Implementation of Hajj

The New Order actually regulated the issue of organizing the Hajj, but this was still not in the form of a law. The form of regulation at that time was Presidential Decree No. 22 of 1969 which was strengthened by Presidential Instruction No. 06 of 1970 where it stated that the government could only carry out the haj pilgrimage.

Entering the Reformation era everything changed fundamentally. These changes include the scope of government, legislative and judiciary institutions. Usually during the New Order era, the Legislative members did not have many suggestions, during the Reformation period they found momentum. For example, even though the membership

¹² Muchsin, *Masa Depan Hukum Islam Di Indonesia*, (Jakarta: Badan Penerbit IBLAM, 2004), p. 67-69.

of the DPR RI at the time of the results of the New Order Election, individually the paradigm of thinking had shifted due to the wave of reform. This can be seen how the right to initiative proposals that have never been used, entered the Reform era, were used, namely the existence of all factions in the DPR¹³ proposed a Draft Law on the Implementation of Hajj. Of course, this political climate change has a positive impact on the emergence of awareness of political parties to pay attention to the legal needs of Muslims in Indonesia.¹⁴

As the rationale for submitting the Draft Law are; first, the second 1945 Constitution, the MPR Decree No. II/MPR/1998 concerning the Outlines of State Policy which have been revoked and replaced by MPR RI Decree No. X/MPR/1998 concerning the Principles of Development Reform in the Framework of Normalizing National Life as a State Policy mandated the need for the implementation of the haj pilgrimage to be regulated in a law as a tangible manifestation of the government's attention so that the implementation of *Hajj* and *Umrah* runs smoothly, safely and transparently in accordance with the guidance of religious teachings; third, the existence of a phenomenon in the community that corresponds to the increasing number of Muslims doing the haj pilgrimage and making *Umrah* trips; and fourth, to improve the quality of services for *Hajj* and *Umrah* affairs that are better,

¹³ The factions in the DPR at that time were; 1-Development Work Faction (FKP), 2-Indonesian Armed Forces Faction (ABRI), 3-United Development Faction (FPP), and 4-Indonesian Democratic Party Faction (FPDI).

¹⁴ Azman, "Penerapan Syariat Islam", *Ad-Daulah: Jurnal Hukum Pidana Dan Ketatanegaraan*, Vol. 7, No. 2, Desember 2018. p. 293.

orderly and in an orderly way, and to further ensure an increase in legal protection for the congregation, it is deemed necessary to regulate the Implementation of Hajj and Umrah Affairs which have been regulated by Presidential and Ministerial Decree. Religion was upgraded to law.

2. Increase the Power of the Religious Courts

The enactment of Law Number 7 in 1989 was then updated through Law Number 3 of 2006 concerning Religious Courts, further strengthening the existence of the Religious Courts because they have adjusted to Law Number 4 of 2004 concerning Judicial Power. Amendments were made to Law no.¹⁵ 7 of 1989 brought fundamental changes in two existing institutions in Indonesia, first, the Religious Courts institution, second, the Islamic economic institutions. In the explanation of Law Number 03 of 2006, it is explained that what is meant by a special court in the environment of the Religious Court, namely the Islamic sharia court which is regulated by law.

Prior to additional power in the Religious Courts,¹⁶ All forms of disputes related to the Shari'ah economy are resolved in the General Court or District Court. This means that the change in the law has brought a new history of economic law in Indonesia. Sharia institutional development develops rapidly. This can be seen from the emergence

¹⁵ Abdul Ghafur Anshori, *Peradilan Agama di Indonesia Pasca Undang-Undang No. 3 Tahun 2006*, (Yogyakarta: UII Press, 2007), p. 55-57.

