TRANSFORMATION OF ISLAMIC LAW INTO NATIONAL LAW: MODEL, PROBLEM AND ALTERNATIVE SOLUTION OF PRACTICING SHARIA IN INDONESIA
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Abstract

In the hands of some Muslims who make religion an ideology, sharia must be realized in real life in society through political instruments that can provide force. However, in their struggle, some of them use only one interpretation and one model, so it is difficult to be compromised. Base on assumption that there is more than one model, this research aims to formulate :1) some models of transformation of Islamic law into national law, 2) the problems 3) alternative concepts of solutions, and 4) the impact of any policy taken by the state. This research is a kind of non-doctrinal qualitative legal research. Data was obtained from the books or literature and it is analyzed to see the correlation between legal substance, legal structure and legal culture. This study concluded that without being Islamic state, there many models that can be used by Indonesian Muslims in transforming or practicing sharia.

Keywords*: Islamic state, politics, religion, secular state*

Abstrak

Di tangan beberapa Muslim yang menjadikan agama sebagai ideologi, syariah harus diwujudkan dalam kehidupan nyata di masyarakat melalui instrumen politik yang dapat memaksa. Namun, dalam perjuangannya, sebagian mereka hanya menggunakan satu interpretasi dan satu model, sehingga sulit untuk dikompromikan. Berdasarkan asumsi bahwa ada lebih dari satu model, penelitian ini bertujuan untuk merumuskan: 1) beberapa model transformasi hukum Islam ke dalam hukum nasional, 2) masalah 3) alternatif konsep solusi, dan 4) dampak dari setiap kebijakan yang diambil oleh negara. Penelitian ini adalah jenis penelitian hukum kualitatif non-doktrinal. Data diperoleh dari buku-buku atau literatur dan dianalisis untuk melihat korelasi antara substansi hukum, struktur hukum dan budaya hukum. Studi ini menyimpulkan bahwa tanpa harus menjadi Negara Islam, ada banyak model yang dapat digunakan oleh Muslim Indonesia dalam mentransformasikan atau mempraktikkan syariah.

Kata kunci: agama, negara Islam, negara sekuler, politik.

Introduction

As a source of ethics, morals and spiritual, religion for the people of Indonesia can not be separated from the life of nation and state. Because the State of Indonesia was founded on divine values. Therefore, efforts to separate religious values from the life of the nation and state will always be in vain.

On the contrary, efforts to integrate religious values into the life of a state always have wide support. For Indonesian Muslims, Islamic law is a source of ethics, moral and spiritual that also can not be separated from the life of nation and state. Therefore, if the values of Sharia are not transformed into the national legal system or if Muslims feel that the State ignores the religious values derived from the Sharia then such conditions can cause unrest.

In the field of law, especially Islamic law, the problem is how the model of transformation that can be used to integrate Islamic law into national law, what is the problem and the extent to which *ijtihad* (individual reasoning) is necessary for Muslims so that Islamic law can be transformed and integrated fully in national law.

This research is very important because there are a number of facts as follows. According to research by Pew Research Center (PRC) in 2013, there are 72% of Indonesian Muslims who support Islamic law as an official

law for the State.[1] But on the other hand there is also the fact that 61 percent of Indonesian Muslims approve of Indonesia as a democratic country.[2] The problems will always arise when the attempts to formalize or transform Islamic law into national law, used only one model that is a rigid, exclusive, conservative or literalist model. The tendency of Indonesian Muslims to use a rigid model does exist. Based on research conducted by PRC in 2013, there are 45% of Indonesian Muslims who hold that the Islamic sharia has only one interpretation.[3] Muslims who hold this opinion tend to see that interpretations that are not the same as theirs are wrong. Such views and attitudes are vulnerable to being exploited by radical Islamic groups or Islamists that make religion a political ideology and Islamic sharia as its political agenda. According to a survey conducted by PRC in 2015, it was found that 4% of Indonesian Muslims support the ideology brought by ISIS (Islamic State in Iraq and Syria). If this percentage is translated into a real population then the number is about 10 million people.[4] For them, Islamic law can not be fully implemented in Indonesia before Indonesia becomes an Islamic State. In other words, sharia can not be fully implemented because Indonesia is a secular state.

With the assumption that the sharia is a law that is always suitable for all places and times and the assumption that Islamic law can change according to the changing times, places, intentions and circumstances, this study has the following objectives: 1) formulate some models of transformation of Islamic law into national law, 2) identify emerging problems 3) formulate alternative concepts of solutions, and 4) formulate the juridical and sociological implications of any policy taken by the state.

The concept or theory used in this study was Hallaq's concept of sharia as paradigm. The concept of the relationship between sharia and state in history according to Lubna A Alam and Khaled Abou El-Fadl and the role of religion in politics according to Masykuri Abdillah.

