

Prophetic Law and Social Engineering: The Interaction between Religious Legal System and Customary Local System in Respect to Maintain and Promote Religious Values in Indonesian National Legal System

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Abstract

Legal system development certainly cannot be separated from sociological developments that include customs, norms, culture, and religion. In terms of rapid economic development, no doubt, a country is required to have a rule of law that can accommodate these needs and could cover various sociological spectrums that exist and are constantly changing within its people. Indonesia as a country with the largest Muslim majority in the world, while the notion of the whole state is based on Pancasila with diverse customs and cultural norms is certainly faced with several challenges, one of which is the transformation and the implementation of living law that includes religious, as well as indigenous law into a state law. The field of economics as an example of a social event that continues to revolve, will significantly be affected in the development of legal and social science. Sharia law is no longer a codification of exclusive law limited to certain groups of people but has become a general rule not only in Indonesia but also internationally with the existence of Islamic banking system. This phenomenon certainly changes the view of the legal order that applies in society if the change is assessed through the eyes of the sociology of law in Indonesia.

Keywords Sociology of law, law, society, economy, economic sharia, sharia law, prophetic.

INTRODUCTION

The 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) is an embodiment of Indonesian governance and regulations. Starting with the 1945 Constitution of the Republic of Indonesia as the highest rules of law in the Republic of Indonesia (NKRI), naturally it then becomes the main legal standard in formulating domestic regulations. Therefore, in addition to the NRI Constitution being the central umbrella for regulatory provisions in Indonesia, it is also a guide for the preparation and implementation of a regulation, including regulations such as Regional Provisions or *Peraturan Daerah* (hereinafter abbreviated as *Perda*) which are a part of hierarchy of laws and regulations in Indonesia. Especially with the affirmation stipulated in the Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia which stated that as a law-abiding state, Indonesian shall abide to its rules of law in all categories of aspects in regards to its social conduct, nationality, dan down to its government and state sovereignty.¹

The arrangements contained in the 1945 Constitution, then triggers the rise to various kinds of laws and regulations, either because they were formed and/or determined based on attribution or delegation. Considering that the 1945 Constitution is a standard regulation, it only regulates universally basic matters. This includes the formulation of Indonesian

¹Murdoko, 2019, Regional Regulations with Religious Value in Aceh and Bali, Yogyakarta: CV Kanca Baba Adirasa, p. 1.



domestic provisions which are as follows: (a) limiting the power of state organs, (b) regulating the relationship between state institutions with one another, (c) regulating the power relationship between state institutions and citizens, and (d) protection of human rights. When referring to the Articles stipulated under the 1945 Constitution, the types of laws and regulations that are explicitly mentioned are very limited in number, namely: First, The 1945 Constitution (Article 5 paragraph (1) and Article 20 of the Constitution). Second, Government Regulation in Lieu of the 1945 Constitution (Article 22 of Constitution). Third, Government Regulations (Article 5 paragraph (2) of the Constitution), and Fourth, Regional Provisions (Article 18 paragraph (6) of the Constitution). The elaboration of various types of laws and regulations and the procedures for their formation are regulated in detail and comprehensively in Law Number 12 of 2011 concerning the Formation of the Legislations or *Pembentukan Peraturan Perundang-undangan* (hereinafter abbreviated as PPP Law). Article 7 of the PPP Law confirms the hierarchical order of Indonesian Legislations:² a) the 1945 Constitution of the Republic of Indonesia; b) Decree of the People's Consultative Assembly; c) Laws/Government Regulations; d) Government Regulations; e) Presidential Decree; f) Provincial Regulations; and g) Substitute District/City Regulations.

Referring to the provisions of the Article 7 paragraph (1) of the PPP Law above, that the Regional Regulation (Perda) is one type of legislation recognized in Indonesia. If you look at the provisions of the 1945 Constitution of the Republic of Indonesia, the recognition of Regional Regulations as a type of legislation is based on the provisions of Article 18 paragraph (6) of the 1945 Constitution which states that regional governments have the right to stipulate regional regulations and other regulations to carry out autonomy and assistance tasks. In addition to being further regulated in the PPP Law, the stipulation of Regional Regulations is also regulated in Law Number 23 of 2014 concerning Regional Government. The existence of regional autonomy This in turn resulted in the regions competing to regulate all matters relating to their regions into a regional regulation, especially the regional regulation on regional taxes and levies. On the other hand, there are also some people in the regions who want their regions to produce regional regulations with religious nuances, which are increasingly widespread, intriguing pros and cons.³

If traced, there are quite several regional regulations with religious nuances in Indonesia. These local regulations are spread in almost all provinces in Indonesia. According to research in 1999-2009 there are about 151 regional legal products with religious nuances, especially Islam, issued by local governments in Indonesia, whether in the form of Regional Regulations, Decrees, Appeals, and so on. The regulation with a religious nuance has caused a lot of controversy, not only from the Indonesian non-Muslim group who challenged the regulation for its discriminatory tendencies, however, some of Indonesian Muslims also shown their displeasure towards the application of *Perda* that purposely prioritise majority belief.

²Ibid., p. 2.

³Alim, Muhammad, "Shariah-based Regional Regulations and Its Relationship with the Constitution", Journal of Law Ius Quia Iustum, FH UII, No. 1 Vol. 17 (January 2010), p. 120.

