FORMALIZATION OF SHARIA LAW IN INDONESIA (A CONSTITUSION PERSPECTIVE)

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ABSTRACT

This study aimed to describe the conceptualization and interpretation of sharia in the practice of law in Indonesia and its relation to the principles of human rights. Normative approach is used to highlight the relevance of constitutionalism in Islamic law. The results show that the formalization of Islamic Law in Indonesia should be done within the constitutional framework. Birth of a variety of legislation based on Islamic law, both at the central and at the local level, since June 22, 1945 shows the symptoms of Islamic law as the living law in Indonesian society. These symptoms can also be seen from the use of fatwa from sharia national council to fulfill the state law absence especially in the field of Islamic finance law. This phenomenon is also supported by an increase the Sharia Court in the Aceh Province, which was limited and the decision should be upheld by the General Court, now is part of the four types of courts under the Supreme Court.

Keywords: *Formalization of Sharia, Constitutionalism, Constitution 1945.*

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INTRODUCTION

Discourse on the formalization of Islamic law is the latent topic for Indonesia's political world. In Islamic political thought, the relationship between religion and state, there are three paradigms, namely: (1) religion and state is an indivisible unity (integrated paradigm), (2) religion and state is an interrelated and related, and (3) a religion which must be separated (Romli, 2006: 28 ; Astarudin, 2006: 49). In practice, the discourse surrounding the formalization of sharia triggered some aspects. First, the efforts some political parties, particularly the United Development Party (PPP) and the Moon Star Party (PBB) in the MPR Annual Session in August 2002 to amend Article 29 of the 1945 Constitution to include "seven words" (with the obligation to carry out Islamic sharia adherents) in Jakarta Charter in order formalization of sharia have a clear constitutional basis in Indonesia. Second, the formalization of some elements of Islamic law by local governments in some regions in Indonesia, such as the province of Nangroe Aceh Darussalam (NAD), South Sulawesi, Banten, Riau, Ternate, West Sumatra, also in Cianjur and Tasikmalaya in West Java. Third, an appeal and a campaign to urge people to formalize sharia in all aspects of life, as do several Islamic groups and movements, such as Hizbut-Tahrir, the Islamic Defenders Front, and Indonesian Mujahidin Council (Al-Jawi, 2002: v-vi).

Discourse formalization of Islamic law, which caused intense enough pros and cons. One view is trying to confront the solicitation formalization of Islamic law. Rejection of sharia formalization is expressed by a variety of arguments. For example, some say that Indonesia is a plural society, not only Muslims, then the formalization of Islamic law that applies generally not acceptable. Some are stating that the formalization of Islamic law means the state intervention for the religious life should be private and individual. Some are rejected because the formalization of Islamic law Sharia incompatible with modernity and public life, such as International Law, Human Rights Democracy, and so on (Husaini & Hidayat, 2002: 155-167; Anggriani, 2011: 320-335).

The debate about the formalization of Islamic law in Indonesia increasingly prevalent after Islamic parties, the PPP, as set forth above, the return of the Jakarta Charter proposed amendments to the 1945 Constitution. Moreover, a number of Islamic organizations except the Nahdlatul Ulama (NU) and Muhammadiyah, voiced action demands the return of the Jakarta Charter, which means also the formalization of Islamic law in the country (Burhanuddin, 2004: 20; Zada, 2006: 8). While on the other hand, there are Islamic groups that reject formalization of Islamic law. Usually they are the group that had been industriously initiated pluralism, inclusiveness, and tolerance. No exaggeration this Islamic group explicitly reject the formalization of Islamic law. They argue that Islamic law does not formally need. Because sustainability is committed to the state practice, not legalistic nor formalistic, including religious reference (Kurzman, 2001: xi-xii; Simarmata, 2006: 6).

This study is concerned to describe the conceptualization and interpretation of the law itself, because without a clear definition of the process, can and in most cases will collide with the principles of constitutionalism and human rights. Then, this study also highlight the relevance of constitutionalism in Islamic law to explain the nature of the formalization of sharia in Indonesia within the framework of constitutionalism.

