CONSIDERING THE DISCOURSE OF ISLAMIC CRIMINAL LAW FORMALIZATION IN INDONESIA

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ABSTRACT

In law science discourse, criminal law is often viewed as a cruel barbarian law. This view is based on an assumption that although the application of punishment aims to recover the damaged social balance, it is well established that in its punishment application, there is an element of revenge against the crime perpetrator. It is confirmed with a massive condemnation model oriented to punishment of freedom expropriation in the form of imprisonment dominating nearly all punishment (condemnation) systems in all countries throughout world, including Indonesia. This paper proves that the legislation of Islam criminal law into the formalization of State legislation has positive contribution to enriching and cohering again as the awareness of commitment in living within nation and state.

Keywords: Law, Punishment, Islam, Formalization, Indonesia

Introduction

Islamic criminal law, by its legality principle, is categorized into an unwritten law. Nevertheless, Islamic criminal law can be actually recognized constitutionally as the ever prevailing law. Islamic law is still perceived poorly by legal scholar, bureaucrat, and political elite, thereby contributing considerably to the public's perception. In *fikih* literature, criminal law is more known as *al-ahkâm al-jinâ'iyyah*, the laws governing speeches, attitudes, or deed of *mukallafs* with a variety of violation or crime *(jarîmah/jinâyah)* along with the types of punishment reasonable to impose.[4]

In al-Syâthibî, Islamic law, including its criminal law, is positioned to protect five human rights *(al-dharûriyyât al-khams),* including: soul/spirit *(hifzh al-nafs),* mind *(hifzh al-'aql),* religion *(hifzh al-dîn),* property *(hifzh al-mâl),* and offspring *(hifzh al-nasl)*.[5]

It is well established that Indonesian Muslim is the majority element. In the context International Islam world, Indonesian Muslims even can be called the largest Muslim community assembling in a state's territorial border. In social- cultural perspective, comparing the national criminal law and Islamic criminal law seems to be a long sustainable discourse within Indonesian people, either legal scholars or Muslims themselves. This problem becomes multicomplex recalling that discussion about criminal law is closely related to life aspects, including politic, social, cultural, and economic.

Masykuri Abdillah views that since reform period, the varying aspirations result from the Muslim, from either exclusive (fundamentalistic) or inclusive (liberalistic) groups.[6] There are eat least three commentaries about National criminal law vis a vis Islamic criminal law. Firstly, national criminal (positive) law is compatible to Islamic criminal law, for example, concerning the violation. Secondly, the positive criminal law is not in contradiction with the Islamic law, but it is not entirely the same as the Islamic law, for example, concerning stealing, murder, and etc. thirdly, positive criminal law is in contradiction with Islamic law, concerning *perzinaan* (sexual act outside of marriage) and liquor, the perpetrator of which can be punished if only he/she harms others only.

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[5] Al-Imâm al-Hâfizh al-Mujâhid Abî Ishâq Ibrâhîm ibn Mûsâ al-Gharnathî al-Syâthibî, *al-Muwâfaqât fî Ushûl al-Ahkâm,* (Bayrût: Dâr al-Fikr, t.t.), p. 15.
[6] Masykuri Abdillah, "Posisi Hukum Pidana Islam dalam Konteks Politik Hukum dan Perundangan Indonesia", a paper of National Seminar, *Islamic Criminal Law: Description, Comparative and constructive critic analysis,* Sharia Faculty of IAIN Syarif Hidayatullah Jakarta, June 22-23, 1999, p. 7.

Regarding this, Abd al-Qadîr 'Awdah gives three forms of clarification concerning the objective of sharia. They are: firstly, ensuring the life safety and needs as the first and primary objective *(dharûriyyah)*; secondly, ensuring the secondary life needs *(hâjiyâh);* and *thirdly*, making some improvement in the society life to make their social affairs better *(tahsîniyyah)*.[7]

In the perspective above, any action that can threat the society's life, including the five basic points above, is considered as the crime that not only is prohibited by the religion but also breaks the law.

History of Indonesian Legal Politics

Islamic law is the critical phase in Indonesian legal history that has existed in Indonesia for the first time as a positive law.[8] In historical review, the practice and application of Islamic law in Indonesia is one element in creating the national law in parallel to Western civil and customary laws. Those three laws (Islamic, Civil, and Customary laws) have encountered a long conflict since the Dutch's entry into Indonesia until today. [9] It means, in Bismar Siregar's terminology[10], that Islamic sharia is accepted as positive law if only it is not in contradiction with customary law. This theory is more known as *receptie* theory just like what is held by Snouck Hurgronje as the attempt of castrating the Islamic law during pre-independence period.[11]

Before Indonesian's Independence Day, Islamic sharia has existed and been popular. Islamic law has ever developed comprehensively throughout Indonesian areas, when Indonesia still consisted of many kingdoms: Banten, Demak, Mataram, and Samudera Pasai.[12]

Regarding this, it is reasonable to elaborate a little background of the Islamic sharia emergence in Indonesia. To discuss the formalization of Islamic sharia, the citation is needed about the background of the emergence of Islamic sharia words in Indonesia. This terminology arises due to the presence of a belief that "Islam is above everything". Islam is believed as the solution to any problems surfacing. As a result, they attempt to make Islamic law the public law. As the state with largest Muslim population in the world, the spirit of applying sharia is reasonable to appear.

Viewed from the history very likely to be the reference, particularly in the beginning of our independence period, the struggle of Islamic group for including sharia surfaced strongly at that time. The spirit appearing was to make sharia the part of the state's ideology.[13]

In legal politics perspective, there are at least three most dominant reasons regarding the position of Islamic law in Indonesian state order system[14]. *Firstly*, in the *Badan Penyelidik Usaha-usaha Persiapan Kemerdekaan Indonesia* (thereafter called BPUPKI)'s meeting conducted toward the Indonesia's independence, there was a hot debate between the nationalist and the Islamic representatives about the provision of including the "seven additional words" into the first principle of Pancasila, "Belief in the divinity of God with the obligation of undertaking the Islamic sharia for its adherents", as included into Jakarta Charter or called *Piagam Jakarta*".