According to Hallaq, sharia in history had emerged as the supreme moral and legal force regulating both society and government. Therefore, according to him, sharia was paradigmatic, having been accepted as a central system of high and general norms by societies and the dynastic powers that ruled over them.[5]

The relationship between Islamic law and the state in history is unique and complex. The classical era of Islamic history, saw the rise of Islamic states as well as the formation of a complex system of Islamic law. From its very beginnings, the content of Islamic law developed largely free from political influence and pressure.[6]

Although, historically, jurists played important social and civil roles and often served as judges implementing the sharia and executive ordinances, for the most part, government in Islam remained secular. Until the modern age, a theocratic system of government in which a church or clergy ruled in God's name was virtually unknown in Islam.[7]

In the modern age, there are three role of religion in politics, according to Masykuri Abdillah. Firstly, religion as a political ideology; secondly, religion as ethical, moral and spiritual base and thirdly, religion as sub-ideology. Countries that place religion as ideology tend to practice religious teachings formally as positive law and take a structural approach to socialization and institutionalization of religious teachings. Countries that place religion as an ethical, moral, and spiritual source tend to support cultural approaches and reject structural approaches in terms of socialization and institutionalization of religious teachings. This means that the implementation of religious teachings should not be institutionalized through legislation and state support, but enough with

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[1] The World's Muslims: Religion, Politics and Society "Chapter 1: Beliefs About Sharia", April 30,2013. Available on website : http://www.pewforum.org/2013/04/30/the-worlds-muslims-religion-politics-society-beliefs-about-sharia accessed on August 14,2018

[2] Jennie S. Bev, "Why 72 Percent of Indonesians Want Sharia" ,Jun 11, 2013 | Common Ground News, French, Indonesia, Islam. Available on website: https://www.jenniexue.com/why-72-percent-of-indonesians-want-sharia/ accessed , August 14, 2018

[3] The World's Muslims: Religion, Politics and Society "Chapter 1: Beliefs About Sharia", April 30,2013.

[4] Survei Global : 10 Juta Warga Indonesia Dukung ISIS, Kompas.com, 21 November ,2015. Available on website : http://internasional.kompas.com/read/2015/11/21/10455731/Survei.Global.10.Juta.Warga.Indonesia.Dukung.ISIS?page=2 accessed July18, 2017

[5] Wael B Hallaq, 2013. *The Impossible State: Islam, Politics, and Modernity's Moral Predicament*, Columbia University Press , p.7.

[6] Lubna A Alam. "Keeping The State Out: The Separation of Law and State in Classical Islamic Law", *Michigan Law Review*, April 2007, Vol. 105 Issue 6, p1255.

[7] Abou El Fadl, Khaled, 2003, "Islam and the State: A Short History", in Khaled M. Abou El Fadl et.al.,2003. *Democracy and Islam in the New Constitution of Afghanistan*, p.14

the consciousness of religious people themselves. Countries that place religion as sub-ideology tend to support a cultural as well as structural approach by involving religious teachings in public policy making in a constitutional, democratic and non-discriminatory manner.[8]

Research Methods

This research is a kind of non doctrinal qualitative legal research which covered some problems, policy and law reform based research.[9] Data was collected from the books or documents . The main data are drawn from the Indonesian constitution (UUD 1945) and laws designed to fulfil the aspirations of Muslims in general or to fulfil the demands of political parties that carry Islamic ideology. Data will be classified and analyzed by using Friedman' legal system model that consisted of structure, substance and culture.[10]

Discussion

If the transformation is a change in the form, nature, or appearance which includes modify or reconstruct then the model of Islamic law transformation into the national legal system can be manifested in three forms, substantive, normative and attributive or symbolic.

Substantively, Islamic law has been transformed into national law because the principle and substance of Islamic law has actually been incorporated into national law. Philosophically, the substance of Islamic law is in line with the substance contained in Pancasila as state ideology and the Indonesian Constitution.

The ideology of the State of Indonesia is Pancasila. Literally, the word Pancasila means five principles (from a Sanskrit word: *pance,* five , and *sila* ,principle). In fact, the term Pancasila was used by Empu Prapanca in his well-known book entitled *Negarakertagama,* and likewise by Empu Tantular in his famous work entitled *Sutasoma.* These two writers were great thinkers and poets who lived under the Hindu Kingdom of Majapahit during the reign of Hayam Wuruk.[11]