¹⁶ Before the added power or authority of the Religious Court only regulated matters of marriage, inheritance, wills, grants, endowments, zakat and shadaqah. Then with the new law added authority, namely in the field of Islamic economics. see: Erfaniah Zuhriah, *Peradilan Agama di Indonesia Dalam Rentang Sejarah Pasang dan Surut*, (Malang: UIN Malang Press, 2008), p. 50-53.

of various kinds of Islamic economic institutions. Among other things, Islamic financial institutions, Islamic pawnshops, and so on. The amendment of Law Number 7 of 1989 to Law Number 3 of 2006 has an important meaning in the emergence of these various Islamic economic institutions. Before any additional power or authority over the Religious Courts institution, if there is a case related to sharia economics before being brought to the District Court, it is first brought to an agency called the Sharia Arbitration Board. However, this agency is not running well because of its limited powers, namely it does not have the authority to bring parties to court, so as a result, many cases of sharia economics are neglected.

3. Sharia Banking Legislation 2008

The addition of power or authority to the Religious Courts has a positive impact.¹⁷ This is proven by the growing enthusiasm of the members of the Indonesian council to draft Islamic economic legislation. This can be seen from the plan to submit the drafting of the Sharia Banking Bill by members of the DPR RI for the 1999-2004 period. However, the efforts of these council members have not been successful due to time constraints, namely the end of the 1999-2004 DPR RI membership period. Furthermore, the idea was forwarded by members of the DPR RI for the 2004-2009 period, particularly through the 2004-2005 session year which included the Sharia Banking Law Plan as an important and prioritized part. Furthermore, Commission XI prepares and compiles a draft

¹⁷ Hasyim Nawawi, "Hukum Islam Dalam Perspektif Sosial-Budaya Di Era Reformasi", *Jurnal Episteme*, Vol. 8, No. 1, 2013, h. 1-27.

or draft of the Sharia Banking Bill, the results of which are then submitted to the leadership of the DPR RI.

In fact, if we look further the Law on Islamic Banking in 2008 is a complement to the previous Law, namely Law No. 7 of 1992 which regulates banking issues. The 2008 Islamic Banking Law is only to reinforce the existing provisions. Therefore this bill is nothing more than the desire of the Indonesian Parliament and the Government to provide a legal framework for the increasing number of businesses in the field of Islamic banking in Indonesia.

The three laws above are only part of the legislation that is “in character”, Islamic in the Reformation Era. There are still many Islamic laws that the author does not mention. However, from the three laws, it can be seen that in the Reformation Era there were significant changes to the members of the DPR RI. Members of the DPR RI who in the previous era were only used as tools to legalize laws, in the Reformation Era they began to show their true function as DPR members, namely exercising their right to suggest a bill. So that in this era more and more Islamic laws were issued.

Meeting Point of Islamic Law and State Law Formulasi Teori Maslahat

Maslahat theory has been formulated by scholars or experts throughout the history of the course of Islamic law. It contains dynamics in formulating the intended reformulation. The explanation below concerns the dynamics of the reformulation of the *maslahat* concept that arose from the ideas of the ulama, including the ushul expert ulama of the contemporary period.

1. Qualification and Existence of Maslahat

The word *al-maslahah* literally means appropriateness, kindness, and harmony. The word *al-maslahah* is often synonymous with *al-mafsadah* and *al-madharrah*, which mean damage.¹⁸

Meanwhile, according to the term, many were conveyed by scholars. For example, al-Ghazali argued that *maslahat* has the meaning of maintaining and realizing the objectives of Islamic law, namely protecting religion, guarding the soul, maintaining reason, protecting descendants, and protecting property. In his view, anything that guarantees the existence of a part of the aims of religion or Islamic law can be called *maslahat*, on the other hand, anything that can destroy or eliminate some of the above objectives can be considered *mafsadat*.¹⁹ So it can be said that preventing anything that can damage some of the objectives of Islamic law is called *maslahat*.

Meanwhile, *Najm al-Din al-Thufi* said that the meaning of *maslahat* can be seen in terms of *urf* and *syar'i*. According to him, in *urf*, *maslahah* is a *sabab* that can have an impact in the form of goodness and benefit, for example trade can be a cause of gaining profit or profit, while in the sense of *syara'*, *maslahat* is the cause which leads to religious or *syara'* goals, whether it is related to worship and *muamalah*.