RELIGIOUS NATION STATE IN INDONESIA

Paragraph 4 of the 1945 Constitution contains the basic objectives and terms of reference state that is the state of Indonesia. Institutionalization strategy requires a distinction between institutionalized through the state and the society. Pancasila is the combination elements of creativity, taste, and cultural initiative of Indonesia, so that no one is opposed to subcultures and religious diversity in Indonesia. According to Pancasila, the state is based on the belief in one God on the basis of a just and civilized humanity. Such a formula is showing us that the Indonesian state based on Pancasila is not a secular state that separates state and religion, as it is stated in Article 29 paragraph (1). This means that the country as a communion of life is based on religion. Consequently all aspects of the implementation and administration of the state should be in accordance with the nature of the values that comes from God.

Similarly, the meaning of which is contained in Article 29 paragraph (1) also contains a sense that Indonesia is a country that is not based on a particular religion nor non- religious. Pancasila essentially is transcends all religions and guarantees all religious life. Article 29 paragraph (2) giving freedom to all citizens to profess religion and to worship according to the faith and devotion of each. The meaning specified relationship with the state religion according to Pancasila is as follows:

(1) The State is based on the belief in one God .

(2) The Indonesian nation is a religious nation. Consequently every citizen has the rights to profess and to practice their religion in accordance with their respective religions.

(3) There is no place for atheism and secularism as based nature of human nature as a creature of God.

(4) There is no place for religious conflicts among religion.

(5) There is no place for religious coercion because faith is not the result of coercion for anyone.

(6) All aspects of the implementation and operation of the State shall be in accordance with the values of belief in one God, especially the norms of positive law and moral norms moral good and moral state of the state apparatus.

One of the main features in the Pancasila is a guarantee of Freedom of religion. However, the freedom of religion always in a positive connotation, meaning that there is no place for atheism or anti- religion propaganda. This is very different from the example in the United States that based on the concept of freedom of religion in the sense of both positive and in a negative sense. Meanwhile in the Soviet Union and other communist countries "Freedom of Religion" also provided constitutional guarantees against anti- religious propaganda. In addition As'ad (2009: 17) also suggests Indonesian Law is lack of a rigid and absolute separation between religion and state. Thus it is very different from that in the United States adheres to the doctrine of separation of church and strictly. On the other hand Kartohadiprodjo (2010: 31) views the Pancasila state law based on the principle of kinship that is listed in the 1945 Constitution. The emphasis in the principle of the family is a lot of people but still human dignity respected. Thus it is reflected by Article 33 of 1945 Constitution which explains that it is important that the public welfare, not individual prosperity. Then, Pancasila state law also can be understood through the study and understanding of state law from the standpoint of understanding the principle of kinship. In this connection, Latif (2011: 106) argues that the law is a tool or vehicle to hold the country life, order and organize social welfare.

CONCEPTUALIZATION & INTERPRETATION OF SHARIA IN INDONESIA

Provisions of Sharia in Arabic means "straightforward way", in terms of Islamic jurisprudence is "the laws that God has set for His servants through His Apostles, so that the full faith practiced by both interlocking with the law or interlocking with faith and conviction and moral. Function and purpose of Sharia (*maqashid ash-Sharia*) made for the release of human passions and pressures grow into a human chest feeling subservient to Divine rules for maintaining public body to maintain the religion, life, intellect, progeny and property. Thus, an injunction, prohibition or statement requires an understanding of the text to be implemented as a way of life. In addition, new events are not defined by religious texts also require the formulation of laws to ensure Islamic view about it. The second aspect is called fiqh or understanding of the law (Ash-Shiddieqy, 1982: 9; Sidik, 2003: 51-58).

Islamic law has three terms. First, as a whole the religion brought by Prophet Muhammad SAW. Second, the entire texts of the Qur'an and Sunna which is the legal values are derived from the revelations of God. Third, an understanding of the legal experts from the revealed God and guided by the results of *ijtihad* is the revelation of God. The third insight is called fiqh. Because it involves the power of thought and analysis. Islamic scholarship in the field of law has given various interpretations in the form of a so-called school of fiqh (Ka'bah, 2004: 42-43; Suharso, 2009: 12).

Understanding Islamic Law is often equated with the notion of fiqh and Islamic law. All three are equally a way that comes from God, but from the development of Islamic history, three have undergone differentiation of meaning. Islamic law generally is the entire text of the Qur'an and the Sunna as the provision of God that man should be the grip or the right way of religion (Ali, 1989: 1297; An-Na'im, 1996: 93).