Secondly, in the constituent meeting, a historical event occurred during post-election 1995, in which a debate occurred between the Nationalist and Islamic groups. The theme of debate is the same, pros and cons around the wish to make Islam sharia the part of Indonesian law. However, because of some deadlocks and no formulation of State established, Soekarno, as the Republic of Indonesia's Presidents, took over the constituent and released the Decree of President on July 5, 1959. Thus, the Muslims' struggle failed again.

Thirdly, as the long period of New Order led by Soeharto tabooing the aspiration, the nuance of Islamic sharia application subsided as well, despite still in the Muslims' memory. Post-New Order regime collapse, characterized with the advent of

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[7] 'Abd al-Qadîr 'Audah, *Criminal Law of Islam,* (Karachi: International Publisher, 1987), pp. 246-249.

[8] Moh. Idris Ramulyo, *Asas-asas Hukum Islam,* (Jakarta: Sinar Grafika, 1995), p. 12.

[9] Khoiron Sirin, "Legislasi Hukum Islam di Indonesia: Sebuah Harapan-harapan Sosiologis", *Jurnal al-Muqarin,* no. 2/Th.IV/1998, p. 35.

[10] Bismar Siregar, *Hukum Acara Pidana,* (Jakarta: Binacipta, 1983), 1st edition, p. 20-29.

[11] Abdul Rahmat AR, "Mempertimbangkan Hukum Pidana Islam dalam Proses Legislasi Hukum Nasional (Telaah Kritis Terhadap Efektifitas Pelaksanaan Sanksi Hukum Pidana Islam di Indonesia", Thesis, Postgraduate Program, IAIN Syarif Hidayatullah Jakarta, 2002, p 7.

[12] Azyumardi Azra, *Jaringan Global Lokal Islam Nusantara,* (Bandung: Mizan, 2002), p. 19; see also, Muhammad Daud Ali, "Kedudukan Hukum Islam dalam Sistem Hukum Nasional", dalam Taufik Abdullah dan Sharon Shiddiqie (ed.), *Tradisi dan Kebangkitan Islam di Asia Tenggara,* (Jakarta: LP3ES, 1989), p. 208.

[13] This reality is inseparable directly from Islamic politic theory that always governs the function and role of a Muslim entity, whose behavior is often recorded in local custome to enforce law and justice. See, Bambang Purnomo, "Menjalin Hukum Islam dalam Konsep Hukum Pidana Nasional", in Amrullah Ahmad SF, et. All., *Dimensi Hukum Islam dalam Hukum Nasional,* (Jakarta: Gema Insan Press, 1998), p. 157.

[14] In this perspective, Islamic law viewed from its source is divided into two: Islamic law as *persuasive source,* and Islamic law as *authority source.* See: Ismail Suny, "Kedudukan Hukum Islam dalam Sistem Ketatanegaraan Indonesia", in Amrullah Ahmad, et al. (ed.), *Dimensi Hukum Islam dalam Sistem Hukum Nasional,* (Jakarta: Gema Insani Press, 1996), p. 133.

Reform Order, the wish to amend the Constitution and to include "the seven words" reappears. In many moments of MPR (People's Consultative Council's meeting making the amendment to the 1945 Constitution as its agenda, some Islamic fractions try to raise the discourse of Jakarta Charter.[15]

It is interesting to observe closely the chronology of Islamic law history amid the largest Islam community in the world. The questions such as "how far is the effect of Indonesian Muslim majority side on the application of Islamic law in our homeland?" can be answered by elaborating the history of Islamic law since the Muslim community was present in Indonesia. In addition, the study on Islamic law history in Indonesia can also be one foothold for the Muslim particularly to determine the appropriate strategy in the future in making this nation close and familiar to Islamic law.

The historical process of Islamic law, colored with "conflict" with the previously prevailing tradition and political policies, and measures taken by previous Indonesian Islamic figures, can be at least the important material of study in the future. That history at least shows that the process of Islamizing a community is the one that can finish immediately.

Islamic Law in Pre-Dutch Colonialist Time

Daniel S. Lev states that Islam has created a supra-local social-political conception before the Dutch colonialist could unite the Archipelago in a government administration (colonialism).[16] The root of Islamic law history in archipelago area, according to some historicists, began in the first Hijriyah century, or about the seventh or eighth century AD. As the gate to enter into archipelago area, it is the north area of Sumatera Island that can be the starting point of proselytizing movement for the Muslim incomers. Gradually, such proselytizing movement then creates the first Islamic community in Peureulak, East Aceh. The development of Muslim community in that area was then followed with the establishment of the first Islamic kingdom in our Homeland in the thirteen century. This kingdom was known as Samudera Pasai, located in North Aceh area.

Those kingdoms, as reported in the history, established Islamic law as the positive or prevailing law. The establishment of Islamic law as a positive law in all of those kingdoms confirmed its experience with developing amid the Muslim community at that time. These facts are evidenced with the fikih literatures written by the archipelago Islamic scholars around the 16th and 17th centuries. And such the condition went on continuously until the Dutch merchants came to archipelago area.