Islamic law governs all human affairs and is in accordance with all circumstances. Through the existing texts, Islamic law is able to create *maslahat* for every legal provision that is

¹⁸ Jamaluddin Muhammad ibn Mukaram ibn Manzbur al-Ifriqi, *Lisanul Arab*, juz 2, (Riyad: Dar al-Alam al-Kutub, 2003), p. 348-349.

¹⁹ Akbar Syarif, Ridwan Ahmad, “Konsep Maslahat dan Mafsadat Menurut Imam Ghazali”, *Jurnal Tsaqafah*, Vol. 13, No. 2, 2017, p. 362-364.

raised. There is no legal problem unless the Al-Qur'an and the hadiths govern it. Islamic law is always in accordance with human nature, paying attention to all sides of human life and life and providing perfect guidance for life. Islamic law always puts forward the realization of *maslahat* for all human beings. Thus, *maslahat* makes a significant contribution to the realization of guidelines that should be adhered to by a scholar to know Islamic law regarding everything that is not contained in the Al-Qur'an and hadith. Thus it is clear that *maslahat* is a very important tool for the continuity of Islamic law to always be able to answer every challenge of the age and always be up to date in facing all the problems of human life.

In every legal formula intended to regulate human life, *maslahat* is always used as a foundation. Islamic law always pays attention to aspects of justice and benefit in every legal product. Legal products that contradict all these principles are not Islamic laws. The greatness of Islamic law can be seen from the compatibility of its doctrine with the development of human life because of the *maslahat* that accompanies it. The existence of *maslahat* in the configuration of Islamic law cannot be denied because *maslahat* and *sharia* are combined and unified, so that the presence of *maslahat* necessitates *sharia* demands.

If we observe that the legal texts in the Al-Qur'an and hadith are all attached to wisdom and *'illat*, which results in *maslahat*, both laws relating to society and individuals. Even Islamic law does not only regulate *muamalah* issues, but also worship issues. So that it can be said that all aspects of life with various kinds of legal provisions that have been outlined by the Al-Qur'an and Hadith that

originate and lead to benefits for human life. This is because Allah does not need anything from humans, on the contrary, it is people who need Allah, so that they benefit from the fact that *maslahat* is the basis for the existence of Islamic law. The existence of wisdom and *'illat* in Islamic law is a guarantee of the existence of Islamic law.

Realizing *maslahat* against humans is the goal of Islamic law. Good *maslahat* that is individual, social, present, world, and hereafter. In providing legal provisions, *al-Shari* 'always gives *maslahat* so that it can cause goodness and eliminate badness, then finally prosperity in the world and the emergence of devotion to Allah are realized. Because the benefit is essentially maintaining the objectives of Islamic law.

The character of *maslahat* is to spread throughout the units of Islamic law type.²⁰ The point of *al-Shari* 'gives *maslahat* for each unit of law is universal, not limited to a particular problem or object. Islamic law is entirely *maslahat*, whose representation is in the form of eliminating *mafsadat* and realizing benefits. The basis for the consideration of *maslahat* is a method of thinking to obtain certainty for a problem that has not been regulated by the Al-Qur'an and hadith. In the end, it can be said that *maslahat* is a provision that contains goodness for humans.

Every text of the Al-Qur'an and hadith that contains the law must contain *maslahat*. There is no term *maslahat* should take precedence if it is not in harmony with the Al-Qur'an and hadith. The laws that have not been explained by the Al-Qur'an and the hadiths, then we look for legal provisions that

²⁰ Abu Ishaq Al-Syatibi, *al-Muwafaqat fi Ushul al-Syari'ah*, Jilid 1, (Mesir: Dar al-Kutub al-Ilmiyah, t.th) p. 42-43.

are capable of realizing *maslahat* whose types and characteristics have been determined by the *ulama*. *Maslahat* that contradicts the Al-Qur'an and hadith is not an essential *maslahat*, but a pseudo-*maslahat*.

In order to determine the above laws, *maslahat* is used which is operationally manifested in the form of *ijtihad* theories,²¹ for example: *qiyas*, *maslahah mursalah*, *istihsan*, *syad al-zdari'ah*, and *urf*. Therefore, every effort made by relying on *maslahat*, can be said to be an attempt to explore the meaning of the text of the Al-Qur'an. Likewise, the *maslahat* affirmation of laws that are not contained in the Al-Qur'an and hadith, can be confirmative and negative.

