



**THE NEW FIQH IN A NATIONAL SCHOOL OF LEGAL THOUGHT:  
A PARADIGM SHIFT IN A NATIONAL SCHOOL OF ISLAMIC  
LAW ON M. BARRY HOOKER'S PERSPECTIVE**

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**Abstract:** The polemic of the domain between religious regulation and state authority in the national school of Islamic law in Indonesia seems to be endlessly debated by Indonesian and Western Scholars, Muslim as well as non-muslims. This article discusses western scholarly discourses on the National School of Islamic law by examining the thoughts and works from M. Barry Hooker. Hooker introduced the term "new fiqh" in the national school of Islamic discourse and explained that the Indonesian fiqh instrumentalized by the state. Based on the model of the study of public figures and grounded its main data of Hooker's work, this paper shows that Hooker criticizes the shifting paradigm of classical fiqh text to fiqh dominated by the state. The state determines the process of fiqh with various instruments and public transmission of sharia, including religious bureaucratization, state intervention in Islamic legal education curriculum, and through religious pulpit mediums.

**Abstrak:** Fikih mazhab nasional mengemuka dalam perebutan domain antara peraturan agama dan otoritas negara. Diskursus ini menjadi perdebatan baik di kalangan sarjana Indonesia maupun sarjana di Barat. Tulisan ini mengkaji diskursus hukum Islam mazhab nasional yang dikenal dengan istilah fikih baru dari seorang intelektual di Barat bernama M. Barry Hooker. Hooker memandang fikih Indonesia saat ini merupakan fikih yang dibentuk dan diinstrumentalisasi oleh negara. Dengan menggunakan model kajian pemikiran tokoh serta karya kesarjanaannya, tulisan ini menunjukkan bahwa Hooker memiliki pandangan yang kritis dengan mengungkap pergeseran dari fikih klasik yang didasarkan pada teks keagamaan kearah fikih mazhab nasional dengan dominasi peran negara. Negara menjadi penentu proses perjalanan fikih dengan pelbagai instrumen yang diberikan pada masyarakat, antara lain birokratisasi agama, intervensi negara dalam kurikulum pendidikan hukum Islam, dan melalui medium mimbar keagamaan.

**Keywords:** *New Fiqh; National School; Islamic Law; MB Hooker.*

## INTRODUCTION

History of the development of the world of Islamic law has produced various thought. In the context of Indonesia, the area of Islamic law becomes the subject of debate from the aspect of locality and globality. The discussion of the issue never comes to an end. The existence of Islamic law is also a debatable issue, at least in the national context. Islamic law continues to be discussed at least because of two factors. First, in terms of quantitative, Muslims are the majority population in Indonesia. This reality illustrates that the interests of Muslims in national law are extensive to continue to be voiced. In this context, the encounter of followers of Islamic law with local culture becomes a nostalgic encounter that requires to accommodate with the living law<sup>1</sup>, not to mention, the encounter of Islamic law with dimensions of regionality and nationality. This sequence then became the trigger and driver of the polemic of the national school of Islamic law in this republic.

In other words, that religion whose teachings will be made into national law should be embraced by the majority group of the existing community. This is the crucial glue because, in terms of the majority of followers of the majority religion, it will be easier to carry out religious teachings together. Besides, in the context of law, the existence of religion can be articulated as a form of living law.

Second, in terms of qualitative and substantive, the law has a relationship with the life of society. Thus, discussing schools of law cannot be separated from the conditions of the existing society. The struggle of Islamic law with all its dynamics has been able to regulate the lives of Muslim communities equipped with the concepts of regulation and prohibition. There is something that can be done by the community, which then the law can be called "*mubah*" or allowed. There is also a concept of prohibition that must not be carried out by the public which is then called "*haram*". There is also something that must be done so that a compulsory law (*taklif*) emerges, which is binding and forcing.

In the reality of its development, especially in the national political reality and the culture of existing legal pluralism, Islamic law is often perceived as part of the constraints in the framework of national legal development. This might appear because Islamic law is considered challenging to integrate with "other laws".<sup>2</sup>

The development of Islamic law continues and is confronted with the reality of social development. Debate after debate has always been emerged to discuss the application of Islamic law in Indonesia amid a Muslim community with a

<sup>1</sup> Andi Fariana, "Hukum Islam Sebagai the Living Law Dalam Meminimalisasi Dampak Negatif Pariwisata di Pulau Lombok Bagian Utara," *Istinbath: Jurnal Hukum Islam* 15, no. 2 (2016): 242.

<sup>2</sup> Ahmad Syafi'i, "Menggagas Hukum Islam Yang Akomodatif-Transformatif dalam Konteks Legal Pluralism di Indonesia," *Al-Manhaj: Jurnal Hukum dan Pranata Sosial Islam* 1, no. 1 (August 30, 2019): 110.

dynamic character and no static character. The two complexities have never found the base. On the one hand, the complexity of Islamic law itself is associated with its adherents as a law that has a divinely ordained law. On the other hand, the reality of a multicultural society opens space for shifting Islamic law in the context of social life. Every social change with all its dynamics must lead to demands for change and renewal, including in the laws and regulations which are essential institutions in the life of society.<sup>3</sup>

Moreover, the problem re-emerged, while the growth of thought initiated by figures and intellectuals in Indonesia about the idea of Indonesian Jurisprudence continues to flow. The Indonesian Jurisprudence discourse was born as a result of the struggle with the problem of community reality that occurred.<sup>4</sup> Jurisprudence is confronted with a fact of life that is utterly modern amid the sophistication of information technology. The jurisprudence of the national schools emerged in the struggle for the domain between religious regulation and state authority. This discourse seems to be a debate among Western scholars which is then known as the term "sharia" in the state conceptualized into the term "new fiqh". M. Barry Hooker introduced this term in his book *Indonesian Sharia: Defining a National School of Islamic Law* (2008).