Islamic Law in Dutch Colonialist Time

Van den Berg, as cited in Busthanul Arifin, concludes that originally, Indonesian Muslims still accepted and prevailed Islamic law comprehensively, called *reception in complex* theory. At that time, the Religion Court has a broad competency to decide on the incoming cases according to Islamic law, including the criminal law.[17]

The seed of Dutch colonialism in the archipelago area began with the presence of Dutch Trading Organization in East Indie, or called VOC. As a trading organization, VOC served more than its function. It was very possible because the Dutch Kingdom government indeed made VOC its hand extension in East Indies area. For that reason, in addition to undertaking the trading function, VOC also represents the Dutch Kingdom in undertaking the government functions, of course using the law they brought with them.[18]

After Thomas Stanford Raffles occupied the Governor position for 5 years (1811-1816) and the Dutch held control again over the East Indie area, it can be seen that the Dutch tried hard to hold its power strongly in this area. However, this attempt found difficulty due to the difference of religion between the colonizer and the colonized, particularly the Muslims recognizing the concept of *dâr al-Islâm* and *dâr al-harb.* That was why the Dutch government attempted to solve the problem in many ways, one of which was to spread Christian tenets to the native people and to restrict the enactment of Islamic law only to spiritual aspects only.[19]

The attempt of restricting the enactment of Islamic law by Dutch East Indies government is chronologically as follows: *firstly*, in the mid of 19th century, the Dutch East Indies government implemented a conscious Legal Politics[20], the policy that wanted to reorder and to change the legal life consciously in Indonesia with Dutch law. Based on the note presented by Scholten van Oud Haarlem, the Dutch Government instructed the use of religion law, institution, and native habit in the term of dispute occurring between them, as long as it is not in contradiction with the commonly recognized decency and justice principles. This last clause then positioned Islamic law below the Dutch law's subordination.

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[15] Ibnu Hadjar, "Syari'at Islam dan Hukum Positif di Indonesia", accessed on November 28 2016); obtained from: http://journal.uii.ac.id/index.php/JHI/article/viewFile/239/235.

[16] Daniel S. Lev, *Hukum dan Politik di Indonesia,* (terj.), (Jakarta: LP3ES, 1990), pp. 122-123.

[17] Busthanul Arifin, *Pelembagaan Hukum Islam di Indonesia: Akar Sejarah, Hambatan dan Prospeknya,* (Jakarta: Gema Insani Press, 1996), p. 35; see also, Ropaun Rambe and Mukri Agafi, *Implementasi Hukum Islam,* (Jakarta: PT Perca, 2001), p. 2.

[18] Busthanul Arifin, *Pelembagaan Hukum Islam di Indonesia.....,* p. 36.

[19] *Mimbar Hukum: Aktualisasi Hukum Islam,* no. 34, the 10th year of 1999, p. 46.

[20] Bismar Siregar, *Hukum Acara Pidana,* (Jakarta: Bina Cipta, 1987), p. 28.

Secondly, in 1925, the amendment was made to the Article 134 clause (2) of *Indische Staatsregeling* (the content of which is the same as that of article 78 *Regerringsreglement),* essentially mentioning that the civic cases between fellow Muslims will be resolved by the Islamic religion judge if it has been accepted by customary law and not determined otherwise by an ordinance. This weak position of Islamic law went on continuously until the Dutch East Indies' rule almost ended in Indonesian area in 1942.

Islamic Law in Japanese Colonial Time

Japanese colonial government had made some policies to attract the Indonesian Muslims' sympathy. These policies are: (1) the Japanese Military Commander's promise to protect and to promote Islam as the religion of majority Javanese populations; (2) the establishment of *Shumubu* (Islamic Religion Affairs Office) led by Indonesian people; (3) the permission of establishing Islamic society organization such as Muhammadiyah and NU; (4) the approval of establishing *Majelis Syura Muslimin Indonesia* (Masyumi) organization in October 1943; and (4) the approval of Hisbullah establishment as the reserve troops accompanying the establishment of PETA.

As such, there was almost no significant change in the position of Islamic law during Japanese occupation time in our homeland. Somehow, the Japanese occupation time was better than the Dutch one, particularly viewed from the new experience of Islamic leaders in governing the religious problems. Abikusno Tjokrosujoso stated that the Dutch government's policy has weakened the position of Islam. Islam had no skillful officials in religion division in masjids (mosques) or Islamic courts. The Dutch government implemented the political policy that weakened the position of Islam. When Japanese troops came, they realized that Islam was a power that can be utilized in Indonesia.

Islamic Law in Independence Time

Although Japanese Occupation gave the Indonesian Islamic figures the new experience, finally as the Japanese strategic measure was getting weaker to win the war that then opened the way toward Indonesian independency wider, Japanese government began to change its policy direction. It began to "turn to" and to support the Indonesian nationalist figures. In this case, Japanese government seemed to be more confident in the national group to lead Indonesia in the future. Therefore, it is unsurprising that some state agencies and committees, such as Adviser Council (*Sanyo Kaigi*) and *BPUPKI* (Dokuritsu Zyunbi Tyoosakai), were then given to the nationalist group.

Concretely, after Indonesia had been independent, the attempt of reforming the criminal law went on continuously. The systematic attempt in the attempt of replacing the Penal Code inherited from the Dutch East Indies government with the one more appropriate to the Indonesian nation's life philosophy and Indonesian people's legal consciousness, was taken incessantly. Even most product of material penal code during 1946-1947 basically represented the effort toward it.[21]

The prolonged debate about the foundation of state in BPUPKI finally ended with the birth of "Jakarta Charter". The most important compromise sentence in the Jakarta Charter lies primarily on the sentence "The State builds on belief in the divinity of God with the obligation of undertaking the Islamic sharia for its adherents".[22] This sentence, according to Muhammad Yamin, makes Indonesia neither secular nor Islamic state.