Islamic law known as sharia, while fiqh is translated as Islamic Jurisprudence. In the Indonesian language, the Sharia often used the term of Islamic rules, while the term used for Islamic jurisprudence or fiqh law sometimes Islamic law. More deeply, Ash-Shiddieqy (1982: 44-46) outlines the differences between the two as follows:

a. Sharia substance of the content contained in the Qur'an and Hadith books. Sharia means here is the revelation of Allah and the Sunna of Prophet Muhammad as His Messenger, and fiqh is as contained in the books of fiqh. Understanding of fiqh is the human understanding of the Sharia qualified and understanding the results.

b. Sharia is fundamental and has a broader scope because of its depth, by many experts to be included aqidah and morals. Fiqh is an instrumental, its scope is limited to the laws that govern the human action, which is usually referred to as a legal act.

c. Sharia law is the commandment of Allah and His Messenger provisions, because it applies eternal, may change over time

d. Sharia is only one, while fiqh may be more than one such as looks the law schools of the so-called schools of that.

e. Demonstrate unity in the Islamic Sharia, Fiqh showed moderate diversity. Although both views have in common the view of Islamic law as the law, fiqh is not necessarily because of the provisions of the Sharia jurisprudence can be obtained from sources outside the al-Quran and as-Sunna. The concept of Islamic law according to the Qur'an are some. First, the Islamic law is intended as a straightforward way. Road or this guide is used by Prophet Ibrahim in life, including the build leadership. Second, the Islamic law is used as a model or system that is used by every people in the span of time in a different era. Thus, the law can be translted as straight path that contains universal values in all aspects of human life, material-immaterial, the world and the hereafter, worship, muamala, and syiyasa (Ali, 1989: 1282).

ISLAM AND CONSTITUTIONALISM IN INDONESIA

The principles of constitutional government of the Republic of Indonesia formulated in 1945. Constitution 1945 juridical effect at the period August 18, 1945 up to December 1949 (The first period) and the 1945 Decree in force after July 5, 1959 to the present (2nd period) Constitution are two completely dissimilar. 1945 to the first period does not have links with Jakarta Charter June 22, 1945, while the 1945 2nd period has a very close relationship, animate and even a single integral unit with the Jakarta Charter (Hazairin, 1990: 69; Wiyono; 2009: 37-45).

Jakarta Charter is an important document for the birth of the Republic of Indonesia. According to Rifyal Ka'bah (2005: 106-111; 2007: 39), 7 (seven) words of the Jakarta Charter which dropped the clause "*with the obligation to carry out Islamic sharia adherents*" means the obligation imposed by the state through legislation to Muslim citizens. That's because Islamic law in practice can be divided into two parts. The first part is a law that does not require state power, leaving implementation to the observance of individual believers. The entire Islamic law actually relies obedience individual Muslims, but there is also a special part of the duty of the state. The second part is an obligation imposed by the state to individuals as part of law enforcement in a sovereign country.

After the Jakarta Charter, the term Shari'a law into the realm of Indonesia through various laws, including the Law No.1/1974 on Marriage, Law No.7/1989 on Religious Courts, Law No. 7 in conjunction with the Law No. 10 year 1998 on Banking, Law No. 30 year 1999 on Alternative Dispute Resolution, Law No. 28 year 2000 on Zakat, Law No. 9 year 2008 About Sharia Securities, Law No. 21 year 2008 On Islamic Banking. Furthermore, on September 10, 2008 issue of the Supreme Court Rules No. 02 On Economic Sharia Law Compilation, and others (Priyanto, 2011: 32).

Law No.10 year 1998, Article 1, paragraph (12) and Article 1 paragraph (10) of the law clearly states that Islamic principles are intended treaty rules based on Islamic law. So the term sharia here equated with Islamic law. Long before this, which is dated June 10, 1991, has been published Compilation of Islamic Law in Indonesia (KHI) by Presidential Instruction No.1 year 1991. KHI consists of three books on Marriage Law, Inheritance Law, and the Law of donation. Particular of Book III has been enhanced to become Law 41 year 2004 on Waqf (benefaction). Book I and Book II KHI is also undergoing revision and have a bill, and sooner or later would also become law. Islamic law in KHI this is not another compilation of Islamic law in the areas of marriage, inheritance and waqf. Since its publication, KHI has been used as a substantive law in the Religious Courts (PA) which is the Islamic Sharia Courts in Indonesia (Hadjar, 2006: 21).