According to Masdar Farid Mas'udi, with Pancasila, Indonesia not Islam State but Islamic State (*Nagara Islamy),* because it makes the One of Godhead (*Tauhid),* as the spiritual foundation, Fair and civilized Humanity (*karamatul insan*) as its moral foundation, Unity of Indonesia (*ukhuwah*)as its social reference, populism which is led by wisdom in consultation / representation (*syuro*) as a political reference, and social justice for all the people of Indonesia (*al-adalah*) as its goal.[12] Therefore it is understood, when three propositions will be chosen for strengthening sharia law for the Unitary State of Indonesia (NKRI): (1) Is the Pancasila not contrary to the sharia (*la tukhalifu al-sharia*), (2) Is the Pancasila in line with sharia (*tuwafiqu al-sharia*), (3). Is Pancasila really the sharia itself, Kiai Afifudin Muhajir, as quoted by Harisudin, calls Pancasila is sharia itself (*al-syari'atu bianiha*).[13] (2018: p.76

In his book *Maqashid al-Shari'ah as Philosophy of Islamic law, A System Approach,* Jasser Auda quoted Ibn al-Qayyim's (d.748 AH/1347 CE) statement: "Shari'ah is based on wisdom and achieving people's welfare in this life and the afterlife. Shari'ah is all about justice, mercy, wisdom and good. Thus, any ruling that replace justice with injustice , mercy with its opposite , common good with mischief , or wisdom with nonsense, is a ruling that does not belong to Shari'ah, even if it is claimed to be so according to some interpretation."[14]

Philosophically, the substance of Islamic law is in line with the substance contained in the Indonesian Constitution. The constitution of Indonesia and the constitution of Medina in the time of the prophet have the same or similar principles according to Harun Nasution and

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[8] Masykuri Abdillah, "Religion within The Nation of Pluralistic Society" (Agama dalam Pluralitas Masyarakat Bangsa) in *Kompas* February 25, 2000.

[9] Ian Dobinson and Francis Johns,2007. "Qualitative Legal Research", in Mike McConville and Wing Hong Chui , ed., *Research Methods for Law*, Edinburgh University Press, p.20

[10] Lawrence Meir Friedman, Grant M. Hayden, 2017. *American Law; An Introduction*, Oxford University Press ,p.6.

[11] Faisal Ismail,1995., *Islam, Politic and Ideology in Indonesia: A Study of The Process of Muslim Acceptance of The Pancasila*, a dissertation, Institute of Islamic Studies, McGill University, Montreal , p.4

[12] Masdar Farid Mas'udi, ,2011, "Islam Indonesia vs NKRI", paper presented in discussing the book "SYARAH UUD 1945 :Perspektif Islam," at UIN Sunan Gunung Djati Bandung , Thursday , June 30, Juni 2011

[13] M.N.Harisudin, "Fikih Nusantara, Metodologi dan Kontribusinya pada Penguatan NKRI dan Pembangunan Sistem Hukum di Indonesia", "Nusantara Jurisprudence, Methodology and Its Contribution to Strengthening the NKRI and the Construction of the Legal System in Indonesia", the inaugural speech of the professor, was delivered at the GKT Auditorium, IAIN Jember, Monday, November 19, 2018.

[14] Jasser Auda, , 2007.,*Maqasid al-Shari'ah as Philosophy of Islamic Law, A Systems Approach*, London, Washington: The International Institute of Islamic Thought, p. xxii.

Munawir Sjadzali.

For instance, the principle of monotheism is mentioned in article 22,23,42,47 in Medina Charter, it also mentioned in the first principle of Pancasila, article 9 and 29 of Indonesia Constitution (UUD 1945).

The principle of unity and togetherness is mentioned in article 1,15,17,25 and 37 of Medina constitution as well as mentioned in the third principle of Pancasila, article 1 verse 1, article 35 and 36 of UUD1945. The principle of unity and togetherness is mentioned in article 1,15,17,25 and 37 of Medina constitution as well as mentioned in the third principle of Pancasila, article 1 verse 1, article 35 and 36 of UUD1945. The principle of equality and justice is mentioned in article 13,15,16,22,24,37 and 40 of Medina Constitution. It also mentioned in the fifth principle of Pancasila, article 27,31,33 and 34 of Indonesia's constitution.

The principle of religious freedom is mentioned in article 25 of Medina Constitution it also mentioned in article 29 verse 2 of UUD 1945. The principle of defending state is mentioned in article 24,37,38 and 44 of Medina constitution. It also mentioned in article 30 of Indonesia's constitution. The principle of preserving good tradition is mentioned in article 2 until 10 of Medina constitution. It also mentioned in article 32 Indonesia's constitution. The principle of supremacy of sharia is mentioned in article 23 and 42 of Medina charter. This principle is not explicitly mentioned in Indonesia's constitution, but religious norms was adopted as logical consequence of implementing the first principle of Pancasila and article 29 of Indonesia's constitution.

