

## THE STRUGGLE BETWEEN POLITICAL AND IDEOLOGICAL OVER THE IMPLEMENTATION SHARIA-NUANCED REGIONAL REGULATION

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**Abstract:** The positivation of Sharia (Islamic law) is an important topic that remains interesting to raise when discussing the institutionalization of Sharia in Indonesia. This topic is also a significant theme in the discussions of Islamic law in other parts of the Islamic world. How to make Islamic law as legal rules that apply nationally is one of the primary agenda. The objective is clear, that is so that Islamic law is neither merely an ideal law found in the collective awareness in the community's belief system nor an "archive" discussed to satisfy the needs of intellectual exercise in academic institutions. It should become the law that applies positively. The establishment of Law Number 1 of 1974 concerning Marriage, Law Number 7 of 1989 concerning Religious Courts, and Presidential Instruction Number 1 of 1991 concerning the compilation of Islamic laws became important milestones in the history of Islamic law in Indonesia. Since the beginning of the reform era, the implementation of Islamic Sharia entered a new phase, as marked by the flourishing of Sharia regional regulations in various regions. The emergence of the Sharia regional regulations is certainly through serious political struggles, given that the real law is a product of the political process. The regional regulations, at the same time, has been through a massive ideological struggle, because the plurality of religions and ideologies in Indonesia will be powerful energy for the emergence of pros and cons of the emergence of this regional regulation. This article will explain the political and ideological struggle around the Sharia regional regulation.

**Keywords:** Positivation of sharia, Religious Courts, Politics and Ideology, Regional Regulation

**Abstrak:** Positivisasi syariah (hukum Islam) merupakan topik penting yang tetap menarik untuk diangkat, apalagi ketika membahas pelebagaan Syariah di Indonesia. Topik ini juga menjadi tema penting dalam diskusi hukum Islam di belahan dunia Islam lainnya. Khususnya tentang bagaimana menjadikan hukum Islam sebagai aturan hukum yang berlaku secara nasional. Tujuannya jelas, yaitu agar hukum Islam bukan sekadar hukum ideal yang ditemukan dalam kesadaran kolektif dalam sistem kepercayaan masyarakat, juga bukan "arsip" yang dibahas untuk memenuhi kebutuhan pelatihan intelektual di lembaga akademik. Seharusnya syariah menjadi hukum yang berlaku positif. Pembentukan Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan, Undang-

Undang Nomor 7 Tahun 1989 tentang Peradilan Agama, dan Instruksi Presiden Nomor 1 Tahun 1991 tentang Kompilasi Hukum Islam menjadi tonggak penting dalam sejarah positivisasi hukum Islam di Indonesia. Sejak awal era reformasi, penerapan syariat Islam memasuki babak baru, yang ditandai dengan maraknya perda syariat di berbagai daerah. Munculnya Perda Syariah tentunya melalui perjuangan politik yang serius, mengingat hukum yang sesungguhnya adalah produk dari proses politik. Perda tersebut pada saat yang sama telah melalui perjuangan ideologis yang masif, karena kemajemukan agama dan ideologi di Indonesia akan menjadi energi yang kuat bagi munculnya pro dan kontra dari kemunculan perda ini. Oleh karena itu, artikel ini akan menjelaskan pergulatan politik dan ideologi seputar Perda Syariah.

**Kata Kunci:** Positivisasi Syariah, Peradilan Agama, Politik dan Ideologi, Peraturan Daerah

## Introduction

This article has investigated the implementation of sharia law in the context of autonomic law. In one hand, the sharia law in some provinces has a part of applying decentralization. In other hands, the sharia law has also made a jealousy of other provinces to do same. Therefore, this article will explore this discourse based on data and fact. Reformation has changed people's views on many aspects, including the law. Especially after the Regional Autonomy Law was enacted, the reformation of law encounters extraordinary problems. One of them is related to the aspirations of the people. On the one hand, it is with the efforts to develop an effective and functional national legal system but, on the other hand, both of them often "clash". One of the current major topics of discussion is the thousands of "problematic regional regulations", including the Sharia regional regulations.<sup>1</sup>

Even though the Sharia regional regulations have passed a reasonable political process and are supported by the political elite and regional executives, the phenomenon of the implementation of the Sharia regional regulation still triggers pros and cons opinions among the people. In particular, if it is associated with the fundamental platform of national and state life, that is in the frame of diversity in Indonesia.<sup>2</sup>

The opponents argue that the ratification and enactment of Sharia regional regulations (perda) are unconstitutional because it contradicts the Pancasila and the 1945 Constitution. They also believed that the regional regulations might damage the Indonesian pluralism and diversity, and potentially create disunity within the nation. On the other hand, the supporters believe that in the spirit of reformation, the Sharia regional regulations should not be a concern because it is part of the implementation of a constitution that guarantees religious freedom and worship based on religious beliefs. The implementation of this regulation is also one way to improve the morale of the nation in eradicating various worsen social diseases.