Constitutionally, regions do have the flexibility to regulate their own regional affairs in accordance with the interests and aspirations that arise in each region. The existence of the provisions of Article 18 of the 1945 Constitution also strengthens the position of the regions to be able to take care of the regional government agenda, so that it seems difficult to be shaken from excessive intervention of the central government to its regional affairs.

Article 18 paragraph (1) of the 1945 Constitution stipulates that the Republic of Indonesia (NKRI) is divided into provincial regions and the provincial area is divided into regencies and cities, where each province, district and city has a regional government, which is regulated under the Constitution. According to Jimly Asshiddiqie, the term "divided up" is intended to emphasize that the relationship between the Central and Regional Governments is hierarchical and vertical.⁴ Then the provisions of Article 18A paragraph (1) which states that: The relationship of authority between the Central Government and the Provincial, Regency, and City Governments, or between provinces and regencies and cities, is regulated by law by considering the specificity and diversity of the regions. Regarding the article, Jimly explained that what is meant by "regional specificity" is the specificity or privilege found in each region, while regional diversity is the diversity between regions, each of which differs from one another.

As how the situation prevails in Aceh, through Law Number 11 of 2006 concerning the Government of Aceh (hereinafter abbreviated as UU PA). The law is the legal umbrella for the Aceh Government to implement Sharia Law. As an elaboration in carrying out basic matters against the provisions of the law, the Aceh Government has the right to issue a further regulatory legal instrument in the form of a *qanun*.⁵

The provision of special guarantees for the implementation of Sharia Law does not mean that it is free from the pros and cons. One of the things that is being discussed is related to the enforcement of the criminal provisions in the Aceh Government, in which the punishment is in the form of caning for those who violate the *qanun* in Aceh. With regard to this provision, many parties then questioned that the provision of the caning punishment was inappropriate or contrary to a higher rule, namely the Indonesian Criminal Code (KUHP).

Starting from this, against the existing controversy, there is an interesting thing about Islam in Indonesia, namely the development of democratic politics, in which the development of Indonesian politics also provides space for the revival of the law that lives in society (Sharia/Islamic law and customary law). There has been a very significant transformation when Islamic law and customary law were transformed into a state law, whereas, in a unitary state there should only be one state law (positive law) but historical and sociological facts show different facts, the diversity of laws that exist in society which initially could not be used as state formal law since the reformation process proved to have undergone a process of fragmentation or decentralization. Therefore, this paper will attempt to provide an answer to the empirical reality of the development of pluralistic Indonesian

⁴Asshiddiqie, Jimly, 2002, Consolidation of the Manuscripts of the 1945 Constitution After the Fourth Amendment, Jakarta: PSHTN FH UI, p. 21.

⁵See Article 13 paragraph (1) of Law Number 11 of 2006 concerning the Government of Aceh.



law, both in terms of legal substance and in its structure/institution. For example, the addition of state institutions that did not previously exist in the Act were transplanted into other important state institutions (auxiliary state organs) which were adopted from the common law legal system such as the establishment of the Constitutional Court, the establishment of the Judicial Commission, and the establishment of the Ombudsman.

Although the addition of these state agencies does not necessarily provide benefits for the quality of a clean and anti-corruption state, in fact the formation of other institutions has also been followed by the formation of religious bodies including religious and customary institutions both at the central and national levels area. The emergence of the diversity of state institutions and religious and customary legal entities occurred more dramatically after the amendment to the 1945 Constitution. This fact shows that the socio-political and legal conditions of Indonesia during the reformation period were far different from those of the New Order government. This significant increase in legal development can be proven both at the central and regional levels.

It is proven that the issue of Sharia law that used to be a phobia has not become an obstacle to the ratification of national laws and regulations. Because the issue of sharia economics is not only in the interests of Muslims, but it contains aspects of national interest such as exports and imports. This means that in Sharia law it contains universal benefits for humans who live in one country.

IMPLEMENTATION METHOD

According to Soekanto, from the point of view of the purpose of legal research, research methods are divided into two types, namely normative legal research, or literature, and sociological or empirical legal research.⁶ The type of research method used in writing this article is juridical-normative law research. Juridical-normative research is where the law is conceptualized as what is written in the legislation (law in books) or the law is conceptualized as a rule or norm which is a benchmark for human behavior that is considered appropriate.⁷ Normative law includes research on legal principles, legal systematics, level of legal synchronization, legal history, and legal comparisons.⁸ The nature of this research was carried out in a descriptive and exploratory manner, based on sources or data from books, journals, and several dissertations that had been conducted in-depth research. Descriptive research is research that is intended to provide data that is as accurate as possible about humans, circumstances, or other symptoms.⁹

The data collection technique used in the preparation of this research is a normative-qualitative technique, so that all materials obtained from the results of literature studies as well as scientific observations and analysis are then systematically compiled and assembled into a descriptive-analytic paragraph framework. In this study, the research results will be

⁶Soekanto, Soerjono, 2010. Introduction to Legal Research. Jakarta: UI Press.

⁷Amirudin and Asikin, H. Zainal, 2004, Introduction to Legal Research Methods, Jakarta: PT Raja Grafindo Persada, p. 118.

⁸Soekanto, Soerjono, *Op. Cit.*, p. 51.