The principle of politics of peace and protection is mentioned in article 15,17,36,37,40,41,47 (peace and internal protection) as well as in article 45 (peace and external protection) of Medina constitution. In Indonesia's constitution, this principle mentioned in preamble, article 11and 13. [15]

Munawir Sjadzali, in his book *Islam and Government (Islam dan Tata Negara)* said the foundations laid down by Medina Charter as the basis of state for the plural society in Medina are : 1) all Muslims although from different ethnic or tribe are one community 2) the relationship between Muslims community and others is based on principles (a) good neighboring (b) to help each other in facing common enemy (c) defending who are persecuted (d) giving advice to each other and (e) respecting religious freedom. In addition, Sjadzali said that Medina charter that often called by many political scholars as the first constitution of Islamic state not mentions state religion.[16] In the Medina charter, the meaning of the *ummah* is extended, it includes not only the Muslim community but encompasses all citizens.[17]

According to Masdar Farid Mas'udi there are eight principles in sharia, namely : (1) The principle of freedom and individual responsibility, (2) The principle of human equality before the God, (3) The principle of justice, (4) The principle of human equality before the law, (5) The principle does not harm yourself and others, (6) The principle of criticism and social control, (7) The principle of keeping promises and upholding the agreement, (8) Principles of mutual help for good.[18] All of these eight principles have been accommodated in constitution.[19]

Symbolically or attributively, there are many terms derived from Arabic or Islamic tradition that was accommodated in constitution such as *permusyawaratan* (deliberation), *majelis* (assembly), *hikmah* (wisdom), *perwakilan* (representation), *rakyat* (people), *keadilan* (justice) and so on. Normatively, part of Islamic jurisprudence (*fiqh),* particularly in civil or personal law has basically become a positive law for Indonesian Muslims. The main reference is: Law number 1/ 1974 about marriage, Government regulation (PP No.28 of 1977) on Endowment (*Perwakafan)*, Law Number 7 of 1989 on Religious Courts, Presidential Decree No.1 of 1991 on Islamic Law Compilation, Law No.17 of 1999 on Zakat Management, Law Number 21/2008 on sharia banking.

At least there are three problems in order to transform sharia into national law. The first obvious problem is the emergence of authoritarianism in understanding sharia. The second problem is ambivalence attitude or

[15] Nasution, Harun,1985., *Islam and the System of Government as Developing in History (*Islam dan Sistem pemerintahan Sebagai yang Berkembang dalam Sejarah) in *Studia Islamika*, Nomor 17 tahun VIII (July 1985)

[16] Munawir Sjadzali, 1990.,*Islam and Government (Islam dan Tata Negara),* Jakarta . UI Press, 1990,p.15-16.

[17] Ahmad Ibrahim al-Syarif, 1972., *The Prophet's State in Medina (Daulat al-Rasul fi al-Madinah),* Mesir, Dar al-Maarif, 1972. p.99-100.

[18] Masdar Farid Mas'udi,1977, *Islam dan Hak-Hak Reproduksi Perempuan: Dialog Fiqh Pemberdayaan,* cet. II (Bandung: Mizan), p. 29-30

[19] Masdar Farid Mas'udi,2011, *Syarah Konstitusi UUD 1945 dalam Perspektif Islam,* (*The Explanation of 1945 Constitution from Islamic Perspective)* , Jakarta, Alvabet

inconsistence of some Muslims in accepting the law that not in line with their individual preference. The third problem is the conflicting provision among the laws in Indonesia.

Authoritarianism is the act of 'locking' or captivating the Will of the Divine, or the will of the text , into a specific determination as inevitable, final and conclusive.[20] In order to overcome rigid, authoritarian interpretation, Muslims need to be introduced to various interpretation of sharia as well as various method for exploring the meaning sharia. Although derived from divine source of Holy book, sharia developed by many rational methods of interpretation.[21] The Islamic legal maxim also said : " it may not be denied that laws will change with the change of circumstances" (*la yunkar taghayyur al-ahkam bi taghayyur al-zaman wa al-ahwal)*[22].

The relationship of Islam and the state in history, both in theory and practice, has been complex and multifaceted. Islam, as a system of beliefs embodying a multitude of moral and ethical principles, has inspired a wide range of social and political practices, and a diverse of legal interpretations and determinations known collectively as the sharia.[23]

The diversity of sharia emerges from the fact although the Qur'an and Sunna are original source of Islamic law, the Islamic legal system has evolved many other sources, methodologies and perspectives. Like any other legal system, the Islamic legal system has developed over many centuries in various Muslim societies, incorporating local culture and customs as well as some limited state decrees and particularly the work of Muslim jurists. It was created and developed by private specialists; legal science and not the state, plays the part of legislator, and scholarly handbooks have the force of law. Islamic law is therefore neither common or civil law, but is juristic law.[24]

As juristic law, the sharia constitutes several schools of jurisprudential thought that are considered equally orthodox and authoritative. In the Sunni world, there are four dominant schools of thought: Shafi'i, Hanafi, Maliki,and Hanbali. In the Shi'i world, the dominant schools are Ja'fari and Zaydi..[25]