Identification of *maslahat* which is the essence of *maqashidul sharia* based on, (1) the texts of the Al-Qur'an, especially those in the form of *amr* and *nahy*, (2) *Illat* and wisdom contained in al-Quran and hadith, (3) al-*Istiqra'*. The *maslahat* identification contained in the Al-Qur'an and hadith, especially those with the *al-amr* and *al-nahy* dimensions, is widely used by ushul scholars from *al-Dhahiri* circles. Meanwhile, there are scholars who explore the *maslahat* elaborating many *'illat* and wisdom. While the identification of *maslahat* through *istiqra* is a theory produced by al-Syatibi.

As the core of *maqashid al-sharia*, *maslahat* is the best alternative in developing various kinds of *ijtihad* methods, in which the Al-Qur'an and hadith must be understood with various *ijtihad* methods with due regard to and based on *maslahat*. *Maslahat* is a medium for change and legal reform. By using *maslahat* theory, Islamic jurists have

solutions in solving various kinds of legal problems inherent in a system based on the Al-Qur'an and hadith, which is the basis of limited legal material, while human life with all its dynamics is constantly changing. Thus, this conception legitimizes and provides an opportunity for Islamic jurists to elaborate on cases that are not contained in the Al-Qur'an and hadith.

Furthermore, it is also necessary to convey about who has the right to determine whether something is *maslahat* or not. In this case the measure is the *maslahat* contained in the Al-Qur'an and the hadith, but if the *maslahat* is an *ijtihad* then the *mujtahid* in individual *ijtihad* may determine.²² However, this matter is prone to misuse of *maslahat* which can disturb the community. That is why the *ijtihad jama'i* (collective) method such as *MUI*, *Bahtsul Masail NU*, and *Majlis Tarjih Muhammadiyah*, is very necessary to minimize errors in using the *maslahat* theory carried out in *ijtihad fardie*, so that the theory and application of *maslahat* in *ijtihad* can be avoided from mistakes.

2. *Maslahat* categorization

It is important to say here whether something is called *maslahat* or not. There are many views of scholars regarding the criteria or categorization of *maslahat*. For example, Muhammad Muslehuddin categorized *maslahat* into three types, namely *maslahat muktabarah*, *maslahat mulghah*, *maslahat mursalah*. Meanwhile *al-Buthi* is of the view that there are five criteria for *maslahat*: First, something that will be decided is still in the area or provisions of the *syara* 'text; second,

²¹ Sakirman, "Meretas Kebekuan Ijtihad Dalam Kontruksi Fiqh Sosial", *Jurnal Ilmiah Mizani*, Vol. 25, No. 1, 2015, p. 2-3.

²² Muhammad Salim Madkur, *al-Ijtihad fi al-Tasyri' al-Islamy*, (Kairo-Mesir: Dar al-Nahdhah al-Arabiyah, 2004), p. 173.

that something is not against the Al-Qur'an; third, that something or problem does not contradict the hadith; fourth, it is not against *qiyas*; and fifth, it does not conflict with other, more important benefits.²³

Meanwhile, al-Ghazali argued that, first the *maslahat* got the justification of the Al-Qur'an and hadith (*maslahah al-mu'tabarah*), and the result was *al-qiyas* and *al-ijma'*. He gave an example of the *fatwa* case of a *mufti* against a ruler who deals with his wife during the day of the month of *Ramadan*, namely the obligation to fast for two consecutive months as *kaffarat* or a punishment that must be carried out by the ruler, with the consideration that if the ruler is given the sentence to free the slave it is so light for him that it does not train himself to strive to stifle lust, so as not to have a deterrent effect. From here, the *maslahat* argument in determining the obligation to fast is *kaffarat* which can have a deterrent effect on him. In al-Ghazali's view, what is like this is an inaccurate legal product, contradicting the Al-Qur'an, which in turn has an impact on the deconstruction of religious teachings on the pretext of social change. Third, *maslahat* that does not get justification from the Al-Qur'an and hadith, either in the form of acceptance or rejection. This is what has become a disagreement among scholars.