⁹Istanto, F. Sugeng, 2007, Legal Research, Yogyakarta: CV. Double, p. 48.

an input and formulation for legislators to reformulate existing laws and regulations, so that they can provide legal protections and preventions to similar matters that could happen in the future.¹⁰

RESULTS AND DISCUSSION

Concept of Prophetic Law vs Pluralism Justice System

In the Prophetic Law concept put forward by Sandors Goodhart, he explained that prophetic ideas have special meaning for us in the modern world, which for us is associated with religiosity or false theology, as in the expression "*nouveau prophétisme*." We seldom recognize the true explanatory power of prophecy, it is because we have lived within the confines of Platonic essentialism which has kept that knowledge from us, of Platonism, it is, if we understand the idea in its greatest sense, the logic of the organization of ritual itself, the logic, moreover, that we share with every other culture on the planet and which we remain tirelessly blind based on our idolatry of Platonic reasoning. Therefore, it is the logic that raises for us the stakes of our ethnocentrism. We live in a culture dominated by Platonic logo thinking, by discourse,¹¹

In Platonic thought there are only two ways we can understand the possibility of knowledge beyond reason. On the one hand, we imagine it comes to us because of divine intercession or destiny. So, for example, we have imagined poetic inspiration among the Greeks or the language of the Hebrew prophets. On the other hand, we have imagined as much knowledge as possible for us through fantasies, illusions, dreams, in short, all experiences that we perceive as products of fiction or desire. These discoveries of Freud, for example, are far from revealing to us a completely new realm, a knowledge which, apart from conscious knowledge, only shows us a territory which, from within Platonism, seems to have been previously mapped.¹² In short, we can never imagine prophethood as a reading of the course of the drama of human relations before us, a reading of what Michel Serres might call the "excluded middle." Meaning, there is such a conceptualization in our culture, again, that has been misunderstood precisely insofar as we feel it is accessible to us in Platonism. Undoubtedly, just like how the Greek tragedy and the Jewish and Christian Bibles prevail.¹³

While the concept of Pluralism justice system put forward by Werner Menski, emphasizes reform of the way of law through a legal culture approach. Law in Indonesia cannot be separated from culture which is an important value to assist the enforcement of the law. The theory of legal pluralism is defined as a connecting line between various legal systems in a particular society, including legal culture. At the time of researching the comparative law of countries in Asia and Africa, Werner Menski concludes that law enforcement in Asia and Africa is different from law enforcement in the West, especially in Europe. Law enforcement in Europe is not too influenced by non-legal elements, such as

¹⁰*Ibid.*

¹¹Goodhart, Sandors, 2020, The Prophetic Law: Essah in Judaism, Giradianism, Literarty Studies, and the Ethical, Michigan: Michigan State University Press, p. 7.

¹²*Ibid.*

¹³*Ibid.*



morals, ethics, and religion. Nations in Europe are very comfortable with state law. In contrast to the nations in Asia and Africa, which are strongly influenced by morals, ethics, and religion in the way of law. In this regard, he argues that the effectiveness of the way law works in Asia and Africa uses a legal pluralism approach that relies on the link between the state (positive law), social aspects (socio-legal approach) and morals, ethics, and religion (natural law).¹⁴

Law as a Tool of Social Engineering for Legal and Political Development

According to Roscoe Pound, Law is a social engineering tool that is used to build a structure of society that is as efficient as possible, required the satisfaction of maximum desires and with minimum friction and risk. Effective legal function depends on the prerequisites: legal planning, legal coordination, legal control, monitoring and evaluation.¹⁵ The main function of law is to protect the interests that exist in society. Pound believe that there are three interests that must be protected by law, namely public interest; individual interests; and interests of personality. The details of each of these interests are not an absolute list but change according to the development of society. Very influenced by time and conditions of society. If these interests are structured as an unchanging arrangement, then the arrangement is no longer a social engineering but a political statement (political manifesto).¹⁶

Law is a social engineering tool, which is used as Legal Planning (Legal Research) such as *Prolegnas-Prolegda*, Coordination such as BPHN, Secretariat, DPR, Ministry of Law and Human Rights, systems for Control such as DPR and DPRD, and Monitoring and Evaluation such as Kemenkumham. The development and establishment of Legal Regulations goes through several stages. First, the Ratification of International Treaties by the Ministry of Foreign Affairs and Law and Human Rights. Second, Amendment to the 1945 Constitution or the Law by the MPR, the Constitutional Commission and the DPR. Third, Codification and Unification by DPR-DPRD RI and DPRD. Fourth, formalization as a form of recognition and respect for legal diversity by the DPRD.¹⁷

Pound states that the law is the most important institution in exercising social control. Law has gradually replaced the function of religion and morality as important instruments for achieving social order. According to him, social control is needed to preserve civilization because its main function is to control "internal aspects or human nature", which he considers indispensable to conquer external aspects or the physical environment.¹⁸ Pound states that social control is needed to strengthen the civilization of human society because it controls antisocial behavior that is contrary to the rules of social order. Law, as a mechanism of social control, is the main function of the state and works through the application of force which is

¹⁴Werner, Menski, 2019, Comparative Law in the Global Context of European, Asian, and African Systems, Bandung: Nusa Media, p. 234-285.

¹⁵Thontowi, Jawahir, 2020, Understanding Contemporary Law, Yogyakarta: UII Press, p. 156.

¹⁶Ibid.

¹⁷Ibid., p. 157.