There were many arguments regarding this. But all versions leaned to Mohammad Hatta conveying the Christian grou's objection in East Indonesia. Hatta stated that he got this information from a Japanese naval officer on the evening, on August 17, 1945. However Letkol Shegeta Nishijima, the only Japanese naval officer Hatta saw at that time refuted it. He even mentioned that Latiharhary stated that objection. That demand seriousness should be questioned recalling that Latuharhary along with Maramis, another Christian figure from East Indonesia, had approved that compromise formulation during BPUPKI meeting.

Finally, in this period, the status of Islamic law remained to be vague. Isa Anshary said that the prominent event in this history was felt by Muslims as a "magic" still enwrapped with secrete mist, a politics encircling the Muslims' ideals.

Islamic Law in Independence Time

Nearly five years after independence proclamation, Indonesia entered into revolution times (1945-1950). Following the Japanese's defeat by the ally soldiers, the Dutch wanted to reoccupy the archipelago island. From some battles, the Dutch finally dominated some Indonesian areas successfully where they then founded small states intended to encircle Republic of Indonesia. Various negotiations and agreement were then entered into, until, finally, soon after Linggarjati, the *Konstitusi Indonesia Serikat* (Indonesian United Constitution) was released on December 27, 1949.

In the enactment of Indonesian United Constitution, the 1945 Constitution was stated as prevailing as the Indonesian United Constitution (thereafter called Konstitusi RIS) constituting one of 16 parts of United Republic of Indonesia (*Republik Indonesia Serikat*)'s state. *Konstitusi RIS* itself, when studied thoroughly, is difficult to be said as the one accommodating the aspiration of Islamic law. This constitution's preamble, for example, does not confirm at all the position of Islamic law just like the draft of 1945 Constitution approved by BPUPKI. Similarly, its body is also affected by liberalism developing in America and Western Europe, and the UN's version of Declaration of Human Rights formulation.

[21] Jimliy Asshiddiqie, *Pembaharuan Hukum Islam,* (Bandung: Aksara, 1996), pp. 19-22.

[22] Faisal, "Formalisasi Pidana Islam di Indonesia: Analisis Kasus Peneraan Hukum Pidana Islam di Nanggroe Aceh Darussalam", Thesis of Postgraduate School of UIN Syarif Hidayatullah Jakarta, 2009, p. 84.

When related to Islamic law, this change did not exert significant effect. For its position vagueness was still found, in both the preamble and the body of 1950 Provisional Constitution (thereafter called *UUDS 1950*), except the article 34, the formulation of which is the same as that of article 29 of 1945 Constitution, that "The State builds on the Belief in the divinity of God", and the state's guarantee for every people's freedom of undertaking their own religion's tenets. The article 43 also shows the state's participation in religion affairs. Another advantage of this UUDS 1950 is the opened opportunity of formulating Islamic law in the form of law and regulation. This opportunity is found in the provision of Article 102 of UUDS 1950. This opportunity has ever been utilized by the representatives of Muslims when proposing the bill of Muslim's marriage in 1954. While this attempt failed due to the nationalist's hindrance that proposed the bill of National Marriage as well. Thereafter, all political figures then nearly did not think of the development of new law material, because they concentrated on how to replace UUDS 1950 with the permanent (fixed) law.

Islamic Law in Old and New Orders

While the position of Islamic law as one of National legal sources was not too firm in the beginning of this Order, the attempts of confirming this were taken continuously. It can be seen from Mohammad Dahlan, a Religion Minister coming from NU group, attempting to propose the Bill of Muslims' marriage with strong support from Islamic fraction in DPR-GR (Legislative Assembly-Mutual Cooperation). Despite some failure, this attempt was then followed with the proposal of formal law draft governing the adjudication institution in Indonesia in 1970. This attempt then resulted in the Law No.14/1970, recognizing the Religion Court as one of adjudication body affiliated with the Supreme Court. In the presence of this law, according Hazairin, Islamic law has enacted directly as the law standing alone.

Islamic Law in Reform Age

After the collapse of Soeharto's regime, democracy and liberality thunder throughout Indonesia. Having passed through a long journey, Islamic law began to occupy its position gradually and surely in this age. The issuance of *Ketetapan MPR* (People's Consultative Council Provision) *No. III/MPR/2000* about Legal Source and Legislation Sequence Order result in the issuance of law based on Islamic law, particularly in Article 2 clause (7) confirming the accommodation of local ordinance based on certain condition of an area in Indonesia, and that this regulation can override the enactment of a more general regulation).

Moreover, in addition to the more obvious opportunity, the concrete attempt realizing Islamic law in the form of law and regulation had result in a real outcome in this era. One of its evidences is the Law Number 32 of 2004 and Kanun of Nangroe Aceh Darussalam province about the Implementation of Islamic Sharia Number 11 of 2002. Thus, in this reform era, there is a broad opportunity for the Islamic law system to enrich the legal tradition vocabularies in Indonesia. We can take reformative measures and even create new law originating from and building on the Islamic law system, to be the positive legal norm prevailing in our National law later.

Regulation and legislation becoming the part of National law in New Order time, the Law No.1 of 1974 about Marriage. Meanwhile, in reform period, the Law No.10 of 1998 about the Amendment to Law No.3 of 1992 about Banking had been released. Similarly, the Islamic regulation and Law becoming the positive law had been legislated, Islamic Law Compilation. Law No.17 of 1999 about the Organization of Hajj worship, and Law No.38 of 1999 about Zakat Management, Law about Sharia Banking, and etc. The Muslim's successful struggle in juridical manner in formalizing the Islamic sharia into the part of National law or into positive law is actually inseparable from the demand of the belief becoming the Muslims' obligation to enforce *khilâfah* and *imâmah* in undertaking Islam sharia in *kaffah* (comprehensive) manner wherever, whenever, however and by whoever without being limited by any view.