Najm al-Din al-Thufi argues that *maslahat* is divided into two,²⁴ namely *maslahat syara* perspective and *maslahat* perspective *urf*. *Maslahat syara* perspective 'is a cause that

conveys the meaning of *shari'* which includes aspects of worship and aspects of *muamalah*. While *maslahat* in '*urf*' means something that causes goodness and benefit, for example, commerce is a cause for profit. On the other hand, Najmuddin al-Thufi distinguishes the concept of *maslahah* into two: 1. the *maslahah* that *al-shari'* 'wants for His right, for example all worship in the category of *mahdhah*. 2, the *maslahat* that *al-shari'* wants for the benefit of His creatures and the order of their lives, examples of law that are categorized as *muamalah*.

While al-Syatibi categorized *maslahat* into three types, *al-dharuriyah*, *al-hajjiyah*, and *al-tahsiniyah*. First, *al-dharuriyah* is something that must exist for the realization of goodness and prosperity, both in the world and the hereafter, that is, if something does not exist, it does not make an orderly and prosperous world life. *Al-Dharuriyah* includes all efforts which include maintaining religion, soul, lineage, property, and maintaining reason.²⁵

Second, *al-hajjiyah* is something that is needed to bring convenience and at the same time eliminate difficulties. If no difficulty arises, it's just not to the extent of causing a damage as in the case of *maslahah dharuriyat*. *Hajjiyah* actually complements *dharuriyat*, this means that with the *hajjiyah*, a *masyaqqah* is lost so that a balance is created.

Third, *tahsiniyah*, is a step to take or do a good habit and avoid bad habits by using reasoning properly.²⁶ Or in other languages with the term good *ahlak* (*makarim al-ablaq*).

²³ Muhammad Sa'id Ramadan al-Buthi, *Dawabith al-Maslahah fi al-Syari'ah al-Islamiyah*, (Beirut: Muassasat Al-Risalat, 2000), p. 217.

²⁴ Arifah Millati, "Teori Ri'ayah Al-Maslahah At-Tufi Dan Aplikasinya Dalam Menakar Problematika Ihdad". *Al-Ahwal (Jurnal Hukum Keluarga Islam)*, Vol. 7, No. 1, 2014, p. 7-11.

²⁵ Abu Ishaq Ibrahim al-Syatibi, *al-Muwafaqat fi Ushul al-Syari'ah*, jilid 1, juz 2, p. 9-15.

²⁶ Nilda Susilawati, "Stratifikasi al-Maqashid al-Khamsah dan Penerapannya Dalam Al-Dharuriyat, al-Hajjiyat, dan al-Tahsiniyat". *Jurnal Ilmiah Mizani*, Vol. IX, No. 1, 2015, p. 7-10.

In Syatibi's view, *tahsiniyah* is centered on the virtues that perfect *maslahah al-dharuriyah* and *maslahah hajjiyah*, this is because if there is no *tahsiniyah*, it does not affect or damage the issue of *dharuriyah* and *hajjiyah*. *Tahsiniyah* is only an attempt to create a beauty and comfort in the order of human interaction with God and human-creature interaction. More specifically, Syatibi said that if the *maslahat* is only supplementative, it means that the *hajjiyah* complements *al-dharuriyah* and *al-tahsiniyah* complements *al-hajjiyah*.

Integration of Islamic Law into State Law through Maslahat Theory

Basically, Islamic law is a law taken from Islamic religious doctrine. The normative character has been inherent in the doctrine of Islamic teachings. Islam is known as the "religion of law". The teachings of the Islamic religion say that *fiqh* and creed cannot be separated, because from the creed a rule or law is built, as well as implementing *fiqh* *aqidah* can be maintained. Al-Quran and Hadith are the two main sources of all the rules of law which every believer must obey. The relationship between law and religion cannot be separated. In Islamic law the role of the Prophet Muhammad is very large, he is not only a messenger of God, but also a model for all mankind in carrying out God's laws for the safety of their lives in this world and the hereafter. It is therefore not surprising that Muhammad's prophethood plays a very important role in the Islamic legal tradition, without which there is no connection between the sacred and the profane.

