

Syari'ah Regulations and Democratic Challenges in Indonesia¹

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It has been a phenomenon that countries with Islam as a majority religion including Indonesia are facing more demands from certain parties to apply the Islamic law (Fealy & Hooker, 2006). Incorporating the Islamic law, or also known as Syariah law, in state law is apparently not something new. Family law (*akhwal asy-shahsiyah*) has been applied since a long time ago. When Indonesia was colonized by the Netherlands, the relations between Indonesian Moslem and the Dutch were facilitated under an Islamic-based bureaucracy. After Indonesia achieved its independence, this bureaucracy was continued under the Religion Affairs Ministry and Islamic Religious Court (Hooker, 2008:9-18). Currently, more Moslems in Europe are also asking for the application of the Islamic law.

However, the colonization did not allow the Islamic law to be applied in a *mu'amalah* relation and criminal action (*jinayah*). It remained and was applied in an authoritarian way when Indonesia was under the new-order period. The colonization accommodated and facilitated the Islamic law (family law) as the Dutch saw it as a local custom that would not bother the Netherlands policies in Indonesia.

But applying the Islamic law in *mu'amalah* relation and criminal action could have affected their political authority. These aspects of Syariah were also deemed as contrary to western philosophy like the principle of equal rights among citizens. The *mu'amalah* relation and criminal action were dealt with by the western laws (Peters, 2005:03-109; Hooker, 2008:3-6).

The demand from certain parties to handle *mu'amalah* relation and criminal action with the Islamic law is actually a logical consequence of the democratic process and even the globalization process. It happens especially when a community is just released from a colonization era (Na'im, 2007:5-40).

Now more people realize that ignoring desire of Moslems who wish to apply the Islamic law in a long time will create a perspective of anti-change. Although the law is not applied, it stays in the hearts of Moslems'. They believe that the law is a Islamic heritage that cannot be changed and modified. For hundreds of years in the colonization era, the Islamic law, especially in *mu'amalah* and *jinayat*, was alienated from the state law.

The Islamic law was studied continuously in various Islamic centers and boarding schools in Indonesia and in the world. It is maintained in ancient manuscripts, and

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passed on by generations. However, it has not evolved or been developed so it can only be applied limitedly to current problems (Hooker, 2008:43-83). This unchanged, not-developed law is the one proposed by many Moslems when they are talking about the application of the Islamic law.

Based on a perspective of change and situation in a post-colonization era and also based on dominance of modern western culture, the proposal of having a Syariah law is part of democratization and human rights. It is a historic follow-up of a freedom, nationalism, and ideology fighting in the past. The fighting now is not only in a frame of Islamic-based ideology or between East and West (read: modernization) but a system built in a state.

The proposal for adopting complete Islamic law appears on the surface as community who has faith in the Islamic law fights for it. They wish to join the political activities that are now open for them after democratization, while their Islamic understanding is still in a basic, static level. They are now faced with community development that is far away from what they understand, in terms of time, system and legal materials.

Everyone can now join in political activities like being a legislator at the parliament and also local parliament. The concept of the Syariah law becomes vary. There is a competition between the Islamic law maintained in a local custom (Lukito, 2003:17-31) and the national law which is based on Dutch law.

So now there is a dilemma. On one side, democracy should accommodate aspiration of all members of the community. While on the other side, it is a fact that a culture and its values cannot always be in line with democratic principles. How to address this problem seems to be the main challenge right now in Indonesia.

In general, there are two approaches for Moslems to answer the challenge. First approach is to see the Islamic legal and teaching system in its entirety as a process. And to change the paradigm of the Islamic law, so it is adjusted to the modern paradigm. According to history, the Islamic law was born and developed in a traditional community that was tied to each other (*Gemainschaft*) by ethnicity, religion, or other identities (Saeed, 2005:37-40; Na'im 2007:65-73). From here, the Islamic state established. It stood between the Islamic State (*dar al-Islam*), the war state (*dar al-harb*) and peaceful state (*dar as-sulh*) (Salim, 2008:33-41).

This first approach changes the whole paradigm of the traditional Islamic law and incorporates it to the modern paradigm (*Gesellschaft*) so it can be applied in a community under a nation-state, a constitutional system and modern international law (Na'im, 1994; Saeed et. al.: 36-37).

This model does not refuse all the aspects of the Islamic law. The community in the nation-state system is not tied to each other by certain religion but by national purposes that are derived from a constitution (Anderson, 1999:13-40; An-Na'im, 2007:65-70). According to this model, the application of the Islamic law should consider, what An-Naim call, rational and public reasons (An-Naim, 2007:155-160).

Its appliance and accommodation does not only depend on the democratic process in a nation but also the contents of the law should be in line with the nationalist, citizenship, and human rights principles. The same reasons should be applied in a context of international law (An-Na'im, 1994). Hence, the whole Islamic law passed on by generations, as well as western law and local custom, should be seen as raw materials for the sake of the national law to build the national law. Its implementation should consider the democracy process and public reasons.²

The second approach is keeping the unchanged, not-developed Islamic law and force it to be applied in a modern system, both ideologically and practically. To apply it ideologically would mean that the state will ignore diversity and make Islam the only formal system. Abul A'la Maududi and Sayyid Qutb are thinkers of this approach, as well as states such as Iran, Pakistan, and Saudi Arabia.