The formalization of Islamic Criminal Law

The formalization of Islamic sharia in some perspectives of Indonesian law order in fact is considered as complicated, because it is related to historical, ideological, political, juridical, religious, sociological, and cultural aspects, in both national and international scope. Those aspects, in fact, do not stand individually, but interdependently. For that reasons, the process of formalizing Islamic sharia in Indonesian law order takes a very long time, crossing some periods and generation, and generating some very crucial problems. Obviously, through formalization and legislation, Islamic law has shifted from the religion law authority (devin law) to the state law one.[23]

Islamic religion is the main Islamic doctrine in all of other Islamic tenets.[24] It is because Islamic law is viewed not only as a rule guiding the religious behavior of Muslims, but also the concrete embodiment of Allah's will amid the society. However, Islamic law grows and develops in various situations and conditions and spatial and temporal aspects, just like other disciplines. The development of Islamic law in the society is the logical consequence of its convergence with the social fact, and it then resulted in the epistemology of Islamic law (*fikih*).[25]

[23] Muhammad Tahir Azhari, *Negara Hukum: Suatu Studi tentang Prinsip-prinsipnya Dilihat dari Segi Hukum Islam, Implrmrntasinya pada Periode Negara Madinah dan Masa Kini,* (Jakarta: Bulan Bintang, 1992), p. 43.

[24] Joseph Schatch, *An Introduction to Islamic Law,* (London: Calender, 1996), p. 1.

[25] Mûsâ Kâmil, *al-Madkhal ilâ Tasyrî' al-Islâmî,* (Bayrût: Mu'assasah al-Risâlah, no year), p. 89; see also, Abû Ishâq al-Shîrâzî, *al-Lumâ' fî Ushûl al-Fiqh,* (Libanon: Dâr al-Kutub, 475 H), p. 6.

Fikih is the standard terminology for one discipline in Islam. The most fundamental definition of this term is a *mujtahid*'s understanding on religious texts (al-Qur'an and Hadith) in its interaction with the developing realities.[26] This understanding is needed before the content of text is implemented. The objective is to confirm the compatibility of the "text speaker (*almutakallim*)'s intention, the meaning according to the text receiver *(al-mutalaqqi)*, and the construction of language used *(al-uslûb al-lughawî)*.[27]

The Islamic law is called with some names[28] or the name representing the certain side or characteristic. There are at least four names often connected to Islamic law including: sharia, fikih, *syarak* and *kanun* law. Sharia is usually used in two definitions: broad and narrow. In broad definition, shariah refers to the collection of norms or instruction originating from God's revelation to govern belief system and concrete behavior of human beings in various relationship dimensions. Thus, sharia, in this case, includes two aspects of Islam religion: *akidah* (belief) and *amaliah* (deed).

Amaliah aspect in sharia can be broadly called sharia as well, the sharia in narrow definition referring to the collection of norms originating from God's revelation governing human being's concrete behavior in its various relationship dimensions. Thus, sharia in narrow definition is a part of sharia in broad definition. Sharia in narrow definition is called law, Islamic Law. However, this sharia concept in narrow meaning is not identical with the concept of law, because sharia (in narrow meaning) does not contain the norm of law *an sich* supported by the sanction that can be enforced compulsively, but it includes religious, decency, and social norms as well. Therefore, the conception of law in Islamic perspective is broader than what we usually know as the law limited to the norms supported by the sanction that can be enforced compulsively by the authorized power.

Fikih is another term used to call Islamic law. This term is usually used in two meanings. Firstly, it is used to refer to the science of law or parallel to the term Islamic jurisprudence in English, so that *fikih* refers to the definition of science studying the Islamic law. Secondly, it is used to refer to the law itself and parallel to the term *law* in English. It means that *fikih* is a collection of norms or rules governing behavior (conduct), both coming directly from Quran and Hadith and from the result of Islamic law expert's *ijtihad*. Generally, in practice, *fikih* in the second definition is used identically with sharia in the narrow definition. The difference lies only on its emphasis on the sharia representing and emphasizing that Islamic law has divine dimension and originates from Allah's God. Meanwhile, *fikih* represents another characteristic of Islamic law in which despite divine character, its application and elaboration in the society's real and concrete life is actually the humane effort.[29]

Syarak law refers to a unity of norms or rules. The collection of *syarak* law and norms creates *shariah* or *fikih*. *Syarak* norm or law creating shariah or *fikih* includes both *taklîfî* norms, like *wajib* (obligatory), *sunah*, *mubâh, makrûh,* and *haram*, and *wadh'î* such as 'cause' (contract is the cause of displacement of traded property), condition (one's own is the precondition for the legality of *wakaf*), and hindrance (murder delict becomes the hindrance for its perpetrator to get inheritance or exhortation from the heir or exhortation giver he/she has killed).

Kanun represents the part of sharia prevailed and integrated by the government to be the state law, such as marriage law (Law No.1 of 1974), *wakaf* law (Law No.41 of 2004), and etc. In addition, *kanun* also refers to a variety of legislations issued by the Government in Muslim country in the attempt of implementing shariah and filling in the gap and completing shariah. This action is called *siyâsah syar'iyyah*.[30]

These terms reveal the strategy and the tactic of Islamic law to keep revolving following the time development and change by maintaining its essential characteristics (features) as the law with divine dimension and originating from God. In its history, Islamic law always becomes the law prevailing in Muslim community. In Indonesia, Islamic law is one source of National law development, in addition to customary and Western laws. In Indonesian law order, Islamic law has a clear constitutional opportunity. The articles of 1945 contain some principles: no rule may be developed in contradiction with the religion rules and the state obligatorily undertakes the sharia of religions, Islamic sharia for Muslim, Hinduism sharia for Hindus, and Christian sharia for Christian, and so on.[31]

Islamic law is the part of Indonesian national law, as the implementation of the first principle of Pancasila and Article 29 clauses (1) and (2) of 1945 constitution. In this way, the provision of Islamic law needs the State's power to get the constitutional guarantee for its implementation.[32] From historical aspect, the fact shows that the struggle of Indonesian Muslims has never ceased since Islam entered into the archipelago, during kingdom and *kasultanan* periods in many areas. Similarly, during

[26] Muhammad al-Dasûqi dan Amînah al-Jabir, *Muqaddimah fi Dirâsah al-Fiqh al-Islâmî,* (Qatar: Dawhah, 1990), pp. 13-22.