At least there are three methods used by Muslim scholars In exploring the meaning and contents of sharia ; *bayani, burhani* and *irfani* should be used together. *Bayani* approach that is widely used by *Fuqaha* emphasizes on how to understand sharia seen from the aspects and rules of language. *Burhani* approach that is used by *mutakallimin,* especially rationalists groups like the *Mu'tazilah,* emphasizes on the way of understanding the teaching of religion seen from the aspect of ratio and logical arguments. The *irfani* approach which more emphasizes on the inner or spiritual meaning and wisdom behind the texts of religious teaching is widely used by the Sufis. *Burhani* reason which put forward the way of demonstrative-philosophical thinking is not much developed by Muslim thinkers and scientists.[26]

In applying or practicing sharia, at least, there are three models; 1) exclusive textual model 2) inclusive substantial and 3) combination. The first model usually tries to implement the Islamic sharia as mentioned in the text of the Qur'an, al-Sunna or in the text of the major books (*mu'tabar)* which its authority recognized in explaining Islamic law. This model is based on assumption that sharia has perfectly set all aspects of life. The sharia after the prophet Muhammad is no longer experiencing the process of evolution. Therefore, what Muslims need to do is apply if the provisions are clear in the text of the Qur'an or the Sunna (the written of the prophet tradition). If the provisions are not clear, then they can use analogy (*qiyas)* or *ijtihad* (individual reasoning). Muslims do not need to take other legal system outside of Islam. Sharia is a law of God that can not be known its intent and its content properly except by the experts, ie *Faqih* or *Mujtahid.* Therefore, any law made by the legislature must be approved by the sharia experts who have the right to veto any laws deemed inconsistence with the sharia.

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[20] Khaled Abou El Fadl, *Speaking in God's Name: Islamic Law, Authority, and Women* (Oxford; One world Publications,2001)p. 202.

[21] Joseph Schacht, 1964, *An Introduction to Islamic Law,* Oxford University Press, p.4

[22] Khaled Abou El-Fadl, *Reasoning with God; Reclaiming Shari'ah in the Modern Age,* (Row man & Little field, Lanham& Boulder, New York, London,2014)p.xxxix

[23] Khaled Abou El Fadl, 2003, "Islam and the State: A Short History", in Khaled M. Abou El Fadl et.al. *Democracy and Islam in the New Constitution of Afghanistan,* (RAND, Santa Monica. 2003)p. 13.

[24] Ann Black, Hussein Esmaeili and Nadirsyah Hosen,2013, *Modern Perspective on Islamic Law,* (Edward Elgar Publishing Limited, UK) p.xi.

[25] Khaled Abou El Fadl, "Islam and the State; A Short History" p.13-14.

[26] Sembodo Ardi Widodo, "Nalar Bayani, 'Irfani dan Burhani dan Implikasinya Terhadap Keilmuan Pesantren", *Hermenia, Jurnal Kajian Islam Interdisipliner*, Vol.6.Nomor 1, Januari-Juni 2007, p 65-92

The second model, trying to practice the sharia by looking at the concepts behind the text. If the main idea has been captured, then its application can be implemented flexibly in accordance with the existing circumstances. This model is based on the assumption that every legal provision in Islamic law has its reasoning and purpose. Therefore, Islamic law undergoes evolution. Any legal system can be accepted as long as it is aimed to uphold justice and benefit for human being. They can accept a legal system that can protect basic human rights. Sharia is openly and inclusively applied, in the sense that sharia is applied while accepting 'external element' such as local customs and thought coming from outside Islamic tradition. Sharia openly applied because it can be interpreted by anyone. There is no monopoly in the interpretation of sharia, and therefore there is no need for 'sharia supervisory institution' that monopolize the interpretation of sharia.

The third model, the combination, meaning that in implementing sharia, they divided sharia into *ta'abbudi* (cannot be understood its reason) and *ta'aqquli* (able to be understood its reason). In this context, they sometimes sort out, between private or personal sharia and public sharia. In private sharia or personal law, they tend to be exclusive textual because they consider it part of *ta'abbudi,* but in public law they tend to be substantially inclusive, because they consider it part of *ta'aqquli*. [27]

Ambivalence arises because there is a gap between legal substance, legal structure and legal culture. While legal system, according to Friedman [28], consisted of three elements; structure, substance and culture, sometime the culture of society not supported the substance or the structure. For example, although marriage legislation in Indonesia has made provisions that the marriage age is 16 years for woman and 19 years for man but in the community there is still a frequent occurrence of underage marriages because their culture allowed it.

In order to overcome the ambivalent attitude, some parts of the family law need to be revised or reformed. For example, if the marriage principle according to marriage law is monogamous, polygamy is only possible in an emergency after someone who will conduct it obtaining permission from the court. If this provision violated the marriage should be declared invalid and the perpetrator should be punished.