The rise of Sharia-nuanced regional regulations (I think this term is more appropriate) is inseparable from the euphoria of reformation, with one of its important agenda is regional autonomy. To meet the needs of the administration in the regional government, many regional leaders implement Sharia-nuanced regional regulations. It is recorded that there are currently around 37 regencies/cities in Indonesia impose Sharia regional regulations. Moreover, 56 other regions are also willing to adopt a similar regulation, and the design is

1 MB and Virginia hooker Hooker, 'Syariat Islam Di Era Otonomi Daerah' (2007).

2 Robert W Hefner, Shari'a Politics: Islamic Law and Society in the Modern World (2011); Vedi R Hadiz, Islamic Populism in Indonesia and the Middle East (Cambridge University Press 2016) <<https://www.cambridge.org/core/books/islamic-populism-in-indonesia-and-the-middle-east/2F39D8B48CCDD596DC66F7A4D847D284>>.

currently in the political process at the regional executive level.

The objects regulated in these regional regulations are very diverse. For example, they are obligating women to wear headscarves and men to wear 'koko' shirt (a type of shirt usually worn by Muslim males in Indonesia), stopping all activities during the call to Friday prayer, requiring the abilities to read and write the Quran as conditions for school entry, the bride and groom, and promotion of civil servants, regulating rules regarding Monday and Thursday fasting, prohibiting women to travel alone without being accompanied by their mahram after midnight, and regulating prostitution, liquor and gambling.

The emergence of the Sharia regional regulations has certainly passed serious political struggles, given that the real law is a product of the political process. The regional regulations, at the same time, has been through a massive ideological struggle, because the plurality of religions and ideologies in Indonesia will be powerful energy for the emergence of pros and cons of the emergence of this regional regulation. Even though the Sharia regional regulations seem to address the interests of the Islamic community, the pros and cons of these regulations, within Islam itself, are also very sharp and dynamic. However, the proliferation of Sharia regulations is a sign of the dominant political power of religion in the local parliament.

As a reality, this phenomenon should be responded wisely and proportionally, because this is related to a fundamental issue of how to place religion in the design of pluralistic nation and state life. Furthermore, in more concrete, how to put Shariah in the frame of the national legal system proportionally.

### **The Pros And Cons Of Sharia Regional Regulations**

The former of chairman of PBNU, KH Hasyim Muzadi<sup>3</sup>, in a meeting with the chief editors of the mass media, argued that regional regulations implementing Sharia and enforced in several regions are unnecessary. He reasoned that the rules have already listed in national law. The issues of prostitution, liquor and gambling have been well-regulated by the Criminal Code (KUHP). He added that if regions implement the regional regulations, it is the redundancy of the Criminal Code. Hasyim further considered that the Sharia regional regulations conducted are not based on a substantial spirit, but rather symbolic and over-symbolic. The most important person of NU even asked that this trend should be observed because it is worrying for some parties.

Hasyim also thought that there is the need to enlighten the DPRD (the Regional House of Representatives) members who establish regional regulation and raise the Sharia issue to be a regional regulation. He also said that Islamic organizations, such as NU and Muhammadiyah, need to enlighten the relevant parties that this is reminiscent of debates about the Jakarta Charter. Hasyim's attitude is in line with the ideological and political lines of NU, that have set Pancasila as the final concept for the foundation of the nation and state life. In line with Hasyim, the former chairman of PP Muhammadiyah, Ahmad Syafii Ma'arif, also believes that Islamic Sharia regional regulations (Perda) are unnecessary due to the existence of a Criminal Code (KUHP). Shafi'i emphasized that the important issue is that the implementation is in line with the available law; it should not be merely a regulation without implementation or the misconduct in its implementation.<sup>4</sup>

3 [Http://Www.Gatra.Com/2006-06-16/Artikel.Php?Id=95450](http://Www.Gatra.Com/2006-06-16/Artikel.Php?Id=95450); See also, Robin Bush (ed), 'Membership of the PBNU, 1999-2004', *Nahdlatul Ulama and the Struggle for Power within Islam and Politics in Indonesia* (ISEAS-Yusof Ishak Institute 2009).