[27] Ibn al-Qayyim al-Jawziyyah, *I'lâm al-Muwaqqi'în,* in 'Abd al-Ra'ûf Sa'dan (ed.) (Ttp. Maktabah al-Kulliyah al-Azhariyyah, no.year.), 1:219.

[28] Mustofa, *Hukum Islam Kontemporer,* (Jakarta: Sinar Grafika, 2003), p. 1.

[29] Akhmad Zaki Yamani, *Syariat Islam yang Abadi Menjawab Tantangan Masa Kini,* translation by Mahyuddin Syafii, (Bandung: Al-Ma'arif. 1986), p 17.

[30] Syamsul Anwar, *Studi Hukum Islam Kontemporer,* (Yogyakarta: Cakrawala, 2006), pp. 11-15.

[31] Hazairin, *Demokrasi Pancasila,* (Jakarta: Bina Aksara, 1985), p. 33-34.

[32] Rifyal Ka'bah, *Hukum Islam di Indonesia: Perspektif Muham-madiyah dan Nahdlatul Ulama,* (Jakarta: Universitas Yarsi Jakarta, 1999), pp. 264.

colonialism period, the Muslims have revealed persistence in struggling for the implementation of Islamic sharia although the colonials, particularly the Dutch, always attempted to keep the Muslims far away from their religion.

Entering into the independence time, it can be seen the violent debate and dispute among the founding fathers in determining the foundation of Indonesia State, in which the nationalist Muslims and secular Muslims were supported by non-Muslim community. Since entering into the beginning of independence time, the dissension has appeared among Indonesian Muslims, either ideologically or politically. The problems of state ideology related to the Islamic or nationalistic foundation of state have become the political elites' consumption. Then, the appearance of nationalistic perspective with the excuse of pluralism always becomes the hindrance every time the Islamic shariah is discussed through the draft of amendment to constitution or other legislation.

In Abdullahi Ahmed an-Na'im's view, Islamic law can be promoted and applied through adaptation with the modern Islamic community's need only. However, the principles of Islamic law are still accommodated in the formalization of State law through secular process, and it is not a direct legislation of Islamic law principles themselves.[33]

Islamic law is basically the law derived from Islamic religion doctrine. The normative character has been already inherent to Islamic religion doctrine so that Islam is known and the constitutional religion. Meanwhile in Islamic religion doctrine, law and *akidah* are inseparable from each other. It is from *akidah* that the legal institution is built, and through complying with the law, *akidah* aspect can be maintained. In Islam, Quran and Hadith are two primary sources of all rules of law that every Muslim should comply with.[34]

Allah SWT has established *'uqûbât* laws (punishment, sanction, and violation) in Islamic rule as the 'preventer' and 'redeemer'. As the preventer, it serves to prevent human being from committing the crime, and as the redeemer, it serves to redeem a Muslim's sin from Allah's punishment in the doomsday. The existence of *'uqûbât* in Islam, serving as preventer, has been mentioned in the Quran. "*And there is (the guarantee of) life sustainability for you in qishâsh, hi you the resourceful men, to make you pious"* (Q.s. al-Baqarah [2]: 179). The meaning of sentence "there is a guarantee of life" as the result of *qishash* implementation is the preservation of society life, rather than the defendant's life. It is because for it is a dead. Meanwhile, those witnessing the application of punishment will not be dared to kill, because the consequence of killing is being killed. Just like other punishments, it serves to prevent the crime from proliferating.

Meanwhile, crime is a deed considered as disgraceful by *syarak*. For that reason, a deed cannot be categorized into crime, except when it has been specified in *nas syarak* (Quran, hadith, and what designated by both of them). If human being breaks Allah's instruction/prohibition, it means that he/she has done disgraceful deed, and is considered as committing crime, so that he/she should be punished due to the crime he/she has committed. It is because without the enactment of punishment against the breakers, the law will be meaningless. An instruction will be valueless when there is no reply (punishment) for the breakers (violator) neglecting the instruction. Islamic sharia has explained that the criminal perpetrator will be punished, both in the world and in hereafter. Allah will punish them in hereafter, with real punishment.[35]

Thus, there are so many verses representing Allah's terrifying torture for those sinful in hereafter. Those paying serious attention to this will feel horrified so that they do not underestimate all punishments in the world. However, Allah is merciful for His servants who believe in His sayings; He provides an alternative that can "redeem" their sins in hereafter, a series of criminal law in the world. Allah has explained the criminal laws for every perpetrator of crime such as stealing, acting sexual intercourse out of marriage, drinking liquor, dropping others' teeth off, and etc, in Qur'an and Hadith, either globally or in detailed. Allah authorizes the *Imam* [leader of communal prayer] (*khalifah*, the single leader of all Muslimin) and their representatives (judges), to apply sanctions as specified by Islamic State *(Khilâfah),* in the form of *hudûd, takzir,* or kafârah (fine). This imposed punishment will nullify the torture against the crime perpetrator in hereafter.

The criminal punishment belongs to public law domain. Criminal law is the law governing the relationship between law subject in the terms of deeds required and prohibited by law and legislation and leading to the imposition of sanction in the form of condemnation and/or fine for those breaking it.