In the Islamic perspective, the law regulates everything according to God's will. The idea of law as an all-encompassing entity is the

main character of how Islamic law views life. Since its inception, Islamic law has in fact made no distinction between matters of the relationship between God and humans and the relationship between humans and humans. The relationship between fellow human beings is even seen as a reflection of the relationship between humans and God where the source of sacred texts (al-Quran and hadith) serves as a reference in understanding God's will about this life. All aspects of human life are covered by law. There is nothing in the aspect of human life that is outside the law because all human behavior in this life is derived from its theological perspective. Because there is no longer any separation between "state" and "religion", in Islam religion and government become one. Islamic law is controlled, governed by the Islamic religion. As a consequence, Islam is closer to a theocracy where the public and private spheres are governed by religion, because use government, law and religion are essentially intertwined together. Of course, in practice various variations arise in various Islamic countries, but one thing is clear that all law, government and civil authorities are based on Islamic creed.²⁷

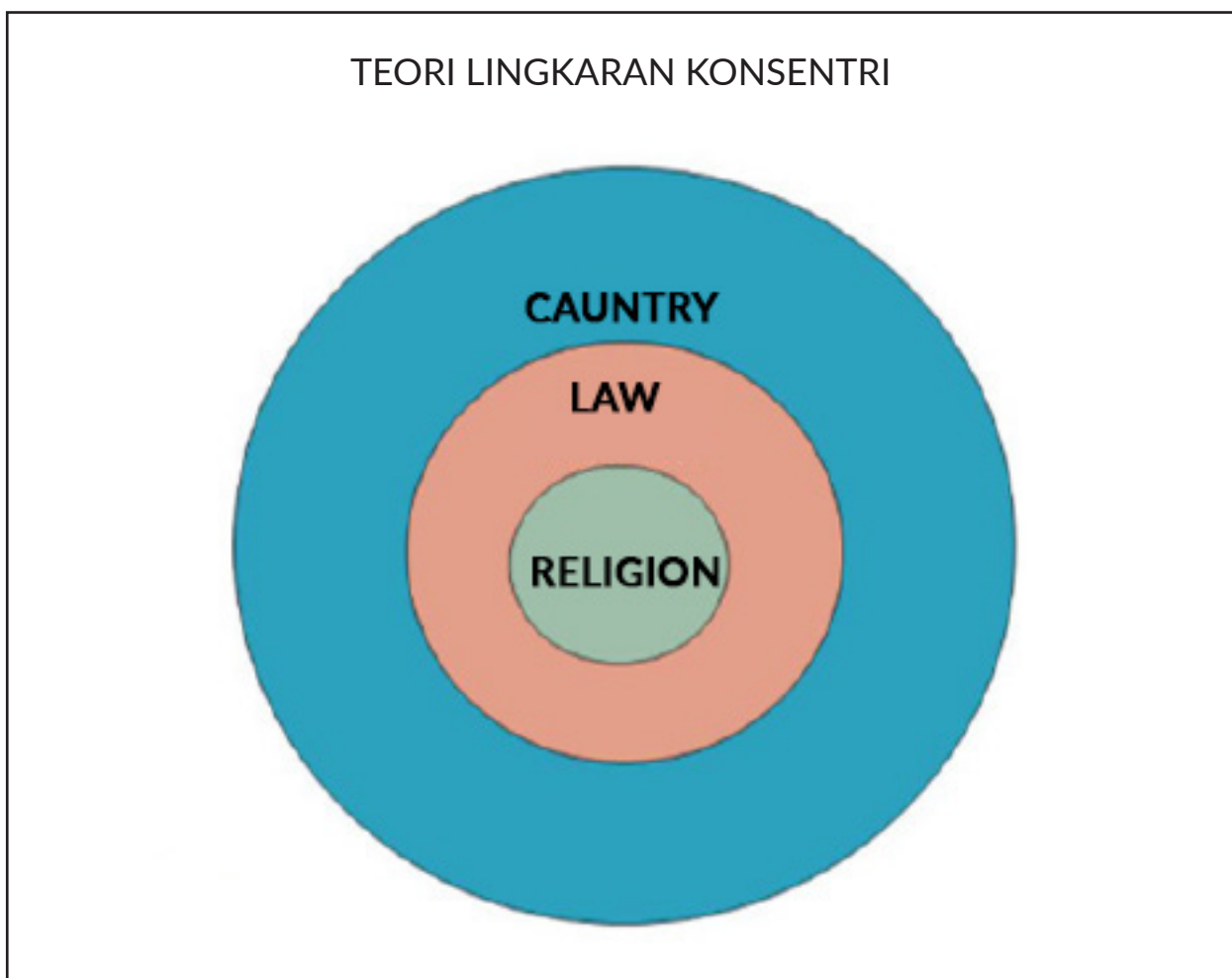
According to Abdullah Ahmaed An-Na'im, Islamic law can only be offered and applied through adaptation to the needs of modern Islamic society. But the adaptation of the principles of Islamic law in the legislation of modern state law must still be done through secular theory, which is a direct legislation on the principles of Islamic law itself.