Sharia the term also appears in Article 25 paragraph (1), (2) and (3) Law No. 18 year 2001 on Special Autonomy for Aceh as the Province of Nanggroe Aceh Darussalam which was ratified on August 9, 2001 (State Gazette Year 2001 Number 114, Supplement to Statute Book No. 4134). Islamic law is not only through the Qanun Aceh Province, but also a variety of Regulation. Some law shows support for Islamic law of the people's representatives in certain areas. Looking at current developments, it is possible the number of Islamic sharia law will increase in the future. This of course in addition to the legislation at the national level that will be born in the near future or in the future to support legal reform in this country (Latief, 2010: 18; Jaih, 2002: 52-54; Nurrohman, 2002: 56).

It turns out a variety of regulations, appeals and circulars gets a negative response from the 56-member House of Representatives on the grounds that formation against Pancasila and the 1945 Constitution (Alim, 2010: 84-85; Mahfud, MD, 2010: 38). Nevertheless, the various factions in Parliament through their spokesman disagreed with this group. They stated that there was no

problem with sharia bylaws nuanced. Actually, in a democracy, is common when there is a difference of opinion about a problem, but if there are those who claim that certain regulations conflict with the law or the constitution, duly concerned to take legal action by filing a judicial review to the Supreme Court or the Constitutional Court . Both of these institutions are authorized by law and the Constitution to examine, define and decide whether a legislation contrary to the laws or the constitution is higher.

CONCLUSION

State is essentially a living communion with nature as a manifestation of human nature as individual beings and social beings. Therefore the nature of the state, so the state as a manifestation of human nature horizontally in relation to other human beings to achieve a common goal. Therefore, man is the founder of the state to achieve the goal of man himself. But we need to realize that human beings live together as citizens, resident personal nature as beings and as creatures of God Almighty. As personal beings endowed with freedom he will of humanity over all things. So this is what a human freedom is a gift from Almighty God. As creatures of God Almighty he has the right and the obligation to fulfill the dignity of humanity is worship of Almighty God. Manifestation of man's relationship with God is manifest in religion. State is a human product that is the result of human culture, while religion is rooted in absolute nature of God's revelation. In the religious life of human beings have the rights and obligations that are based on faith against God, while in the state have the right human - rights and obligations horizontally in relation to other human beings.

Birth of a variety of legislation based on Islamic law, both at the central and at the local level, since June 22, 1945 shows the symptoms of Islamic law as the law of life in Indonesian society. These symptoms can also be seen from the use of fatwa DSN lately in lieu void legislation in the field of Islamic finance law. This phenomenon is also supported by an increase in the authority of Religious Court, including the Sharia Court in Aceh Province, which had been limited and the decision should be upheld by the General Court, now is part of the four types of courts under the Supreme Court. Nevertheless, the application of Islamic law does not necessarily have to go through the formal and repressive regulation, but let himself be consumed by the public in accordance with belief and principles in accordance with the norms appreciated as wisdom. Islamic law should be understood as a space that allows for adherents to treat it in accordance with the assumptions and their will for their own needs and the good of society without coercion, violence (violence), and uniformity.

REFERENCES

Ali, Abdullah Yusuf. (1989). *The Holy Al-Quran: Text, Translation and Commentary*. Brenwood: Maryland Amana Corporation.

Alim, Muhammad. (2010). Perda Bernuansa Syariah dan Hubungannya dengan Konstitusi, *Jurnal Hukum Ius Quia Iustum*, FH UII, 1.17, 84-95.

Al-Jawi, Muhammad Shiddiq. (2002). Formalisasi Syariah Suatu Keharusan, *Formalisasi Syariah Islam dalam Kehidupan Bernegara Suatu Studi Analisis*, terjemahan al-Fakhr ar-Razi dari judul asli *Attasyri` wa Sann al-Qawanin fi ad-Daulah al-Islamiyah: Dirasah Tahliliyah.* Yogyakarta: Media Pustaka Ilmu.

Anggriani, Jum. (2011), Kedudukan Qanun dalam Sistem Pemerintahan Daerah dan Mekanisme Pengawasannya, *Jurnal Hukum*, 18, 320-335.

An-Na'im, Abdullahi Ahmed. (1996). *Toward Islamic Reformation: Civil Liberties, Human Rights, and International Law*. New York: Syracuse Universitty Press.