In criminal law, there are two types of deed: crime and violation. Crime is the deed not only in contradiction with the legislation but also in contradiction with moral value, religion value, and the community's feeling of justice. The perpetrators of violation in the form of crime imposed with sanction in the form of condemnation (punishment) are those stealing, murdering, making sexual intercourse out of marriage, raping, and etc. Meanwhile, the violation is the deed prohibited by legislation only but does not affect others directly, such as not wearing helmet, not wearing seatbelt during driving, and etc. In Indonesia, criminal law governed generally in the Penal Code (*Kitab Undang-undang Hukum Pidana*, thereafter called KUHP), constituting the legacy of Dutch colonial period, formerly called *Wetboek van Straafrecht* (WvS). KUHP is *lex generalis* for governing the criminal law in Indonesia in which the general principle is contained and becomes the foundation for all criminal provision governed out of KUHP (*lex specialis*).[36]

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[33] Abdullahi Ahmed an-Na'im, *Islam dan Negara Sekular: Menegosiasi Masa Depan Syariah,* translation by Sri Murniati, (Bandung: Mizan, 2007), pp. 36-37.

[34] Ratno Lukito, *Hukum Sakral dan Hukum Sekuler: Studi tentang Konflik dan Resolusi dalam Sistem Hukum Indonesia,* translation by Inyiak Ridwan Muzir (Jakarta: Pustaka Alvabet, 2008), pp. 73-75.

[35] See Q.s. Fâthir [35]:36; Q.s. al-Hâqqah [69]: 35-37; and Q.s. al-Ma'ârij [70]: 15-16.

[36] Obtained from http://id.wikipedia.org/wiki/Hukum, accessed on November 20, 2016.

Criminal law in Islam is called "*kisas*", in which soul is replied with soul, hand with hand. Nevertheless, in Islam when there is an individual committing murder, he/she will not be killed directly but should pass through the examination process to find out whether or not he/she killed intentionally. If the murder is committed intentionally, the punishment is being killed. If it is committed unintentionally, the perpetrator should obligatorily liberate the slave; if there is no slave, he/she should pay with 100 camels. If he/she gets forgiveness from the victim's family, he/she will not be punished.[37]

To enforce the material law, there should be a procedural law or so-called formal law. Procedural law is the provision governing how and who is authorized to enforce the material law in the case of material law violation. Without a clear and adequate procedural law, those authorized to enforce the material law will found difficulty of enforcing the material law. To enforce the provision of criminal material law, the criminal procedural law is required. For civil material law, the state administrative procedural law is required. The criminal procedural law should be mastered particularly by police officers, public prosecutor, advocate, judge, and penitentiary officer,

The police officer should master the criminal procedural law particularly the one governing investigation and examination, because the police officer's basic duty, according to criminal procedural law (*hukum acara pidana*, thereafter called KUHAP) is to conduct investigation and examination. The public prosecutor's duty is to prosecute and to implement the judge's verdict. For that reason, the judge obligatorily master the procedural law related to its duty. Meanwhile, advocate and judge should master the civil procedural law, including the state administrative procedural law. It is because in civil procedural law and state administrative procedural law, both police officers and public prosecutor are not given the role just like in criminal procedural law. It is advocate that represents an individual to file lawsuit, either civil or state administrative lawsuit, against others considered as harming his/her client. Such t he lawsuit will be examined and decided by the judge. The prosecuted can authorize an advocate as well to represent him/her to ward off the lawsuit.

The enforcement of law supremacy is highly dependent on the honesty of law enforcers in enforcing the law expected to uphold truth, justice, and honesty. Those law enforcers are judge, public prosecutor, police officer, and penitentiary institution officer. If the five pillars of law enforcers actually enforce the law by upholding the values aforementioned, the society will respect highly the law enforcers. Through the higher respect, the society will be spurred to comply with the law.

In the discourse of Islamic criminal law formalization and implementation, Islamic modernism's and Islamic fundamentalism's perspectives are relevant to be raised. Modernistic Islam considers that the doctrine related to *muamalah* problem is general in nature so that *ijtihad* should be promoted. This fundamental view is closely related to the law problem to be enacted in the state. Because modernistic Islam views that the beginning Islam tradition is the law resulting from *ijtihad* over the basis of shariah as the source of law. Its enactment is conducted as the consensus, the decision of all people's representatives in the parliament. Meanwhile, according to Islam modernism, sharia law is the supreme source of law within the state.[38] For Islam modernism, the implementation of Islamic tenet and law should take the local condition and time into account. Islamic law to be implemented is the modern one, the law corresponding to the context of corresponding Islamic State.

The term sharia as the source of law is different from the definition of *shariah* as the law. As the source of law, sharia is not implemented directly, but detailed first into a law form enabling its enactment in certain adjudication system. For Islamic modernism, the law regulation *hudûd* and *qishâsh* is considered as maximum law (ultimum remedium). The detail of such the provision is very desirable, for example the qualification of *hudid* delict.[39]

In relation to the enforcement of Islamic sharia, in this case Islamic criminal law in Indonesia, there are at least four perspective groups. *Firstly*, those wishing the Islamic criminal law to be enforced entirely and not intervened with by other legitimate laws. *Secondly*, those believing that the feasibility of Islamic criminal law in parallel with Western Law and Customary law becomes the source of criminal law in Indonesia, thirdly, those believing that Islamic sharia should be enforced entirely so that there should be Islamic government. Fourthly, those arguing that the most important thing is the enforcement of Islamic sharia values.[40]

From some information above, there are several alternative implementations of Islamic criminal law in Indonesia: institution transformation, National criminal law system transformation into the Islamic one, National criminal law Islamizing, Religious Court's competency expansion, transformation of Islamic criminal law norms and concepts into the National one, and optimization of Local Government law.[41] Each of offerings has varying implication, affected by the factors enclosing respective problems.