¹⁸Rasjidi, Lili and Rasjidi, Ira Thania, 2007, Fundamentals of Philosophy and Legal Theory, Bandung: Citra Aditya Bakti, p. 74.

carried out systematically and regularly by agents appointed to perform that function. However, Pound adds that the law alone is not enough, it needs support from family, education, moral and religious institutions. Law is a teaching system with ideal and empirical elements, which combines natural and positivistic theories of law.¹⁹

Pound says that the natural law of every era is basically a "positive" natural law, an idealized version of positive law at a certain time and place, "naturalized" for the sake of social control when the power established by organized society is no longer considered a tool to adequate justification. He acknowledges the ambiguity of the three meanings of legal terms: law as a social rule, legal entity as an authoritative body, and law as a judicial process. In this regard, Pound tries to unite the three meanings into a definition. He defines law with the main function of exercising social control: Law is a special form of social control, implemented through a special body based on authoritative teachings.²⁰

Roscoe Pound has an opinion on law that emphasizes law on discipline with his theory, namely: "Law as a tool of social engineering" (that law is a tool to renew or engineer society). To be able to fulfill its role, Pound then made a classification of the interests that must be protected by the law itself, namely: public interest, social interest, and private interest. The public interest includes the interest of the state as a legal entity and guardian of the public interest. The interests of the community (social interests) include the interests of peace and order; protection of social institutions; prevention of moral decline; prevention of rights violations; and social welfare.²¹

Law as a tool of social engineering theory by Pound, means law can be used as a tool to renew society, in this term the law is expected to play a role in changing social values in society. By adjusting to the situation and conditions in Indonesia, the concept of "law as a tool of social engineering" which is the core thought of the flow of pragmatic legal realism, by Mochtar Kusumaatmadja was later developed in Indonesia. According to Kusumaatmadja, the conception of law as a means of reforming Indonesian society is wider in scope compared to the United States where it was born.²²

The concept of law as a tool of social engineering has so far been considered a neutral concept, which was coined by Roscoe Pound. Pound provides an overview of what should be and should not be in regard to the use of law as a "social engineering tool" which are as follows:²³ a) Studying the real social effects of legal institutions and teachings; b) Conducting sociological studies in order to prepare legislation; c) Conduct studies on how to make the rule of law effective; d) Pay attention to legal history.

Law as a means of social engineering, according to Satjipto Rahardjo, is not only used to strengthen the patterns of habits and behavior that exist in society, but also to direct them to the desired goal, to eliminate habits that are considered no longer in accordance with the

¹⁹Ibid.

²⁰Ibid., p. 75.

²¹Raharjo, Satjipto, 2006, Legal Studies, Bandung: Citra Aditya Bakti, p. 206.

²²Kusumaatmadja, Mochtar, 1990, Law, Society, and Development, Bandung: Binacipta, p. 10.

²³Ibid., p. 91.



society patterns, new behavior patterns, and so-on. Therefore, the law can function to control society and can also be a means to make changes in society.²⁴

A discussion that has not stopped until now is the question of the function of law in society. On the one hand, people believe in the truth of the premise that the law is nothing but a normative reflection of behavioral patterns that have materialized as social reality. While on the other hand, there are still many people who like to theorize that the law is an independent variable which, when operationalized as a force for political purposes, will be able to change the structural order in society. The first-mentioned view is the view that sees law as a collective expression of a society, and therefore the results of its conceptual description will give birth to the concept of law as part of the ideal cultural element. The second view is the view that sees law as an instrument, and therefore the results of its conceptual description will result in the perception that law is part of a straightforward technology; or to borrow the words of Rouscoe Poend, the law is a "tool of social engineering".

According to Lawrence as quoted by Soetandyo, stating that law as a social engineering tool is the main characteristic of a modern state. Jeremy Bentham (in Soetandyo) even proposed this idea in the 1800s, but it only received serious attention after Roscoe Pound introduced it as a special perspective in the discipline of sociology of law. Pound requested that experts focus more on law in practice (law in actions), and not just as provisions contained in books (law in books). This can be done not only through laws, government regulations, presidential decrees, etc., but also through court decisions.²⁵

Today the number of exponents who support the idea of "law as a tool of social engineering" is increasing. The development that Geertz (in Soetandyo) calls the development "from old society to a new state" has indeed fostered determinations to move and change all forms of stagnation, both through extra-legal revolutionary means and through a wise way to use law as a means of social change. According to Soetandyo, this has implications for many practitioners who are interested in thinking about the most appropriate changes of strategies to take and to engineer what "*ius constituendum*" should be immediately drafted and promulgated as an implementation step. Meanwhile, many of the theorists are interested in exploring studies on the effectiveness of the law to find the (most) important determinants that need to be known in order to function the law as a means of development.²⁶

In accordance with number of experts, legal development has two meanings. First, as an effort to renew positive law (legal modernization). Second, as an effort to functionalize the law, namely by participating in making social changes in accordance with the needs of the developing community. Thus, the development of law is not limited to legislative activities, but also as an effort to make law as a social engineering tool. In other words, we can conclude, the definition of legal development is "realizing the function and role of law

²⁴Rahardjo, Satjipto, Legal Studies, Op. Cit, p. 189.

²⁵Thontowi, Jawahir, Understanding Law, Op. Cit., p. 160.

²⁶Ibid.

in society". For that there are three functions of law: as social control, as a dispute settlement, and as a tool of social engineering.