As'ad, Said Ali. (2009). *Negara Pancasila: Jalan Kemaslahatan Berbangsa.* Jakarta: Pustaka LP3ES.

Ash-Shiddieqy, T.M. Hasbi. (1982). *Dinamika dan Elastisitas Hukum Islam*. Jakarta: Tintamas.

Astarudin, Tatang. (2006). Perda Syari'at; Aspirasi Masyarakat Daerah, *Taswirul Afkar*, 20,45-60.

Burhanuddin, Nandang. (2004). *Penegakan Syariat Islam Menurut Partai Keadilan*. Jakarta: al-Jannah Pustaka.

Hadjar, Ibnu. 2006, "Syari'at Islam Dan Hukum Positif Di Indonesia", *Jurnal Hukum Islam Al-Mawarid*, XVI, 20-33.

Hazairin. (1990). *Demokrasi Pancasila*. Jakarta: Penerbit Rineka Cipta.

Husaini, Adhian & Hidayat, Nuim. (2002). *Islam Liberal: Sejarah, Konsepsi, Penyimpangan, dan Jawabannya*. Jakarta: Gema Insani Press.

Jaih, Mubarok. (2002), Dinamika Pemikiran Hukum Islam di Indonesia", *Jurnal Ilmu-Ilmu Sosial*, Vol. 26, No. 48, 52-63.

Ka'bah, Rifyal. (2004). *Penegakan Syariat Islam di Indonesia*. Jakarta: Khairul Bayan.

Ka'bah, Rifyal. (2005). *Piagam Jakarta 22 Juni 1945, Politik dan Hukum Menurut al-Qur'an*. Jakarta: Khairul Bayan.

Ka'bah, Rifyal. (2007). Fenomena Perda Syariat dalam Sistem Hukum Indonesia, *Jurnal Hukum Suara Uldilag*, 3.X, 37-49.

Kartohadiprodjo, Soediman. (2010). *Pancasila Sebagai Pandangan Hidup Bangsa Indonesia.* Jakarta: Gatra Pustaka.

Kurzman, Charles. (2001). *Wacana Islam Liberal Pemikiran Islam Kontemporer dan Isu-Isu Global*, terjemahan Bahrul Ulum dari *Liberal Islam: a Sourcebook*. Jakarta: Paramadina, Yayasan Adikarya IKAPI dan The Ford Foundation.

Latief, Husni Mubarrak A. (2010). Sengkarut Hukuman Rajam dalam Rancangan Qanun Jinayat Aceh, *Jurnal Sosio Religia*, 9.3, 17-29.

Latif, Yudi. (2011). Pancasila Sakti. *Gatra*, 48.XVII, 106-108.

MD, Moh. Mahfud. (2010). Politik Hukum Islam dalam Sistem Hukum Nasional, *Varia Peradilan*, XXV.290, 37-44.

Nurrohman, (2002). Syari`at Islam, Negara dan Transformasi Hukum Islam, *Jurnal Hukum Islam & Pranata Sosial Asy-Syari`ah*, 25, 47-58.

Priyanto, I Made Dedy. (2011). Instrumen Hukum Pembatalan Perda Syari'ah di indonesia, *Jurnal Konstitusi* PKK Udiknas Denpasar, I.2, 21-36.

Romli, Lili. (2006). *Islam Yes, Partai Islam Yes: Sejarah Perkembangan Partai-Partai Islam di Indonesia*. Yogyakarta: LIPI-Pustaka Pelajar.

Sidik,Tono. (2003). Penerapan Hukum Islam di Indonesia (Peluang Konstitusional & Implementasinya dalam Hukum Positif*)*, *Unisia*, 26. 51-60.

Simarmata, Rikardo. (2006). The Life of Law Has Not Been Logic, *Forum Keadilan* dan *Huma* No. 42, 5-15.

Suharso. Pudjo. (2009). Pro Kontra Implementasi Perda Syari'ah (Tinjaun Elemen Masyarakat), *Jurnal Al-Mawarid*, XVI, 5-20.

Wiyono, Suko. (2009). Hak Asasi Manusia (HAM) Dalam Kerangka Negara Hukum yang Demokratis Berdasarkan Pancasila. *Jurnal Konstitusi*, I.2, 37-45.

Zada, Khamazi. (2006). Perda Syariat: Proyek Syariati yang Sedang Berlangsung, *Taswirul Afkar*, 20, 7-20.