In personal or family law, Muslim countries take different model of reformation. Some countries take progressive reform such as Tunisia and Turkey. For instance, based on the Turkish Civil Code 1926, polygamy is strictly prohibited and if it happens then the marriage is declared invalid.[29]

The conflicting provision among the laws in Indonesia is like the age of children. According to Law No.35/2014 on Child Protection, article 26(1), parents are obliged and responsible for preventing marriages from occurring at the age of the Child. According to this law the child is someone who is not 18 (eighteen) years old. However, according to Law No.1/1974 on Marriage, a woman who is 16 years old and a 19 years old man can get married. As a result, child marriages still occur in Indonesia. Child marriage is a national's problem because it violates children's rights to get education, health, growth and others.

The conflicting provision among the laws is morally unacceptable because it violated the principles of morality of law. There are some standards of morality of law such as the clarity of law and the absence of contradictions in laws. Rules that its formula is not clear, or contained contradictions between one and another are immoral rules.[30] The conflict between laws horizontally or vertically in some case has caused negative impact on women in Indonesia.[31]

Therefore, rules that conflict with higher rules must be canceled or declared invalid. Thus sharia should be reformed. In order to reform sharia, eclectic choice which is proposed by

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[27] Nurrohman dkk, *Sharia, Constitution and Human Rights; Study on The View of Acehnese Figures on The Model of Sharia Implementation (Syariat Islam, Konstitusi dan Hak Asasi Manusia ; Studi Terhadap Pandangan Sejumlah Tokoh tentang Model Pelaksanaan Syariat Islam di Daerah Istimewa Aceh),* (Bandung, Lembaga Penelitian IAIN , 2002) p.9.

[28] Lawrence Meir Friedman, Grant M. Hayden, *American Law; An Introduction,* (Oxford University Press, 2017) p.6.

[29] Miftahul Huda, "The Variety of Family Law in Modern Muslim's Countries; Typological Studies", ("Ragam bangunan Perundang-Undangan Hukum Keluarga Di Negara-Negara Muslim Modern ; Kajian Tipologis"*) , Al-Manahij, Jurnal Kajian Hukum Islam*, Vol.XI,No.1, Juni 2017.

[30] Lon L Fuller, *The Morality of Law*, Revised Edition (The Storrs Lectures Series), (New Haven, Yale University Press, 1969) p.33-94.

[31] Ahmad Fuad Fanani, "The Implementation of sharia bylaws and its negative outcome for Indonesian women", *Indonesian Journal of Islam and Muslim Societies*, Vol.7,no 2(2017).pp.153-174, doi:10.1832/ijims.v7i2.153-174

Tahir Mahmood [32] need to be used. In Indonesia this method was also proposed by Mahfud MD. According to Mahfud, the formation of national law should be processed through an eclectic choice process in legislative institutions by preserving the objective of sharia which include public benefit and justice.[33]

The ideal concept of justice for Indonesia is justice for all proposed by John Rawls which well known as shared justice.[34] This concept should be used by citizens to regulate their political affairs and interpret the constitution.[35] Rawls believes that, in modern conditions , a conception of justice can achieve stability only if it can be the object of overlapping consensus , that is, only if it can be morally endorsed by citizens who are also committed to diverse and partially conflicting moral, religious, and philosophical worldviews.[36] Rawls theory of justice need to be accompanied with the pure theory of law introduced by Hans Kelsen.

In order to overcome the problem aroused from dualism that dominate legal theory, Kelsen introduced the pure theory of law as the theory for positive law. This theory attempts to answer the questions of what the law is and how the law is made, not the questions of what the law ought to be or how out to be made. The pure theory aims to free legal science of all foreign elements. The pure theory of law refused the assumption of dualism which said that above the state system of positive law, there is legal system that is superior , divine , based on reason or natural law.[37]

According to Kuru, Indonesia is like Turkey in choosing secular state for a Muslim-majority society. In the Muslim world, twenty out of forty-six Muslim-majority states are secular, as they do not declare Islam as official religion, and Islamic law does not control their legislative and judicial processes.[38] If compared to other Muslim countries in placing Islamic law in their constitution, Indonesia can be paced in the third grade.[39] However, there is no correlation between the degree of state in placing the sharia formally in their constitution with the degree of the state in practicing sharia. For instance, although Indonesia placed only in the third grade, but the values of sharia which are practiced in Indonesia are better than Iran. Base on Islamicity index made by Rehman and Askari, Indonesia ranked at 140, higher than Pakistan that ranked at 147, Egypt 153, and Iran at 163.[40] Because Islamic law in Indonesia has entered into the life of the state through structural and cultural processes by transforming its values, norms or symbols.