In one of her articles, Paramita stated that legislation is a relatively complex phenomenon whose formation process involves various other social factors. The formation of laws and regulations is an effort to realize certain goals, in the sense of directing, influencing, regulating behavior in a social context which is carried out through and with the means of legal rules that are directed at the behavior of community members or government agencies, while certain goals to be realized are generally refers to the idea or purpose of law in general, namely the embodiment of justice, order and legal certainty. Forming a law also means creating a source of law that will regulate the rights and obligations of all parties related to the implementation of the law.²⁷

In contrast to Paramita's view, the functional school or so-called sociological school of law (sociology of law) through its character, Roscoe Pound (in Satjipto) argues that law is more than just a set of abstract norms or orders of law. However, law is a process to balance opposing interests and provide guarantees, certainty of satisfaction to the wishes of the most groups with the least friction possible. The analogy of such an understanding of law is what Pound calls social engineering. It should also be noted beforehand that a new regulation or law can be said to be good if it fulfills three conditions according to Radbruch's theory, namely philosophically it can create justice, sociologically useful and juridically it can create certainty. Meanwhile, according to Pound, a law must function as a "tool of social control" and a "tool of social engineering".²⁸ In line with Pound, Prof. Max Radin, as quoted by Mahendra, states that law is a technique to drive a complicated social mechanism. On the other hand, the law is not effective unless it is recognized and sanctioned by political power. Therefore Maurice Duverger (in Mahendra) states: "law is defined by power, it consists of a body of laws and procedures made or recognized by political power".²⁹

The law provides competence for holders of political power in the form of positions and legal authority to carry out political actions, when necessary, by using coercive means. Law is an established guide for political power to take decisions and actions as a framework for orderly social engineering. Although the exponents who support the idea of "law as a tool of social engineering" are now noted to dominate the arena and key positions in national law development, that does not mean that their ideas and operational steps can develop and run without criticism. Criticisms that are raised based on ideological reasons and or moral paradigms that are absolute and partial in the framework of determining political policies are not as strong as they used to be.

According to Soetandyo, discussions among academics are still taking place asking whether the law in fact "*in concreto*" will indeed be able to manipulate society effectively when it only appears as a manifestation of borrowing the positivist adage "the command of the sovereign" (sovereign command), and not have considered the following two questions: First, what are the real moral values and social norms adopted by the people in their daily

²⁷Ibid.

²⁸Ibid., p. 161.

²⁹Ibid.



lives; Second, the extent to which the common people are willing to share loyalty and obedience, not only to their own informal values and rules but also to the formal-style command of the sovereign.³⁰ Soetandyo added that those who think that the law is an effective means to manipulate society are certainly more inclined to be anticipatory to changes that are always happening. They will undoubtedly move to design future changes and will use the law as a model for describing the relationships between subjects in the future that must be realized by sanctioned actions. So, in their hands the law will function to dynamize change, and not (just) to control the all-static status-quo in the structure.

Critics of the idea of "law as a tool of social engineering" generally add that people still must ask, is there a way that can be recommended to change the normative reference of the people, from their inclination to local values and norms that are parochial and insightful into the past to new values and principles that are national and forward-looking. The law can still be used as an instrument that is used consciously to achieve certain goals. The process will last quite a long time and the effects it causes can be a chain effect. This decision can be included in the social engineering class because it aims to create change in society.³¹

Based on all of that, there is one important thing that needs to be realized as a separate problem based on the basic assumption regarding the proposition "law is a tool of social engineering", that according to Von Savigny (in Soetandyo), in fact the law can never be made based on the willful rationality of the human mind. Law is always processed and manifested in and at the same time as the development of society and the history of a nation. Therefore, the next attitude is how "law is a tool of social engineering" should be placed, not in the rule-by-law position, but in the rule of law paradigm.

Living Law Transformation: Islamic Law and Customary Law in the Development of National Law

Islamic or Sharia law in Indonesia must be accepted scientifically in the discipline of law (jurisprudence) and in the process of democratization, not indoctrination. If viewed from the academic aspect, it must be in a democratic corridor, if viewed from a political aspect, it must also be in a democratic corridor. Positivization by upholding these two values works well, because in Indonesia there are several legal systems, namely Islamic law, colonial law, and customary law. Each legal system competes democratically.³²

The actualization of law and religion so that they can go hand in hand, can at least be used with 2 (two) approaches that are also described by Azizi, namely the normative or formalism approach and the cultural approach.³³ Both approaches, as well as answers to the question of how to apply Islamic law. First, the formal or normative approach. According to this opinion, Islamic law should be applied to those who have said the *shahadah* or those who have converted to Islam. The term 'positivization of Islamic law' will not be popular,

³⁰Ibid.

³¹Ibid., p. 209.

³²Azizi, A. Qodri, 2004, Eclecticism of National Law, Competence Between Islamic Law and General Law, Yogyakarta: Gama Media, p. 61.

³³Ibid, p. 17.

unless it means that those who are Muslim must immediately implement or be forced to accept Islamic law in their daily lives. Therefore, the process of political life, including political parties, is within the framework or as a tool to apply Islamic law in a normative or formal manner.