As revealed by Nasir in his search for contemporary sharia discourse in the West in the study of Hallaq and Hooker thought, he mentioned that Hooker had a rather distinctive tendency to think about sharia discourse in the state.<sup>5</sup> National school sharia, according to Hooker, is Islamic law adopted and selected from various sources, especially from fiqh carried out by the state. This reconstruction of thinking resembles Wael B. Hallaq's construction of thought about the dominance of the nation-state role in reconstructing the law.

The name M. Barry Hooker is common among Indonesian Islamic law reviewers. Hooker is a Western scholar who studies and dissects legal issues in Southeast Asia. Hooker's writings and scholarship have become a reference among legal scholars, especially in the study of customary law.<sup>6</sup> Hooker is a prolific scholar who does in-depth study on one issue, including his study on the national school of Islamic law which he calls new fiqh. His criticism is very sharp and dived, built from a solid foundation of argumentation, rational, empirical,

<sup>3</sup> Z. Zubaedi, "Membangun Fikih Yang Berorientasi Sosial: Dialektika Fikih Dengan Realitas Empirik Masyarakat," *Al-Jami'ah: Journal of Islamic Studies* 44, no. 2 (December 30, 2006): 434, <https://doi.org/10.14421/ajis.2006.442.429-452>.

<sup>4</sup> M. Noor Harisudin, "Diskursus Fikih Indonesia: Dari Living Laws Menjadi Positive Laws," *Al-Manahij: Jurnal Kajian Hukum Islam* 10, no. 2 (2016): 169, <https://doi.org/10.24090/mnh.v10i2.932>.

<sup>5</sup> Mohamad Abdun Nasir, "Wacana Syariat Kontemporer di Barat: Studi Pemikiran Wael B. Hallaq dan M. Barry Hooker," *Ulu' Albab Jurnal Studi Islam* 18, no. 1 (July 31, 2017): 14, <https://doi.org/10.18860/ua.v18i1.4268>.

<sup>6</sup> Gary F. Bell, *Pluralism, Transnationalism and Culture in Asian Law: A Book in Honour of M.B. Hooker* (ISEAS-Yusof Ishak Institute, 2017), ix.

based on direct observation and his struggle with the society he was studying. Hooker's thesis on new fiqh becomes an exciting discourse to study in intersections between religious rules and state regulation<sup>7</sup>, between public contestation and private sphere, between the dominance of legal pluralism at the level of national political reality and divinely ordained law<sup>8</sup>, between living laws and positive laws<sup>9</sup>, and also between social fiqh and formalistic fiqh.<sup>10</sup>

This article bases the primary data on Hooker's works, especially Hooker's book entitled *Indonesian Sharia: Defining the National School of Islamic Law*. This study is a study of figures who study the thoughts of a figure in a particular scientific field, in this case, the field of Islamic law which is then placed in a circular historical and social context. Accurately, this article tracks the construction of Hooker's frame of mind in a hypothesis built on the discourse of a new fiqh shift in Indonesia with the term "new fiqh" built from his observations of the dominance of state law. Hooker mentioned several national figures who have described the Indonesian fiqh discourse for long. However, Hooker surpassed the scholarship of Indonesian figures by issuing new fiqh terms which could not be avoided from the power and grip of the state.

So far, there has been no study that examines Hooker's thought explicitly in the Islamic school discourse on national schools. Although Hooker is a familiar scholar of Islamic law in Indonesia, the national school of Islamic law discourse in Indonesia is always juxtaposed with the thinking of Indonesian scholars. In this context, this study becomes essential as a knowledge base on how Indonesian Islamic law is discussed and reconstructed by Western scholars.

The first part of this paper discusses the discourse of the national school of Islamic law with a point of discussion on the discourse of the birth of Indonesian school of Islamic law from figures and intellectuals. This discussion is important to be discussed to find out the development and debate of the academic community about the discourse of national Islamic law in Indonesia. Besides, the discourse also forms the basis of an analytical framework for examining Hooker's thinking at a later stage. In the next section, the intellectual sketch of Hooker's thought and his academic journey is vital to be appointed as the basis for knowing Hooker's figure and his contribution to the legal scholarship. The next section provides a descriptive-critical account of Hooker's thinking relating to new fiqh with in-depth analysis.

<sup>7</sup> Ismatu Ropi, *Religion and Regulation in Indonesia* (Palgrave Macmillan, 2017), <https://doi.org/10.1007/978-981-10-2827-4>; Moch Nur Ichwan, *Official Reform of Islam: State Islam and the Ministry of Religious Affairs in Contemporary Indonesia, 1966-2004* (Universiteit van Tilburg, 2006).

<sup>8</sup> Syafi'i, "Menggagas Hukum Islam Yang Akomodatif-Transformatif dalam Konteks Legal Pluralism di Indonesia," 110.

<sup>9</sup> Harisudin, "Diskursus Fikih Indonesia," 169.

<sup>10</sup> Zubaedi, "Membangun Fikih Yang Berorientasi Sosial," 430.

## **DISCOURSE ON NATIONAL SCHOOL OF ISLAMIC LAW**

Islamic law as a scientific building has never escaped debate, including the Islamic law of a national school. This debate at least revolves around nuanced discourse that surrounds it to show a paradigm. In order to understand the context of the debate in national school of Islamic laws, this section traces the portrait of ideas as the basis of scientific networks of Islamic law from an intergenerational intellectual chain.

Islamic law as a scientific building can never be separated from debate, even a prolonged polemic. This is inseparable from the condition of community reality that continues to be dynamic, and the law is also experiencing change and continuity.<sup>11</sup> With more straightforward language, Islamic law is integrated with the complex and multicultural reality of community life so that the discourse of Islamic law dynamically raises new nuances and perspectives. As Hallaq explained, there are new nuances and perspectives from every thought of Islamic law, which is an annotation from old works.