In Islam there is no dichotomy between religion and state or between religion and law. The three components when combined

²⁷ Mahathir Muhammad Iqbal, "Merumuskan Konsep Fiqh Islam Perspektif Indonesia", *Jurnal al-Abkam*, Vol. 2, No. 1, 2017, p. 17-19.

form a concentric circle which is a unity and is closely related to one another. Religion as the first component is in the position of the deepest circle because religion is the core in that circle. Then followed by the law occupying the next circle. This has a very big influence on religion on law and at the same time religion is the main source of law, besides ratio as a complementary source. Viewed from the basic framework of Islam

which consists of faith, sharia and morality. Akidah is the central point, while the next structure is sharia and ahlak as well as legal substance, so that the concept of law in that circle contains not only law in a normative sense, but also law and morality. As the third component, countries are in the final circle covering the previous two components, namely religion and law. Here's a concentric pie chart:



This position shows that in this concentric circle, the state includes the former two components, namely religion and law. Because religion is at the core of this concentric circle, the influence and role of religion is very large on law and the State. It can also be seen how

close the relationship between religion, law, and also the state are components that are in one unity that cannot be separated. It must be understood that if the position of the state is placed in the latter circle, it does not mean that the state confines or imprisons religious

law.²⁸ From this it can be said that the state can only operate officially established general principles of law, the principles of sharia can influence politically and sociologically, but are not automatically applied as positive law without state intervention.

In the absence of a dichotomy of religion and state or religion and law, *maslahat* theory plays an important role. Since its promulgation, sharia has not been built on any other basis except for the benefit of mankind.

Departing from the above thought, some Muslims are of the view that the formalization of Islamic law through positive law or statutory regulations is a necessity. For them, Indonesian law can be divided into several categories; first, the law that makes *adat* the basis, so that the community norms and customs that have been accepted from generation to generation that last for a very long time and are inherent in public awareness are made into positive law. Second, the law is taken from religious law, namely the religious teachings brought by the prophet. Third, law as a rule in life together originating from official legislators which is accompanied by certain sanctions in the event of violations and is implemented by the state.

The three legal rules above are contained in the legal culture of the Republic of Indonesia which was proclaimed on August 17, 1945. Thus, Indonesian law that was born after that date has four basic forms, namely law products of colonial legislation, customary law, Islamic law, and national products. So orderly and in order to formalize existing laws in Indonesia, so that the constitutionalization of law or

Islamic law is also a necessity, although the boundaries of formalization are not clear. With Islamic law formalized, finally the state has the obligation to maintain and enforce it, not only society as a community whose obligations and rights must be protected.²⁹

The constitutionalization of Islamic law can be connected to the time of the prophet, friends, caliphs afterward, to the implementation of Islamic law in modern Islamic countries today, for example, Saudi Arabia, Sudan, Pakistan, Malaysia, Egypt, and others. In Indonesia, since the time of the kingdoms and colonialism, Islamic law has been officially applied, although not completely. The emergence of statutory regulations since the founding of the state until now is a lot related to Islamic law which can also be said to be the result of *ijtihad* by Indonesian ulama.