Given the normative approach, the formal application of Islamic law, if necessary, is forced in Indonesia to become scriptural and textual, which often does not consider the contextual and sociological environment. Basically, the normative approach alone is not always bad, because it can be positioned as a controller but if it is excessive, it will reach scripturalism, so that up to this point positivization is not the answer because it tends to be coercive formally and ideologically. The normative approach, it can also be said that the means used are 'official media' in the form of bureaucratic instruments. This approach outlines that every person who is part of a rule is obliged to obey it, and the strength of the law that is highlighted is its binding power.³⁴

Second, the cultural approach. According to this approach, the most important thing is not the formalism of applying Islamic law or the ideological normative approach. However, it is the absorption of Islamic legal values into society that is even more important. In addition, to create the ideal law in civil society, one must also start by absorbing the values of universal law proportionally. The universal legal values in question include justice, honesty, freedom, equality before the law, legal protection for minority-religion group of people, and upholding the rule of law. Universal values must be sought to be embedded and implemented in all civil society, starting from the institutional system and elements of the supporting community. In terms of value absorption, it means that the process is very cultural, not normative coercion. This strategy seeks to target public awareness to implement what has been formulated in the domestic law. He idealized the conscious absorption of Islamic values in the realm of public affection, hoping that a pattern of community behavior would emerge based on knowledge and awareness of the law.³⁵

Based on the description above, the pattern of application or realization of religious law is still required to be democratic which reflects free competition with the possibility of eclecticism, not coercion from the majority regime. This is because in the present context it is very impossible to do if the basis for its application is the will of certain groups. In a competition that includes eclecticism, once again it is necessary to emphasize that democracy must be the corridor, not power. Therefore, the public interest must be a reference in making decisions for the public, including the law.³⁶

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³⁴Fuad, M. Fahimul, "Thought and Codification of Islamic Law Reform in Indonesia", Istinbath Journal, Lampung: Stain Metro, Vol. 9 No.2 of 2012, p. 11.

³⁵Fuad, Mahsun, 2005, Indonesian Islamic Law: from Participatory Reasoning to Emancipatory Reason, Yogyakarta: LKIS, p. 31.

³⁶Azizi, A. Qodri, Op. Cit., pp. 172.



The development of law during the Indonesia's reformation period, the government seems to have a very striking difference when the development of law also undergoes significant changes. Especially when there is an expansion of legal development in various provinces which are more influenced by local cultural values. As happened with the implementation of Islamic law in Aceh Darussalam Province, the fact that Regional Regulations (*qanun*) are not limited only to aspects of criminal law or *muamalah*, but the implementation of Islamic law in Aceh is also related to aspects of Jinayat Islamic criminal law. As found there are regional regulations related to the prohibition of men having social life that is contradictory to the Islamic teachings. Cases of social association that must be strictly limited. The relationship between men and women of the opposite sex is very limited by the existence of regional regulations (*qanun*) regarding social norms. Furthermore, any violation to the *qanun* has its own executorial provisions, to flog, or whip an unmarried couple who were found alone together, this proven the existence of Sharia Court as the universal executive body in the region.

Although some Indonesian legal experts disagree about the application of caning law for perpetrators of violations of regional regulations on Islamic criminal law (*qonun* and *jinayat*). However, because Islamic law has been used as a cultural solution for the Acehnese people, the pressure and application of sharia is also seen as not contradicting the Indonesian legal principles. This is because the enactment of the Privilege Regulations has been ratified based on the National Legislative Regulations agreed upon by the House of Representatives and the Central Government. The enactment of Law Number 4 of 1999 concerning the Implementation of the Privileges of the Province of the Special Region of Aceh. The enactment of the Law was also based on the Helnsinki Memorandum of Understanding (Helsinki MoU) of 2005.

It is the same with the Papua Province which demands customary law as a special characteristic of the Papua province as regulated by Law Number 21 of 2001 concerning Special Autonomy for the Papua Province. The specific character of the Aceh province is that the central government provides customary law as a character for the specificity of the Papua Province. As for the specifics of Papuan customary law applied in the regional government system, namely, first, apart from the specificity, it is manifested in the Papuan People's Assembly as a traditional institution that can also become a member of the legislature at the provincial level. There are customary heads who are representatives of the people in the Papua Regional Representative Council. Another special character is that governors, regents, mayors as regional heads are obliged to prioritize children of indigenous Papuan descent.

Secondly, although different from the Provinces of Aceh and Papua, the Province of Bali has related regional regulations based on customary law, customary law that contains substantive values of Hindu religious teachings. For example, the regional regulation on Awig-Awig, the Nyepi holiday ceremony which is comprehensively enforced for Indonesian citizens living in Bali and its surroundings must comply with regional regulations and enforce them regardless of whether the resident adheres to Hinduism or not, even public service activities must stop to provide services. For example, all private and public activities

must stop as a sign of respect for Nyepi. The state-owned international airport also stopped in providing transportation services during the Nyepi holiday.

Based on these facts, it is clear that the development of law in the government of the Indonesia's reformation period is very much different, because the development of a centralized law has affected aspects of the needs of the basic rights of religious life. The fact that the diversity of the implementation of religious teachings is also protected by state regulations, both at the central level as the implementation of Islamic law in Aceh Darussalam Province and specifically in Papua Province has the consequence of a balanced implementation with several provinces as the case in Bali Province is different from Aceh Province. and Papua. Because Bali is not a special province, nor is Bali a special province like the Special Region of Yogyakarta. However, in the context of the Pancasila, the fulfillment of basic socio-economic and cultural rights, including the right to carry out religious teachings in accordance with their respective beliefs, is urgent for the protection and enforcement of the state. Although constitutionally the Province of Bali is not a special province, but in fact, the geographical position of the Province of Bali as a province in the eastern region of the island of Java with a majority Hindu population, geographically Bali is classified as a province that has the highest foreign exchange in the entire territory of Indonesia.