In a broader context, Islamic law as a guide is often influenced by external elements in the transformation process, including locality and globality aspects in its representation map. The most crucial thing, in this case, is the continuing polemic of the idea of realizing sharia law as one of the crucial elements in national law and the desire of the state to accommodate the elements of religious law, including sharia. This polemic became a debate and its central discourse in the academic community. Some thoughts that emerge cannot be separated from the development of Islamic law as scientific buildings reconstructed from the works of intellectual history to create the genesis of thought.

In line with this process, several figures were born who took part in the history of the development of Islamic law in Indonesia, which could be calculated methodologically and had areas of application of thought in the national school of Islamic law discourse. A series of names have tried to actualize his thoughts in the realm of national Islamic law as the basis of reading modern, applicable Islamic law, and also paying attention to aspects of locality and globality. Various thought were born from the reading of Islamic law which is placed as a diversity framework, Islamic law as a dynamic scientific framework (change), and the development of Islamic law that fosters a variant of thought (continuity).

It started from the emergence of the Indonesian Fiqh idea through its character Hasbi ash-Shiddieqy. Hasbi, with his argument of accommodating the needs of a more harmonious society, marks the birth of the development of Indonesian Islamic law. In his argument, the issue of compatibility of Islamic law

<sup>11</sup> Wael B. Hallaq, "Authority, Continuity and Change in Islamic Law," Cambridge Core (Cambridge University Press, July 2001), 24, <https://doi.org/10.1017/CBO9780511495557>.

with the identity of the Indonesian people is crucial. From this idea, Hasbi then explored Islamic law following the socio-culture and religion of the Indonesian people.<sup>12</sup>

Hasbi's ideas became brilliant ideas and provoked the thoughts of other figures. The point of Hasbi's thought lies in the in-depth analysis that the character of thought in classical fiqh books is no longer able to meet the needs of Muslims in Indonesia. This concept focuses more on the adherence to the classic fiqh text, which Hasbi considers incompatible with the reality of Indonesian society. However, Hasbi's thought does not discuss the debate over Islamic law and its relationship with state regulation. Hasbi's thinking specifically lies in Islamic law that is lagging behind the conditions of Indonesian society. This concept is different from the concept put forward by Hooker with the term "new fiqh". If Hasbi introduced Indonesian fiqh with the argument that the existing Islamic law does not fit the conditions of Indonesian society, then Hooker put forward the concept of new fiqh because it assumes that the state is annexing the existing Islamic law.

Apart from that, Hasbi's idea had invited the dynamics and social history of Islamic legal thought from other figures such as Hazairin. Unlike Hasbi, Hazairin introduced the Indonesian national school fiqh. Hazairin offered the formation of Indonesian fiqh based on the development of the Shafi'i school fiqh. Also, Hazairin was very concerned about the existence of customary law which he considered to have played an essential role in the formation of Indonesian Islamic law.<sup>13</sup> In this case, Hazairin discussed the national school fiqh by accommodating local laws that exist in Indonesian society.

Then in the early 1970s, Ibrahim Hossen introduced the contextualization of Islamic law with the contextual ijthad method. Ibrahim's scientific ideas put the nature of fiqh which is genuinely dynamic, flexible, and offers many choices in realizing its primary objectives (*maqasid al-syariah*).<sup>14</sup> In the middle of 1975, Abdurrahman Wahid or Gus Dur also introduced a thought of Islamic law as a support for development, which in general the ideas and insights revolved around

<sup>12</sup> Nourouzzaman Shiddiqi, *Fiqh Indonesia: Penggagas dan Gagasannya* (Pustaka Pelajar, 1997); M. Andi Sarjan, "Hasbi Ash-Shiddiqie wa Tajdid al-Fiqh fi Indunisiya" 3, no. 3 (1996).

<sup>13</sup> Hazairin is a prominent figure and also reformer of Islamic law in Indonesia, well known by his ideas and concepts on customary law. He was born in Bukittinggi, West Sumatera on November 28, 1906. Hazairin was a professor in customary law and Islamic law in Indonesia University and also Jakarta Islamic University. See detail in Rizal F. Aji Suryaningrat Wisnu M., "Pembaharuan Hukum Islam di Indonesia: in Memoriam Prof.Mr.Dr.Hazairin," Universitas Indonesia Library (UI-Press, 1981), <http://lib.ui.ac.id>.

<sup>14</sup> Ibrahim Hossen, "'Fiqh Siyash dalam Tradisi Pemikiran Islam Klasik,' *Jurnal Ulumul Qur'an*, no. 2 (1996). Ibrahim Hossen is an expert on ushul fiqh (Islamic law philosophy) and comparative fiqh. Hossen was graduated from Al-Azhar University, Egypt and the leader of fatwa commission of Indonesia Ulama Committee (MUI) for two decades (1981- 2000).

the role and function of Islamic law to support the development of positive law in Indonesia.<sup>15</sup>

In the mid-1980s, Munawir Syadzali introduced the idea of re-actualizing Islamic teachings by taking issues of talk about inheritance law, slavery, and bank interest and interpreting them in very bold language.<sup>16</sup> In Islamic law thinking, there is also Ahmad Azhar Basyir, who introduced local legal features in the contestation of Islamic law in Indonesia.<sup>17</sup>

Meanwhile, some scholars in the Islamic religious tertiary environment also appear to be critical players in the map and development of the national schools of Islamic law. One of the university intellectuals who helped develop the model of nationalist-empirical Islamic law studies was A. Qodri Azizy. In the eclecticism discourse of Islamic law, for example, Azizy tried to combine Islamic law and general law by using the term eclecticism.<sup>18</sup> With the term "eclectic", Qodri offers the concept of Indonesian Jurisprudence. In this context, the most straightforward example is the reconstruction of Islamic legal thinking with the language of the law, such as the Compilation of Islamic Law so that it will be more readily understood by using the language of law in general.