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[37] Obtained from http://id.wikipedia.org/wiki/Hukum, accessed on November 20, 2016.

[38] Yusril Ihza Mahendra, *Modernisme dan Fundamentalisme dalam Politik Islam: Perbandingan Partai Masyumi (Indonesia) dan Partai Jamâ'at-i-Islâmî (Pakistan),* translation by. Mun'im A. Sirry (Jakarta: Paramadina, 1999), p. 237-238.

[39] *Ibid.*

[40] Topo Santoso, *Membumikan Hukum Pidana Islam: Penegakan Syaiat dalam Wacana dan Agenda,* (Jakarta: Gema Insani Press, 2003), p. 146.

[41] *Ibid.,* pp. 99-100.

Briefly, the enforcement of Islamic criminal law actually supports the reform of National criminal law and vice versa. Islamic sharia as the law originating from God's revelation will, of course, give soul and spirit to the National criminal law respected and obeyed by Indonesian nation, the majority of which are Muslim, and also by non-Muslim Indonesian people. In this context, the formalization of Islamic criminal law in Indonesia into the National criminal law is a necessity and will not surely break and hit the preexisting rules. Despite the preexisting practice, the movement and the journey of Islamic criminal law legislation into the National one still run falteringly or there are still some weaknesses in many aspects. Even more ironically, some people still consider that Islamic criminal law is the one in contradiction with Human Rights. Therefore, this paper offers an alternative and an option all at once in contextualizing the Islamic criminal law in the frame of National criminal law order as the manifestation of creating the more beautiful and better Republic of Indonesia country.

The transformation of Islamic criminal law into the National one remains to be the agenda and primary issue, when Islamic law keeps taking a part in regulation pattern of modern Indonesian people. In this context, Abdurrahman Wahid said that through integrating Islamic law into the National one, a variety of epistemological problems regarding Islamic law can be solved themselves. To achieve such the transformation, Islamic law should be able to develop a dynamic character for itself, one way of which is to make itself supporting the transformation of National law transformation in this development nature. Islamic law should have multidimensional approach to life, and not only bond to the normative provision that has precipitated for a long time, even nearly becoming the fossil.[42]

Transformation of Islamic criminal law in Indonesian contemporary law system can be primarily based on the two main arguments. *Firstly*, cultural, historical, and sociological argumentation. Secondly, normative and legal constitutional argumentation. If cultural, historical, and sociological argumentation is related to the empirical fact of society's acceptance to the existence of Islamic sharia law in Indonesian contemporary law system as a series inseparable from its existence in pre-independence time, the normative and legal constitutional argumentation is, of course, related to the constitutional legal politics foundation based on the 1945 Constitution and the authentic demand of Islamic law.

The empirical fact of Islamic law as *the living law* in Indonesian people's daily interaction shows clearly that the existence of Islamic sharia law in Indonesian law system has actually had "historical root" in the Muslims' awareness, as the Islamic religion tenets themselves grow and develop. The intended historical root of Islamic law existence is, among others, represented with *Receptio in Complexu* and *Receptie* theories.[43]

This National law building, including criminal law, has been conducted for a long time. GBHN has outlined the attempt of building and establishing the National law during 1973-1999, despite considerable effect of the ruler's politics in practice. The building of national law largely originates from: Customary, religious, and foreign laws, particularly Western law.[44] It is because theoretically the sources of Islamic law, customary law, Western law, and others have equal value and opportunity to be the source in the implementation of punishment in Indonesia, not only the existence of Muslim in Indonesia with majority and largest number in the world, but also the effectiveness of its punishment or sanction.

The condemnation (punishment) in Islam should be positioned rationally in modern world. The technical matters in the implementation of criminal sanction can be adjusted with the time progress, without abandoning the basic principle of punishment aiming to minimize the humanity crime occurrence. Choosing the types of punishment originating from Quran and Hadith having spiritual values and hereafter dimension can affect its application psychologically. Otherwise, applying the concept of criminal sanction based on merely the human's thinking will be ineffective and can change and be abandoned by the time development. In this context, Islam provides an alternative punishment in the form of *kisas, diat* and *takzir*. The punishment should not be viewed from primitive and modern parameter but should emphasize on its effectiveness.

Conclusion

From the elaboration above, it can be stated that the enforcement and formalization of Islamic criminal law into the National one will be complementary each other and the answer to the endless criminality problems until today. It is the time for the government to reconstruct the existing criminal law and it is the time to include the values of Islamic criminal law into the National Law. It is noteworthy that the objectification of Islamic law makes Quran law the positive law first, the establishment of which is based on the mutual approval of citizen. It should be confirmed here that religious law is an absolute element of National law. In this case, the Indonesian people's law orderliness needs the regulation and legislation consistent with/and originating from the religious tenets.

[42] Abdurrahman Wahid, *Islam Kosmopolitan: Nilai-nilai Indonesia dan Transformasi Kebudayaan,* (Jakarta: The Wahid Institute, 2007), hlm. 50.

[43] For more detailed about *Receptio in Complexu* and *Receptie* theories see also: Muhammad Daud Ali, *Hukum Islam: Pengantar Ilmu Hukum dan Tata Hukum Islam di Indonesia,* (Jakarta: PT. Raja Grafindo Persada, 1999), p. 219. See also: Muhammad Idris Ramulyo, *Asas-asas Hukum Islam: Sejarah Timbul dan Berkembangnya Hukum Islam di Indonesia,* (Jakarta: Sinar Grafika, 1995), pp. 58-59.

[44] A. Qodri Azizy, *Eklektisisme Hukum Nasional: Kompetisi antara Hukum Islam dan Hukum Umum,* (Yogyakarta: Gama Media, 2002), pp. 111.

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