The basic reason if the central government does not question various regional regulations that are hindered by conflicts with sectoral interests includes the importance of increasing all Indonesian citizens respecting Nyepi as a religious holiday in accordance with the demands of the needs of Hindus, for example on Nyepi day it is not allowed to light a fire including carrying out activities that are suspected to be able to tarnish the sanctity of Nyepi. On the basis of the values of tolerance as a pillar of the creation of religious harmony by referring to the model of legal development at the regional level as happened in the Province of Aceh, Papua Province, and also in the Province of Bali, then Indonesian domestic law development in the reformation period is clearly shown besides there is an economic or material needs, there are also in fact, non-material needs (inner satisfaction) as well as religious needs (spiritual needs).

Sharia comes from the word *shari'a*, meaning to take a path that gives access to sources. The term sharia also means 'a way of life'. The root of the word shariah and its derivatives in a general sense is used only in five verses of the Qur'an: First, QS. al-Maidah verse 48; Second, QS. ash-Syuura verse 13; Third, QS. Ash-Shura verse 31; Fourth, QS. al-Jaatsiyah verse 18. According to Fazlur Rahman, sharia are religious values that are expressed functionally and in a concrete sense in life that aim to direct human life in goodness.³⁷

Discussing sharia in Indonesia is a necessity. As Muslims, obeying sharia as God's legal system on earth is an undeniable obligation. In the constitutional mandate of the 1945 Constitution, Article 18 paragraphs (1) and (2) states: "The Unitary State of the Republic of Indonesia is divided into provincial regions and the provincial regions are divided into

³⁷Rahman, Fazlur, 1997, Islam, Chicago: University of Chicago Press.



regencies and cities, each of which has its own province, district and city. local government regulated by law". The meaning of article 18 in the 1945 Constitution states that Indonesia is a decentralized unitary state. The implementation of regional autonomy does not cover certain fields, such as foreign policy, defense and security, justice, monetary, fiscal, and religion. These areas remain the affairs of the central government.³⁸

The emergence of sharia regulations has consequences as laws in the regions that have absolute binding power to all people, government, and private institutions as well as to immigrants who interact in the region. Shariah regulations are a special type of regional regulations, which are sourced from local custom, or the living law contained in the area. The local custom is more based on the composition of the number of people in an area or the hegemonic strength of the regional political elites that are spread both in political parties, legislative institutions, or executives. According to Munawar, the emergence of the Shariah regional regulation was not merely born but was the result of the political journey of Muslims.³⁹

Muhtada categorizes Indonesian Sharia regulations into seven regulatory aspects.⁴⁰ First, local regulations on decency. This includes local regulations that prohibit alcohol, prostitution, or gambling. Second, regional regulations related to *Zakat*, *Infaq* and *Shadaka* policies. Third, regional regulations related to Islamic education, this includes local regulations on reading and writing Madrasah Diniya and the Qur'an. Fourth, regional regulations related to sharia economic development, these include the local regulations of Baitul Mal wat Tamwil (BMT) and Sharia Rural Banks (BPRS). Fifth, regional regulations regarding Muslim beliefs, this includes laws prohibiting the activities of the Ahmadiyya and other Muslim sects deemed heretical. Sixth, local regulations on Muslim dress, including the mandatory hijab for women. Seventh, another category of Sharia rules, local regulations in this category include regulations on large mosques, Hajj services, and Ramadhan.

Regional autonomy gives power to local governments as responsibilities grow. The implication of having such broad administrative powers given to local governments, under its own government, could be of benefit to the regional political structure. Thus, policy makers to apply Islamic teachings in the economic field essentially aim to build an Islamic economic system that produces the perfection of Islam itself. Islam provides the principle of fiscal policy or budgetary income and expenditure aimed at developing a society based on a balanced distribution of wealth by placing material and spiritual values at the same level, which cannot be separated from political and economic control (*as-siyasatu al-iqtishadi*). which aims, as stated by Andurrahman Al-Maliki, it guaranteed primary and basic needs (*al-hajat al-asasiyah*) for each and every one, and it helps each person among themselves to

³⁸Fitrandasari, Zavirani, and Muhtadi, Ridan and Nafik HR, Moh., "Shari'a Regional Regulations in Efforts to Increase Sharia Economic Competitiveness", Jurisdicctie: Jurnal Hukum dan Syariah Vol. 10 No.1 of 2019, p. 101.

³⁹Munawar, Ahmad, "The Phenomenon of Shari'ah Regional Regulations: Identity Institutions at the Local State Level", Journal of Sociology of Religion, Volume I, No. 1: 2007.

⁴⁰Muhtada, Dani, 2014, "The Mechanisms of Policy Diffusion: A Comparative Study of Shari'a Regulations in Indonesia", Dissertation Submitted to The Graduate School, Department of Political Science, Northern Illinois University.

fulfil their secondary, and tertiary needs (*al-hajat alkamaliyah*) according to its level of ability.⁴¹

Efficiency and effectiveness are the cornerstones of government spending policies. In Islamic teachings this is guided by the principles of Shariah and the determination of the priority scale. According to Al-Maliki, there are four things that form the basis of Islamic economic politics. In general, first, every person is an individual who needs fulfillment of needs; second, the fulfillment of basic needs is carried out thoroughly (completely); third, it is permissible (permissible) for individuals to seek income (by working) with the aim of obtaining wealth and increasing the prosperity of their lives; fourth, noble values (Islamic law) must dominate (become the rules that apply) all interactions involving individuals in society.⁴²