Besides A. Qodri Azizy, there is also intellectual-academic Nur Fadhil Lubis with creative-integrative Islamic legal jargon. According to Lubis, Islamic law has played an essential role in the existence and survival of Muslims, especially for the development and progress of the Indonesian nation.<sup>19</sup> Islamic law has been tested in historical reality which functions as a dynamic and directed legal system, which is creative but integrative. In Lubis's analysis, confronting Islamic law with the nation-state or with customary legal systems or national legal systems is not appropriate.

The academic debate in the discourse of the national school of Islamic law above shows that the interaction of Islamic law and positive-national law

<sup>15</sup> Abdurrahman Wahid, "'Hukum Islam sebagai Penunjang Pembangunan', *Jurnal Prisma*, no. 14 (1975).

<sup>16</sup> Munawir Syadzali, *Ijtihad Kemanusiaan*, Cet. 1 (Jakarta: Paramadina, 1997). Munawir Syadzali is the most influential intellectual and also has a big contribution to the development of Islamic law in Indonesia and the growth of Islamic higher education in Indonesia.

<sup>17</sup> Ahmad Azhar Basyir, "'Corak Lokal dalam Hukum Positif Islam di Indonesia: Sebuah Tinjauan Filosofis', *Mimbar Hukum*, no. 13 (1994).

<sup>18</sup> Ahmad Qodri Abdillah Azizy, *Eklektisisme Hukum Nasional: Kompetisi Antara Hukum Islam dan Hukum Umum* (Gama Media, 2002). A. Qodri Azizy is a bureaucrat-intellectual with the idea and the concept that influenced to the development of integrative Islamic studies in Islamic higher education in Indonesia. He pursued his Master and Ph. D in The University of Chicago, USA. In the context of the development of Islamic law, Qodri was the one who involved in contributing to the modernity of Islam. Qodri was born in Kendal, 24 October 1955. Some of his works are *Islam dan Permasalahan Sosial: Mencari Jalan Keluar* (Yogyakarta: LKiS, 2002), *Pengembangan Ilmu-Ilmu Keislaman* (Direktorat Perguruan Tinggi Agama Islam: 2004), *Hukum Nasional: Eklektisisme Hukum Islam dan Hukum Umum* (Jakarta: Teraju, 2004), *Menggagas Hukum Progresif di Indonesia* (Yogyakarta: Pustaka Pelajar, 2006).

<sup>19</sup> Nur A. Fadhil Lubis, "'Islamic Legal Studies in Indonesia: Some Notes on Contemporary Challenges,'" in *Proceeding AICIS XII* (Jakarta: Direktorat Pendidikan Tinggi Islam, 2012).

represents each of the surrounding complexities. Indonesia, whose majority population is Muslim, cannot be separated from religious law. Islam is also a religion which has a high complexity in all aspects of life, ranging from theological systems to highly detailed behavioral systems in the private sphere. This aspect then makes the preparation of positive law in Indonesia experience difficulties in carrying out unification and codification of Islamic law. However, in its history, the process can be done with all alternative solutions integrated.

In relation to the idea of new fiqh brought up by M. Barry Hooker in his book entitled *Indonesian Sharia, fiqh of the national school* is fiqh formed and instrumentalised by the state. According to Hooker, several instruments of socio-political life in Indonesia have encouraged the formation of national school fiqh. In this context, Hooker wanted to explain the shift from classical fiqh, which in some cases was adopted in positive law towards the national school fiqh. The state determines the fiqh progress with various instruments given to the community, including bureaucratization, state intervention, and through religious pulpit medium. However, before discussing the core discourse conveyed by Hooker, it is vital to examine the intellectual figure of Hooker with all his contributions to the science of law both in Indonesia and western countries.

### **M. BARRY HOOKER: THE PROLIFIC ACADEMIC CUM-ACTIVIST INTELLECTUAL**

Professor M. Barry Hooker is a prolific scholar of law and society in Southeast Asia. His line of scholarly works has become the foundation in the field of legal pluralism and customary law in Southeast Asia, especially Malaysia, and Islamic law (sharia) in Southeast Asia.<sup>20</sup> Hooker has established an intellectual framework and way of thinking about legal pluralism and the hybridity of Islamic law in Southeast Asia. He also presented a discourse that invited the contestation of thought, scientific expansion, and academic elaboration.

His life journey began from Christchurch, New Zealand until his academic career and intellectual journey continued to Singapore, the United Kingdom, and Australia. Since the early 1990s, he has written and contributed to national conferences on the form and position of sharia in Indonesia. Hooker's work entitled *Legal Pluralism: an Introduction to Colonial and Neo-Colonial Laws* (1975), *Legal History of South-East Asia* (1978), *Islamic Law in South-East Asia* (1884), became the foundation and the primary reference which determines legal history outline for Southeast Asia.<sup>21</sup>

<sup>20</sup> Veronica L. Taylor, "M.B. Hooker and Southeast Asian Law: Path-breaking Passions'," in *Pluralism, Transnationalism and Culture in Asian Law: A Book in Honour of M. B. Hooker* (Singapore: Yusof Ishak Institute, 2017), 2.

<sup>21</sup> Arif A. Jamal, "Comparative Law, Anti-Essentialism and Intersectionality: Reflections from Southeast



In 2003, he wrote a book entitled *Indonesian Islam: Social Change through Contemporary Fatawa* from the results of in-depth and comprehensive research studies on interactions between sharia as stated in legal opinions (*fatawa*) and Muslim communities in Indonesia. In this book, Hooker highlights fatwas from various social organizations such as Nadhlatul Ulama (NU), Muhammadiyah, and Persis. Hooker sees the fatwa issued by some social organizations in Indonesia as a blend of creativity between text and contemporary social reality.