The impact of policy taken by state has made Indonesia differ with other country in practicing sharia. Diversity, in Sunni community, is a normal life, it is accepted as blessing. Because, in the Sunni community there is no one universally accepted doctrine of caliphate. What is does lay down is a principle: that caliphate is that form of government which safeguards the ordinances of sharia and sees that they are put into practice. So long as that principle is applied, there may be infinite diversity in the manner of its application.[41] In Indonesia, theocratic caliphate cannot be accepted because it contrary to in the principle of democracy.[42] In addition, the idea of the Islamic State in the form of a theocratic caliphate in a modern democratic country is an impossible.[43] Because it will hinder the emergence of what is

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[32] Tahir Mahmood,1987, *Personal Law in Islamic Countries; History, Text and Comparative Analysis,* (New Delhi, Academy of Law and Religion, p.13.

[33] Moh Mahfud MD, “Sharia in National Law” (“Hukum Islam dalam Hukum Nasional”),*Kompas*, Jum’at ,22 Juni 2018

[34] Yudi Latif, “Crocheting on Unity and Justice”, (“Merenda Persatuan dan Keadilan”),*Kompas*,10 January, 2017.

[35] John Rawls,2005, *A Theory of Justice;* (*Original Edition,*)p.365.

[36] Thomas Pogge, Michelle Kosch,2007, *John Rawls; His Life and Theory of Justice,* USA, Oxford University Press, p.41

[37] Hans Kelsen, 1992, *Introduction to the Problems of Legal Theory* (A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law)p. 7-37.

[38] Ahmet T. Kuru,2009, *Secularism and State Policies toward Religion*: *The United States, France, and Turkey*, Cambridge University Press , p. 8.

[39] Nurrohman dkk,2002. *Sharia, Constitution and Human Rights: Study on The View of Acehnese Figures on The Model of Sharia Implementation (Syari’at Islam, Konstitusi dan Hak Asasi Manusia: StudiTerhadap Pandangan Sejumlah Tokoh tentang Model Pelaksanan Syari’at Islam di Daerah Istimewa Aceh),* Bandung: Lembaga Penelitian IAIN , p.17

[40] Scheherazade S.Rehman and Hossein Askari, “How Islamic are Islamic Countries”, *Global Economy Journal,* Volume 10, Issue 2,2010 Article 2, The George Washington University

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[43] Wael B. Hallaq,, 2013., *The Impossible State: Islam, Politics, and Modernity’s Moral Predicament*, Columbia University Press

called “pragmatic eclecticism” in Islamic law.[44]

Viewed from general legal system in the world, what is going on in legal policy in Indonesia is a mixed legal system, a legal system that combines civil law, common law, customary law and Islamic law. Under these conditions, all legal systems have an opportunity to contribute, [45] although indirectly through various models of transformation. In the history of Indonesia, there are theories of practicing sharia, introduced by some scholars.

In civil cases, some experts in Indonesia, explained how the sharia is applied. According to *reception in complex* theory supported by Van Den Berg (1845-1927), Muslims should adhere sharia norm as consequence of their belief or religion. This theory became a reference in the colonial policy since 1855. Later, this theory developed by Juhaya S Praja as credo theory. According to the *receptie* theory, supported by Snouck Hurgronye (1857-1936) Islamic law in Indonesia was applied only if customary law requires it. This theory became the reference of colonial policy since 1929 through the *Indische Staatregeling* (IS). Article 134 paragraph 2 of IS said: “In the case of civil cases among fellow Muslims, will be resolved by judges of Islam if their customary law wants it.” [46]

After Indonesia become independent state, some theories emerge. According to *receptie exit* theory proposed by Hazairin, after Indonesia became independent state and has its own constitution, all laws of Dutch East Indies government based on *receptie* theory cannot be applied again, because its soul is contradictory to the 1945 constitution. Article 29 verse 1 of the 1945 constitution said that the state shall be based upon the belief in the One and Only God. Based on this article, the Republic of Indonesia is obliged to form an Indonesian national law with the material derived from religious law. It is the obligation of state to do it. The religious law that would be Indonesian law is not just Islamic law, but also other religious law living in Indonesia. Religious law in civil and criminal law that was absorbed into Indonesian national law, then becoming a new Indonesian law based on *Pancasila*. This theory was developed by Hazairin in his book *Tujuh Serangkai tentang Hukum (The Seven Laws)*.[47]

Another theory, *receptie a contrario*, introduced by Sayuti Thalib. This theory said that for Muslims, Islamic law should be applied to them, customary law can be applied if not contrary to Islamic law. Another theory, the *positivization* of Islamic law that was supported by A Qadri Azizi said that Islamic law basically has become a positive law for Indonesian Muslims. Therefore, the application of Islamic law no longer determined on acceptance of customary law. The main reference of this theory is Law No 1/1974 on marriage. Article 2 (1) of this law said that marriage is valid, if it is done according to the law of each religion and belief.[48]

So, if in family or civil cases, sharia is practiced exclusively, in public or penal cases, sharia was practiced inclusively or substantively to all Indonesian. The exception is in Aceh province which has special status for applying sharia based on Law No.11/2006. Article 125 of this law said that sharia implemented in Aceh covered worship, *ahwal syakhshiyah* (family law), *muamalah* (civil law), *jinayah* (criminal law), *qadla* (justice), education, *da'wah, syiar*, and defense of Islam. Article 128 verse 3 of the Law No.11/2006 said that the Sharia Court has the authority to examine, hear, decide, and settle cases which include the field of family law, civil law, and criminal law which are based on Islamic sharia.