Basically, based on a sociological view of the position of sharia economic law in the scheme of the Indonesian legal order, sharia economics does not only act as a religious product but in practice it is also an actor driving the progress of the Indonesian economic system.⁴³ Juridically, the position of sharia economics in the legal system in force in Indonesia is actually legal and has legal certainty, as a real result of the transformation of living law into state law. Of course, this strengthens the position of sharia economic law in the development and enforcement of the legal system by obtaining formal juridical arrangements within the framework of the basic legal scope of economic activities and sharia banking.⁴⁴

One example of the legitimacy of sharia economic law in the legal framework in the economic field is Banking Law, Law Number 7 of 1992, Law Number 10 of 1998 concerning Amendments to Law Number 7 of 1992, Government Regulation Number 72 of 1992 concerning Banks, and Law Number 23 of 1999 concerning Bank Indonesia (BI) which was confirmed by the enactment of Law Number 21 of 2008 concerning Islamic Banking. The legal basis is certainly a manifestation of the existence or position of the Islamic economy in the development of the banking system in Indonesia.⁴⁵ Meanwhile, financial service providers in the UK specifically provide services in the form of *murabaha* financing and offer deposit investments in the form of profit-sharing investment accounts based on the *wakalah* principle. The UK's leading banks include Al Rayan Bank, Gatehouse Bank and Bank of London as well as branches of several well-known Middle Eastern banks such as Abu Dhabi Islamic Bank and QIB UK.⁴⁶ This proven the existency of the economic sharia law have wider reach. However, the application of Islamic law into state law and the

⁴¹Al-Maliki, Abdurrahman, 2009, Political Economics of Islam, Translation by Ibnu Sholah, Bogor: Al-Azhar Press.

⁴²Fitrandasari, Zavirani, and Muhtadi, Ridan and Nafik HR, Moh., "Shari'a Regional Regulations in Efforts to Increase Sharia Economic Competitiveness", Op. Cit., p. 102.

⁴³Hasan, Ahmadi, 2017, History of Sharia Economic Law Legislation in Indonesia, Yogyakarta: LKIS, p. 189.

⁴⁴Suadi, Amran, and Candra, Mardi, 2016, Legal Politics Perspective of Islamic Civil and Criminal Law and Sharia Economics. Jakarta: Kencana, p. 427.

⁴⁵Ibid. p. 423.

⁴⁶Dewar, John, and Hussain, Munib. The Islamic Finance and Markets Law Review: United Kingdom. <https://thelawreviews.co.uk/title/the-islamic-finance-and-markets-law-review/united-kingdom> accessed on 13 October 2022.



necessary transformations are certainly not perfect and leave several questions regarding the priority scale of basic legal needs with the existence of various beliefs, as well as the existence of the highest legal basis, namely Pancasila which upholds unity in diversity.

CONCLUSION

Regional regulations and qanuns in Aceh Darussalam Province, Awig-awig in Bali Province, Regional Regulations, and special autonomy for Papua Province must be in harmony with national laws and regulations or positive laws, based on the following reasons, first, the Aceh Darussalam government, Bali, and Papua are inseparable parts of the Unitary State of the Republic of Indonesia and the autonomous system established by law. This means that autonomy is not just a right, but also a responsibility to maintain and implement the basic consensus of the state, namely Pancasila, the 1945 Constitution, the Unitary State of the Republic of Indonesia, and Bhineka Tunggal Ika. Second, basically the qanun in Aceh Darussalam Province, Awig-awig in Bali Province, Regional regulations, and special autonomy for the Papua Province are part of the national legal system, therefore their existence must be in accordance with the theory of laws and regulations in Indonesia which emphasizes that lower regulations must rely on the provisions of higher regulations. Third, the meaning of special autonomy in the provinces of Aceh, Bali and Papua should not be understood as the positioning of exclusive regions that are free to apply the law without referring to the provisions of national law (positive law). This is seen as regional autonomy which means autonomy within a country, not contrary to the provisions of law in a country. Therefore, its existence must be in accordance with the theory of laws and regulations in Indonesia which emphasizes that lower regulations must rely on the provisions of higher regulations. Third, the meaning of special autonomy in the provinces of Aceh, Bali and Papua should not be understood as the positioning of exclusive regions that are free to apply the law without referring to the provisions of national law (positive law).

The application of Islamic sharia is one way to make Islamic sharia a constitution (*dustur*) and state law (*qanun*). The sharia constitution only contains the most important points of Islamic sharia that can describe Islamic Sharia as a whole and comprehensively, although with a very global and concise editorial, that is where the real implementation of Islamic sharia in various fields is presented. It is proper that the significance of regional regulations and *qanuns* with the nuances of Islamic law must be placed proportionally. In other words, the existence of regional regulations and *qanuns* with the nuances of Islamic law must be viewed in terms of the extent to which they can realize benefits the social structure in positive manners, as well as in scope of economy and development of Islamic finance.

The existence and effectiveness of the Islamic economy in terms of the development of the banking system and the economic system in general, has provided a view not only for Indonesia but also for the world community that the scope of scientific fields in the history of Islamic development is very broad. It's just that in its application requires a mature unification and harmonization process, so that it does not conflicting with positive law and fundamental principles that apply in the Indonesian legal order. Because basically, the law

of a country should not be the law of the majority, but the law that can protect the welfare and security of the entire people, regardless of race, ethnicity, culture, and religion.

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