Hooker has also contributed a lot to entries to the Islamic Exclopedia in the form of aspects of Islamic law in Indonesia and Malaysia. His love for the sciences of Islamic law in Indonesia and Southeast Asia was realized by becoming a pioneer in the study of Indonesian Islamic law in some of the world's leading universities including University of Kent (Canterbury UK), the Australian National University (ANU), Canberra and University of Melbourne. It is not excessive if Hooker is considered as an activist in the field of legal pluralism, especially about the dynamics of law in Indonesia, which pioneered the expansion of access to study in global scholarship.

Hooker's perseverance can be seen from several books he wrote in studying the field of law since 1967. The first book written entitled *A Sourcebook of Adat, Chinese Law and the History of the Common Law in the Malayan Peninsula* (1967) (Faculty of Law, University of Singapore, *Malaya Law Review Monograph No. 1*), *Readings in Malay: Adat Laws* (Singapore: University of Singapore Press), *The Personal Laws of Malaysia* (Kuala Lumpur: Oxford University Press, 1976), *Adat Law in Modern Indonesia* (Kuala Lumpur: Oxford University Press, 1978), *An Introduction to Javanese Law* (with MC Hoadley, Tucson: University of Arizona Press for the Association of Asian Studies, 1981), *Law and the Chinese in Southeast Asia* (Singapore: Institute of Southeast Asian Studies, 2002), *Indonesian Islam: Social Change through Contemporary Fatawa*, (Sydney: Allen & Unwin. Honolulu: University of Hawai Press, 2003), and *Indonesian Syariah: Defining a National School of Islamic Law* (Singapore: Institute of Southeast Asian Studies, 2008).

M. Barry Hooker is emeritus professor at the Faculty of Asian Law, Australian National University (ANU) Canberra, Australia. His intellectual odyssey travelled from one tertiary institution to another across continents to develop a love of science, especially in the field of law. In the context of law in Indonesia, Hooker has a focus on the development of the national sharia he

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Asia in Search of an Elusive Balance,'" in *Pluralism, Transnationalism and Culture in Asian Law: A Book in Honour of M. B. Hooker* (Singapore: Yusof Ishak Institute, 2017), 54. Jamal called Hooker as the 'maestro' of pluralistic law in Southeast Asia either after the influence of European law or before it. Jamal wrote... Hooker has been a salient expositor of the plurality of law in Southeast Asia both before and after the influence of European laws.

saw when he conducted in-depth research in several locations, including in Islamic religious colleges in Indonesia. From his research, he later produced a book entitled *Indonesian Syariah: Defining a National School of Islamic Law* (Singapore: Institute of Southeast Asian Studies, 2008). In this book, Hooker shows that Indonesia compiled and developed its Islamic project or national school of Islamic law, which he termed as new fiqh.

### **M. BARRY HOOKER'S NEW FIQH CONCEPTUALIZATION**

M. Barry Hooker introduced the term “new fiqh” in his book entitled *Indonesian Syariah* by first portraying the dynamics of Islamic law in Indonesia. Hooker saw that the state had carried out the jurisprudence. In other words, the dominance of the state role has changed the existing fiqh paradigm. In this context, Hooker examined three elements which surround the dynamics and all changes in Islamic law in Indonesia. The first is the reality of the development of Islamic law amid multicultural conditions in society. This element was used as an analytical tool to place synchronous conditions in a diachronic context. The purpose of this approach is to look at the continuity and change in the movement of the development of Islamic law, especially in matters involving the interaction of thinkers with the dimensions of space and time, academic discourse contradictions, and transformations that take place outside of discourse. For example, the correlation between religious discourse with all changes political and social events that have occurred since the beginning of the formative period of Islamic law.

The second is the interactive side. Hooker tried to describe the Islamic jurisprudence development movement as a result of the dynamic struggle between the past and present. This approach seems to emphasize the existence of the connectedness of the legacy of the past in contemporary intellectual thinking so that there is no view that new ideas just appear and are taken for granted. The third is inter-textual. Hooker accommodates the interdisciplinary way of working that no particular scientific discipline has a monopoly on the truth of ideas. The term inter-textual refers to the conception of relationality, interdependence and interdependence of texts and discourse. In this context, the narrative of religious texts is confronted with a growing discourse then associated with the role of the state.

These three approaches were carried out by Hooker in reading the dynamics of Islamic law in Indonesia concerning state domination. Hooker put it in his book *Indonesian Syariah: Defining a National School of Islamic Law* with a very observant and comprehensive. This book, which was published in 2008, examines how shariah is formulated into Indonesian law which is more or less the state's

formation and intervention. Hooker's thoughts about the national school of Islamic law are detailed in a book consisting of seven chapters.

Not many Indonesian scholars have analyzed Hooker's work. One article that has discussed and compared Hooker's discourse with other scholars is Nasir's article.<sup>22</sup> As Nasir also revealed in his article, Hooker's book has a strict methodology and selection of appropriate diction in Hooker's analysis.

Hooker examined sharia in the country, which was then termed new fiqh. Hooker explains in detail the sharia historicity in Indonesia since the Dutch colonial period. When reviewing Indonesia's new fiqh, Hooker depicted the religious court and its reforms which were marked by the issuance of the Compilation of Islamic Law and the Counter Legal Draft of Compilation of Islamic Law. This is done to see the political, social and cultural struggle that surrounds the construction of Islamic law, especially those relating to bureaucratization in the Ministry of Religion.