The formalization of laws and regulations derived from Islamic teachings can be made through the Constitution as basic guidelines that inspire the existing regulations, namely the MPR, UU, Perpu, PP, Presidential Decree, and Perda. The following are several legislative products that lead to sharia enforcement. In the form of Law no. 1/1974 which regulates the validity of marriage based on religious law; UU no. 7/1989 which was updated by Law no. 3/2006 concerning Religious Courts, Law No, 17/1999 on the Implementation of Hajj; UU no. 23/1999 concerning Bank Indonesia mandating the establishment of a Bank or Government Sharia Bank; and Law no. 38/1999 concerning Zakat Management. Meanwhile, the Government Regulations issued were PP N0.70 and 72/1992 which

²⁸ Muhammad Thahir Azhari, *Negara Hukum: Studi tentang Prinsip-Prinsipnya dilihat dari Segi Hukum Islam, Implementasinya pada Periode Negara Madinah dan Masa Kini*, (Jakarta: Bulan Bintang, 2002), p. 43.

²⁹ Iqbal Maulana Dan Yuni Roslaili, "Penerapan Syariat Islam Dalam Bingkai Keberagaman Nusantara", *Dusturiyah (Jurnal Hukum Islam, Perundang-Undangan dan Pranata Sosial)*, Vol VIII, No. 1, 2018, p. 11-13.

explained profit-sharing banks and Law no. 7/1992. Then Inpres N0.1 / 1991 concerning Compilation of Islamic Law was added with Kepmen N0.154/1999, as the implementation of the Inpres. In the management of zakat issued Ministerial Decree No. 581/1999 and specifically for the City of Bandung, a Perda No. 30/2003.

Of course, in implementing this law, another law is needed which regulates it as an authorized institution to serve as an umbrella for the enactment of this law. For example, there is Law no. 14/1970 concerning Basic Provisions of Judicial Power which in Article 10 paragraph (1) are promulgated, Judicial Power is exercised by the Court in the following environment: first, General Courts, second, Religious Courts, third, Military Courts, fourth, State Administrative Courts. "So institutionally, Islamic law can be implemented, even though these categories of authority overlap at times because the Muslim community is not aware of the application of sharia in certain fields.

When Islamic law is to be made positive law, the steps taken are through the parliamentary route, where there are many people and parties with different social and religious backgrounds. However, the enforcement of Islamic law through parliamentary channels is the best way for now. There are still many legal issues that need to be adopted in our legislation. The issue that is still being kept is that it relates to Islamic criminal law which of course requires a bigger political decision relating to the overall constitutionality. In fact, the formalization or legislation of Islamic law has been carried out in such a way, so that the future arrangement of Islamic society has adequate legal certainty. Indonesian criminal law requires new engineering and more

intensive political power because many people oppose it. If in the early days of independence only "people from the East" were now more than that, but also Muslims, non-Muslims, maybe even certain countries that were not happy with the teachings of Islam.³⁰

Conclusion

Integrating Islamic sharia into Indonesian state law is not an easy task, this is due to the state's form factor and the plurality of its people. Even among Muslims themselves, the idea of this differs from one group to another. The first group wants Islam as an ideology whose manifestation takes the form of the formal implementation of sharia as positive law. Meanwhile, the second group wants the implementation of religious ethics and rejects the formalization and integration of sharia into state law. However, there are opportunities to include religious teachings, including Islamic law, in the national legal system, which can avoid socio-political resistance. This opportunity is through the application of maslahat theory while still paying attention to the dynamics of modern society in Indonesia, to transform Islamic law into a state legal framework.

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³⁰ Masykuri Abdillah, dkk. *Formalisasi Syariat Islam di Indonesia, Sebuah Pergulatan yang Tak Pernah Tuntas*, (Jakarta: Renaisan, 2005), h. 249-250.

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