Therefore, constitutionally there is no obstacle to transform Islamic law into national law. But the transformation must be done through a democratic process without discrimination. According to Muhtada, until 2013 there more than 422 sharia bylaw widespread in Indonesia. The weakness of this bylaw, in general, is because of its discriminative content.[49] So, the problem for practicing sharia

[44] Ahmed Fekry Ibrahim, 2015., *Pragmatism in Islamic Law. A Social and Intellectual History*, Syracuse University Press , p.10.

[45] Vernon Valentine Palmer , Mohamed Y Mattar, and, Anna Koppel, ed., 2015.*Mixed Legal System, East and West*, Ashagate Publishing Company , p.279.

[46] Nurrohman Syarif,“Sharia in The Perspective of State System Base on Pancasila” [“Syariat Islam dalam Perspektif Negara Hukum berdasar Pancasila”) , *Pandecta* ,Volume 11. Nomor 2. December 2016] Available on website: https://journal.unnes.ac.id/nju/index.php/pandecta/article/viewFile/7829/6325 accessed August 14, 2018

[47] Hazairin,1985 *Tujuh Serangkai tentang Hukum*, Jakarta, (Bina Aksara, cet.ketiga, p.52.

[48] Nurrohman Syarif, “Sharia in The Perspective of State System Base on Pancasila” (“Syariat Islam dalam Perspektif Negara Hukum berdasar Pancasila”) , *Pandecta* ,Volume 11. Nomor 2. December 2016]

[49] Dani Muhtada, “Perda Syariah di Indonesia: Penyebaran, Problem dan Tantangannya” (“ Sharia bylaw in Indonesia: The Spread, Problems and Challenges”), paper delivered in a scientific speech in the framework of the Anniversary VII of

in Indonesia actually only belong to parties who will imposed sharia formally, literally, rigidly through authoritarian interpretation.

All that explanation shows that in Indonesia, the model of implementing Islamic law is not single but plural. The acceptance of plurality is important for democracy because a democratic country is not because it is secular but because it is dedicated to accept pluralism. It is pluralism – the peaceful coexistence and legal equality between different ethnic, religious or political ideologies – that defines democracy not secularism.[50]

All that explanation also shows that there is no fixed and permanent model in practicing sharia in Indonesia, including what is practiced in Aceh. The model for implementing sharia should be adjusted to the dynamics of society. In the context of Indonesia, it should be adjusted to the Pancasila as the philosophy and ideology of state. If Whitehead in his book *Religion in The Making*, explained that one's religious awareness experienced a process of development[51], sharia as a religious norm also experienced a process of development. Hallaq called it the evolution of Islamic law.[52]

Conclusion

This study concluded that sharia for Muslims is paradigm. As paradigm it is rather abstract concept which leaves ample room for various concrete interpretations. This study also concluded that while there is no single model for Muslim in understanding and practicing sharia, there is also no single model in transforming sharia in Indonesia.

From three models of practicing sharia, inclusive, exclusive and combination, Indonesia tends to use combination model by dividing sharia into private and public. Although there are many models to implement the sharia, but all of them lead to the same goal, namely to realize justice and benefit for all, Muslim and non Muslim.

There are many models that can be used by Muslims in transforming sharia into national law. This study concluded that without being an Islamic state or caliphate, Islamic law can be transformed into national law as long as not depend on one model of transformation.

Theological assumption that sharia is a fixed set of norms that apply exclusively to all Muslims not supported by legal and empirical evidence. As a religious norm base on faith, sharia is developing in accordance to the development of faith.

Suggestion

Since the model of practicing sharia in Indonesia is still in the making, the following studies of sharia must be directed to realize the objectives of sharia by using more objective indicators in order to achieve justice and benefit for all citizens.

Under these circumstances, if the public aspect of the sharia will be applied in Indonesia, then dialogue and deliberation must continue to be made to achieve justice that is acceptable to all citizens, Muslim and non Muslim. Because, If the transformation of sharia into the national law is done in an authoritarian, discriminatory way and not able to protect the weak and marginalized group then the sharia will lose its function as the spreading of mercy.

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