There are four things that Hooker wanted to reveal about the polemic of the idea of sharia or the national school of Islamic law. The first is the debate about the existence of sharia in the state. Some groups are keen to discuss sharia as an alternative state paradigm. The idea put forward by this group is the belief that the sharia is a reasonably complete and powerful set of values and systems. One intellectual who has this view, which is then discussed in Hooker's book, is Munawar Cholil with a spirit of renewed thinking. This idea was welcomed by groups who have a tremendous militant nuance, namely the Islamic Defenders Front. The second is the philosophical aspects of the sharia which Hooker called the local sharia, i.e. grounded sharia. In this context, Hooker gave an explanation of each leading legal experts in Indonesia, including Hazairin from the University of Indonesia. Hazairin initiated the idea of grounding the sharia, which was more in line with the local context of Indonesian society. Hazairin's thoughts then found similarities with the thoughts of Satria Effendi, one of the most prominent Islamic legal thinkers in Indonesia. The third is the thoughts and ideas of rational sharia which Hooker called a vehicle for interpretation of rational syariah. The figures mentioned by Hooker include Harun Nasution, Nurcholis Madjid, Hamka and Muhammad Roem. Fourth, historical and contextual syariah.

Hooker's thoughts about the polemic of Islamic law in the Indonesian School of Islam contain an exciting side. He attributed that the national school of Islamic law, on the one hand, was also formed and influenced by sharia learning in tertiary religious institutions with national and local curricula. Hooker questioned the curriculum taught at the Faculty of religion, especially at the Faculty of Sharia

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<sup>22</sup> Nasir, "Wacana Syariat Kontemporer di Barat," 14-17.

in Indonesia which he considered as a curriculum formed and regulated by the state. In this context, Hooker saw a role and state intervention in the sustainability of the sharia learning curriculum in Indonesian Islamic religious colleges.

Hooker also associated the national schools of Islamic law with the transmission of sharia teachings taken place in religious pulpits such as Friday prayers. According to Hooker, the national school of Islamic law is strongly influenced by sharia bureaucratization driven by the Ministry of Religion.

According to Hooker, Indonesia is developing its Islamic project or national school of Islamic law. National school sharia is derived from the role and domination of the state. Hooker writes:

*"... We have at least some answers to what the new fiqh means. It means what the state says it means. The new fiqh is found in the positive laws of the state. At this very basic level this is what sharia "in the state" means. But the new fiqh is not wholly disassociated from classical texts".<sup>23</sup>*

The new fiqh referred by Hooker is all forms and tools of the Islamic law that are defined, said, formed, and associated by the state in the form of positive law. However, this new fiqh also cannot be separated from religious texts of Islamic law. Interestingly, according to Hooker, the religious texts of Islamic law in Indonesia suffered defeat from the power and domination of the state in shaping the law. This can be seen in part from some positive laws, court decisions, bureaucratization in the Ministry of Religion, and other matters. In other words, there is a paradigm shift in the development of Islamic law in Indonesia began to be dominated by the state rather than based on religious texts.

## **NATIONAL SCHOOL OF ISLAMIC LAW: FROM SHARIA TO NATIONAL SCHOOL**

The basic building structure that underlies Hooker's way of thinking in the dynamics of the national school of Islamic law or new fiqh in Indonesia lies in the word "selection" or the selection of individual sections. In other languages, not all parts of the process of the positive law birth in Indonesia are then considered as a result of the power and domination of the state. Nevertheless, in this section, the author needs to express about the conceptualization of sharia used by Hooker. Hooker seems to equate sharia and Islam in Indonesia. As a result, this blurring then becomes a further debate. One example is the confusion between the elements of Islamic law and positive law in Indonesia.

Apart from that, Hooker's position as a legal scholar who critically sees the phenomena and dynamics of Islamic law in Indonesia, especially in the aspect

<sup>23</sup> M. Barry Hooker, *Indonesian Syariah: Defining a National School of Islamic Law* (Singapore: Institute of Southeast Asian Studies, 2008), 40.

of the dominance of state power becomes vital to be studied. The political and socio-cultural aspects that strengthen this article also contribute critical thinking to see how the state intervenes Islamic law to be drawn into positive law. In the early part of his book, Hooker explained that the dominance and role of the state in the motivation of Islamic law are strictly related to the ongoing conditions. Not only that, the bureaucratization created by the state also contributed to it. This is not only experienced by the Indonesian state but also occurs in several other countries. Hooker writes:

*“The main characteristic of state dominance is selection; the practice of taking from the classical (Arabic) legal thought that which is held to be appropriate for a particular state at a given time. The motive for particular selections vary according to the political circumstance of the time and place. But whatever the motives are, they all have in common a belief in the inevitability of the process. Even the contemporary calls for an Islamic state while generally vague as to the substance of the law, do admit the necessity for modern bureaucratic structures and some degree of legal borrowing from outside the Sharia. The result of selection is change in the character of the Sharia”.*<sup>24</sup>

From the narration, it appears that Hooker’s criticism lies in seeing how the state uses certain motives to carry out and perpetuate national school law which is then uniformed according to the state version. Hooker further explained that the new fiqh was born from the intersection of classical religious texts with the state apparatus. The results of these intersections have expanded in terms of state intervention. In this case, Hooker writes:

*“The new fiqh is little more than the classical texts in rewritten from, but the new form (laws, ministerial decisions, Department of Religious guides, bureaucratic requirements for registration and so on) imposes extentions on the classical functions”.*<sup>25</sup>

The intersection between religious texts and state instruments as explained above then leads to a map of changes in the national school of Islamic law towards the national school or which Hooker termed new fiqh. Three explanations of the shift can at least be seen as follows:

**a. Religious Bureaucratization**

According to Hooker, religious bureaucratization through the involvement of the state apparatus called the Ministry of Religion of the Republic of Indonesia is a form of state intervention in integrating fiqh in the state system. The state, with all its powers and roles, has entered the technical realm of regulating the implementation of sharia. This can be seen from the regulation of zakat, pilgrimage, and others. Religious bureaucratization carried out by the Ministry

<sup>24</sup> Hooker, *Indonesian Syariah*, 1.