In this model, all laws should be tested by Ulemas understanding of fiqh and so the Ulemas have highest legal authority here. Democracy can be applied but the final decision is still in hands of the . The law cannot be criticized or argued about in or by the public.

Both approaches have their own consequences. The first approach is based on a modern constitutional system and its implementation can be different in many countries. Islamic law can be used as long as it is aligned with equality, citizenship, and human rights principles.

By implementing the first approach, people can intellectually criticize the law without ignoring the main idea of it (*maqaasid asy-syari'ah*). For example, the arranging of almsgiving, better known as *zakat*. All Moslems with certain amount of assets (*nishab*) should allocate 2.5 percent of their total asset for *zakat*. By considering the income gap, this approach will allow reconsideration over criteria of *zakat* giver (*muzakki*)³ and *zakat* recipient (*mustahiq*)⁴.

This question can come up when the *zakat* is accommodated by the state. The situation will be different when *zakat* is handled by the Islamic community on a voluntary basis where it depends only on the agreement made by religious figures and community.

² According to Peters (2005, page 174-185), the Islamic criminal code gives significant contribution to modern western criminal code. Unfortunately, it is not developed and so it is replaced by western law. Peters provides possibility that the Islamic criminal code can be applied again by adjusting it first to citizenship and human rights principles.

³ There is a debate whether a *zakat* for professionals is an obligation or not. Its percentage is also a matter of debate.

⁴ It is still a matter of debate whether *zakat* can be distributed for non-Moslems. How to have a sustainable *zakat* distribution is also still being debated.

In the second approach, the implementation of the Islamic law follows the original doctrine (not-developed law). Variations are allowed as long as they refer to the original doctrine. For example, the Syariah banking. Its implementation does not have to be under the Islamic state. It forbids bank interest and replaces it with a profit sharing, for example *mudhorobah* system. In this case, there is no opportunity to question the system by the public: for example can profit-sharing system influence the economic distribution of funds more fairly than bank-interest system.

According to Daniel E. Price, the Islamic law and its implementation is divided into five categories (Salim and Azra, 2003:11). First is private law like a marital law, wakaf, and sodaqah (deeds). Second are the economic matters like banking and commercial business. Third are religious practices in public space like head-cover for women, prohibition on alcohol, gambling, and others that are considered contradictory to Islamic moral standards. Fourth, is the criminal law like *hudud*. And fifth, is about Islam as the foundation of the state. Various religion-based regulations and drafts⁵ are included in one of these five categories.

Each of five categories can be tested with the nation-state and human-rights principles. Although the Islamic private law has been applied for hundreds of years, the debate is still found in a nation-state. For example about mixed faith that is arranged in a regulation No.1/1974.

The application of the Syariah regulation in Indonesia can have positive as well as negative effects. It can reduce alcohol drinkers but it can limit freedom of expression when it enters private areas like how women should dress and behave, and so it will lead to discrimination of women and non-Moslems (Sukron and Chaider, 2007:145-214).

According to research by the Wahid Institute⁶, the making of religion-based regulations is part of political dynamic that is influenced by local political issues. Political groups use religious issue to get political sympathy from voters and public.

⁵According Robin Bush, there are around 78 religion-based regional regulations in 52 regencies and cities, not to mention decree by Regent, Mayor, and Governor and regulation draft by city council (DPRD) in Indonesia. (Robin L. Bush, , 2007, "Regional 'Shari'ah' Regulation in Indonesia: Anomaly or Symptom?"). This paper was presented at the forum of Indonesia Update on September 2007 at ANU, Camberra (not published)).

⁶ The Wahid Institute conducted a research about religion-based regulation in 2008 in Java Island including Pasuruan (regulation about Ramadhan), Jombang (anti-prostitution), DI Yogyakarta (regulation draft about Jilbab -cancelled), Surakarta (still in a debating process), Cianjur in West Java about *Gerbang Marhamah*, Tasikmalaya dan Banjar (still in a debating process at community and regional parliament levels).

Therefore, it shows weakness of politicians and civil society in responding to local troubles and in prioritizing problems. For example, *jilbab* (head-cover for Moslem woman), for some politicians and public figures, Jilbab is considered an urgent matter that can solve morality matters. It is deemed more important than poverty and educational issues.

To conclude the idea of having religion-based regulations is not a result from the accumulation of the political powers in the hands of those supporting the non-changed Islamic law which can endanger the state principles like Pancasila and UUD 1945 (the constitution). But in terms of its content, the regulations tend to be disturbing since they are contradictive to democracy principles like freedom of expression and of belief. They discriminate against women and non-Moslems. When these religion-based principles are accommodated by national laws, it will be difficult to reverse them, especially if the state is in under an authoritarian governance.

From the point of view of internal developments in Islam, the ideological paradigm is still stronger in seeing the Islamic law for *muamalah* and *jinayah* affairs than placing it as a solution. Thus, pro-democracy movement should not respond the creation of religion-based regulation with great deal of attention and efforts. However, in terms of its legal materials, it indeed needs special attention and should be handled in a cautious way. Responding to this phenomenon in various ways is actually a valuable learning process for democracy development in Indonesia.***

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