<sup>25</sup> Hooker, *Indonesian Syariah*, 40.

of Religion, according to Hooker is like an organization with a *modus operandi* that must be taken for granted by the community. Hooker called it an organized corpus of received practice.

The role of the Ministry of Religion in regulating the pilgrimage administrative-technical affairs from the registration, guidance, departure, until repatriation, was discussed by Hooker. Interestingly, how-to guide the practice of the pilgrimage through the Ministry of Religion hajj ritual program, makes prospective pilgrims believe that that is the right religious law, without any criticism. Hooker deemed hajj technical administration until the guidebook arranged by the Ministry of Religion with all forms and systematic as part of how to include the state role and domination in the construction of the national school of law. The pilgrimage, which has a fantastic value of direct communication between prospective pilgrims and God, is facilitated by the state, with all its roles and domination, including the technical arrangements to worship. In this case, Hooker highlights as follows:

*“The pilgrim captured in these books can be thought as a Department of Religion construction as a surrendered person, as a traveller and as an instructed individual. This instruction extends not just to orthopraxy but also what the Department of Religion believes to be the true significance of the hajj”.*<sup>26</sup>

According to Hooker, the role and power of the state in the technical-administrative arrangements of zakat and pilgrimage has altered sharia or national school of Islamic law by scraping religious texts. This is what Hooker referred to as part of the sharia shift toward new fiqh of the sharia national school with extreme national domination.

#### **b. State Curriculum Intervention**

The second factor after divine intervention and bureaucratization is state curriculum intervention at the higher education level. This happened especially in the Sharia Faculty in the Islamic religious tertiary environment in Indonesia. Hooker examined the syllabus and curriculum in several Sharia Faculties, among others at UIN Syarif Hidayatullah Jakarta, UIN Sunan Kalijaga Yogyakarta, IAIN Sunan Ampel Surabaya (2008), IAIN Raden Fatah Palembang (2008), and IAIN Imam Bonjol Padang (2008). According to Hooker, there was a shift in Islamic legal education curriculum.

In the course of its history, according to Hooker, the era before the 1990s, classical fiqh literature was very dominant in the Sharia Faculty of Islamic religious colleges. Comparisons of schools (*muqoronaḥ al-mazahib*) which are very fiqh oriented, for example, are not only the name of the course but also majors in the

<sup>26</sup> Hooker, *Indonesian Syariah*, 233.

Sharia Faculties. Additionally, some of the subjects used as General Basic Courses and Basic Skills Courses are also based on text. However, it experienced a shift, both in the course preparation and the content provided in the new curriculum. An interdisciplinary and integrative approach and also integrated with the thinking of contemporary Muslim scholars have dominated the curriculum of the Sharia Faculty in Indonesia.

The Sharia Faculty curriculum at various Islamic religious colleges nationally regulated by this form of uniformity, in Hooker's analysis, indicates peculiar nature in Islamic legal education in Indonesia. In fact, in some respects, according to Hooker, the sharia curriculum has a broader scope than the academic curriculum used by institutions and tertiary institutions in the West. There is an indication of the role and power of the state in uniforming the sharia curriculum by slowly eroding religious texts.

**c. Religious Pulpit Medium: Narrative Text of the Sermon**

The third is the discourses that appear in the weekly Islamic ritual activities of Friday sermons. The religious pulpit becomes a strategic place and place to carry out and perpetuate the sharia messages. Narrative sermon texts are quickly delivered effectively and efficiently. Hooker's analysis found a distinction in the context of studying the sharia with the dynamics of the religious pulpit in Indonesia.

In Hooker's analysis, the Friday sermon reflects the brilliant ideas in the Islamic discourse packed in narrative texts which are so profound and delivered intensively every week. Sermons become a means of transformation of sharia values embodied in the religious pulpit. The sermon is useful since it is structured and routine given every week in front of the unlimited congregation. The role of a preacher is expansive because his position is the leading figure in efforts to spread the values of sharia. While pilgrims cannot respond, in other words, a preacher has the freedom to appear actively conveying material and ideas. While the pilgrims are passive and tend to be easy to accept what is delivered by the preacher.

From here, sharia was also faced with a complicated problem when brought by the preacher. The messages conveyed have the potential to shift the narrative of original and substantive religious texts.

**CONSIDERING HOOKER'S THOUGHT: JURISPRUDENCE OF THE NATIONAL SCHOOL**

This article is not in a position to introduce a typology of Islamic law in Indonesia. This study examines Hooker's thinking that sees a paradigm shift in the formation of national school of Islamic law, which Hooker considers to be new fiqh because it

shifts from the right domain. This shift can be seen from the dominance of the state in the process of legal institutionalization in society. M. Barry Hooker's thoughts become an essential note in the journey of Islamic law in Indonesia. The role and dominance of the state became a special note for Hooker, who is considered to reduce the narrative of religious texts in the current process of Islamic legal reasoning construction. Islamic law is carried out by the hands of the state with various instruments operated.

However, Hooker's view is biased because it is too broad to position the state as the controlling authority of Islamic legal regulation in Indonesia. As Nasir revealed, Hooker's thought was in a state-minded construction; the state is a measure in everything.<sup>27</sup> Hooker seemed to put aside the complexity of the Indonesian nation, which is predominantly Muslim so that it cannot be separated from religious law. The reality of Islamic law in Indonesia is strongly influenced by the surrounding social and cultural realities, ranging from theological systems to highly detailed behavioral systems in the private sphere. Moreover, the implementation of the law in each region always varies according to conditions. Thus, the role of the state will not be able to uniform laws due to differences in social structure, conditions, and values that exist amid of society. Of course, this complexity is different from countries in the West, such as Europe.

## CONCLUSION

The new fiqh referred by Hooker is all forms and instruments of the Islamic law that are defined, said, formed, and associated by the state in the form of positive law, but cannot be separated from religious texts of Islamic law. This new fiqh is subject to and losing to the power of state domination. This can be seen in some part of positive laws, court decisions, bureaucratization in the Ministry of Religion, and other matters.

In other words, there is a paradigm shift in the development of Islamic law in Indonesia, which began to be dominated by the state rather than based on religious texts. The state runs the instrument through three things. The first is the regulation and bureaucratization of religion, such as the implementation of sharia in the technical realm, namely zakat, hajj, and others. The Ministry of Religion has a role in regulating religious bureaucratization as if it contains an element of coercion to be accepted by the public (an organized corpus of received practice). The second is state intervention in the curriculum arrangement of the Sharia Faculty in various Islamic tertiary institutions which indicate peculiar nature in Islamic legal education in Indonesia. The last is religious messages conveyed through religious pulpit media.

<sup>27</sup> Nasir, "Wacana Syariat Kontemporer di Barat," 14-17.



## REFERENCES

### Journal

- Basyir, Ahmad Azhar. "Corak Lokal Dalam Hukum Positif Islam di Indonesia: Sebuah Tinjauan Filosofis," No. 13 (1994).
- Fariana, Andi. "Hukum Islam Sebagai the Living Law dalam Meminimalisasi Dampak Negatif Pariwisata di Pulau Lombok Bagian Utara." *Istinbath: Jurnal Hukum Islam IAIN Mataram*, Vol. 15, No. 2 (2016), 236-54.
- Harisudin, M. Noor. "Diskursus Fikih Indonesia: Dari Living Laws Menjadi Positive Laws." *Al-Manahij: Jurnal Kajian Hukum Islam*, Vol. 10, No. 2 (2016), 169-84. <https://doi.org/10.24090/mnh.v10i2.932>.
- Hossen, Ibrahim. "Fiqh Siyasa Dalam Tradisi Pemikiran Islam Klasik," No. 2 (1996).
- Nasir, Mohamad Abdun. "Wacana Syariat Kontemporer Di Barat: Studi Pemikiran Wael B. Hallaq Dan M. Barry Hooker." *Ulul Albab Jurnal Studi Islam*, Vol. 18, No. 1 (July 31, 2017): 1. <https://doi.org/10.18860/ua.v18i1.4268>.
- Sarjan, M. Andi. "Hasbi Ash-Shiddiqie Wa Tajdid al-Fiqh Fi Indunisiya" Vol. 3, No. 3 (1996).
- Syafi'i, Ahmad. "Menggagas Hukum Islam Yang Akomodatif-Transformatif Dalam Konteks Legal Pluralism di Indonesia." *Al-Manhaj: Jurnal Hukum Dan Pranata Sosial Islam*, No. 1 (August 30, 2019), 1-25.
- Wahid, Abdurrahman. "Hukum Islam Sebagai Penunjang Pembangunan," *Jurnal Prisma*, No. 14 (1975).
- Zubaedi, Z. "Membangun Fikih Yang Berorientasi Sosial: Dialektika Fikih Dengan Realitas Empirik Masyarakat." *Al-Jami'ah: Journal of Islamic Studies*, No. 44, No. 2 (December 30, 2006): 430-52. <https://doi.org/10.14421/ajis.2006.442.429-452>.

### Book

- Azizy, Ahmad Qodri Abdillah. *Eklektisisme Hukum Nasional: Kompetisi Antara Hukum Islam Dan Hukum Umum*. Gama Media, 2002.
- Bell, Gary F. *Pluralism, Transnationalism and Culture in Asian Law: A Book in Honour of M.B. Hooker*. ISEAS-Yusof Ishak Institute, 2017.
- Hallaq, Wael B. "Authority, Continuity and Change in Islamic Law." Cambridge Core: Cambridge University Press, July 2001. <https://doi.org/10.1017/CBO9780511495557>.
- Hooker, M. Barry. *Indonesian Syariah: Defining a National School of Islamic Law*. Singapore: Institute of Southeast Asian Studies, 2008.
- Ichwan, Moch Nur. *Official Reform of Islam: State Islam and the Ministry of Religious Affairs in Contemporary Indonesia, 1966-2004*. Universiteit van Tilburg, 2006.

- Jamal, Arif A. "Comparative Law, Anti-Essentialism and Intersectionality: Reflections from Southeast Asia in Search of an Elusive Balance." In *Pluralism, Transnationalism and Culture in Asian Law: A Book in Honour of M. B. Hooker*, 54. Singapore: Yusof Ishak Institute, 2017.
- Lubis, Nur A. Fadhil. "Islamic Legal Studies in Indonesia: Some Notes on Contemporary Challenges." In *Proceeding AICIS XII*. Jakarta: Direktorat Pendidikan Tinggi Islam, 2012.
- Ropi, Ismatu. *Religion and Regulation in Indonesia*. Palgrave Macmillan, 2017. <https://doi.org/10.1007/978-981-10-2827-4>.
- Shiddiqi, Nourouzzaman. *Fiqh Indonesia: penggagas dan gagasannya*. Pustaka Pelajar, 1997.
- Sjadzali, Munawir. *Ijtihad Kemanusiaan*. Cet. 1. Jakarta: Paramadina, 1997.
- Suryaningrat, Rizal F. Aji, Wisnu M. "Pembaharuan Hukum Islam Di Indonesia in Memoriam Prof. Mr. Dr. Hazairin." Universitas Indonesia Library. UI-Press, 1981. <http://lib.ui.ac.id>.
- Taylor, Veronica L. "M.B. Hooker and Southeast Asian Law: Path-Breaking Passions'," In *Pluralism, Transnationalism and Culture in Asian Law: A Book in Honour of M. B. Hooker*, 2. Singapore: Yusof Ishak Institute, 2017.