4 [Https://Nasional.Tempo.Co/Read/369489/Indonesia-Negara-Demokrasi-Terbesar-Ketiga-Dunia](https://Nasional.Tempo.Co/Read/369489/Indonesia-Negara-Demokrasi-Terbesar-Ketiga-Dunia); Jeremy Menchik, *Islam and Democracy in Indonesia: Tolerance without Liberalism* (Cambridge University Press 2016); La Jamaa, 'Fatwas of the Indonesian Council of Ulama and Its Contributions

In contrast, a legal practitioner, Adnan Buyung Nasution, had a different point of view. He argued that Sharia regional regulations implemented in several regions violate the constitution. He believed that the idea of Sharia should not be included in the State Law. Even though the majority of Indonesian citizens are Muslims, the law must respect the rights of other citizens, as mandated by the constitution. Any religious law must be correct, but it is inappropriate if Islamic law becomes state law. The issue lies on who will be able to interpret the law of God. Judges do not have the authority, but ulemas have. This contradicts the principle of democratic countries where all forms of regulations, laws, norms and ethics must be based on universal laws and accepted by all groups. Moreover, Indonesia is a state based on Pancasila, that guarantees the rights of citizens, regardless of their religion. If only one religion takes precedence, clearly there has been a denial of the 'Indonesian-ness' of all people<sup>5</sup>.

The Coordinator of the Legal Reform Division of the National Commission of Women, Husna Mulia, highlighted that Sharia regional regulations from the perspective of women's interests. Even though the initiators of Sharia regional regulations argue that the Sharia regulations aim to protect women, Mulia believes otherwise. Instead of protecting women, the presence of the Sharia regional regulation not only corners but also discriminates women. Mulia realized that the proliferation of these regulations is a result of the implementation of regional autonomy. However, she argued that the application of this regulation restrain the freedom of women; women become expressionless and ultimately lose their rights<sup>6</sup>.

The former Vice President, Yusuf Kalla, is one of the opponents of the Sharia Regulations. Kalla was disappointed with the regions implementing Sharia Regulations. He argued that the measures taken by the local government reduce the Sharia itself. Kalla explained that a Sharia regulation should not be applied in the rule of law as it is attached to the Muslim and is manifested in daily life. Regional governments should not interfere with the implementation of Sharia because it is accountability between God and humans; it should be practiced willingly, not because of fear of regulations established by local governments.

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to the Development of Contemporary Islamic Law in Indonesia' (2018) 8 Indonesian Journal of Islam and Muslim Societies. democracy, and reputation amid diversity. Yet scholars poorly understand how these organizations envision the accommodation of religious difference. What does tolerance mean to the world's largest Islamic organizations? What are the implications for democracy in Indonesia and the broader Muslim world? Jeremy Menchik argues that answering these questions requires decoupling tolerance from liberalism and investigating the historical and political conditions that engender democratic values. Drawing on archival documents, ethnographic observation, comparative political theory, and an original survey, *Islam and Democracy in Indonesia* demonstrates that Indonesia's Muslim leaders favor a democracy in which individual rights and group-differentiated rights converge within a system of legal pluralism, a vision at odds with American-style secular government but common in Africa, Asia and Eastern Europe."

5 'Http://Www.Mail-Archive.Com/Eskol@mitra.Net.Id/Msg00357.Html'; Adnan Buyung Nasution, 'Religious Freedom, Minority Rights and the State of Democracy in Indonesia', *Religion, Law and Intolerance in Indonesia* (2018).

6 'Http://Www.Mail-Archive.Com/Eskol@mitra.Net.Id/Msg00357.Html' (n 3); See also, Muhammad Ansor, 'Being Woman in the Land of Shari'a: Politics of the Female Body, Piety, and Resistance in Langsa, Aceh' (2015) 52 *Al-Jami'ah: Journal of Islamic Studies* 59; Zainuddin and Sahban, 'Problematics of Jinayat Qanun Implementation In Nanggroe Aceh Darussalam Community' [2018] *Tadulako Law Review*; Faradilla Fadlia and Ismar Ramadani, 'The Qanun Jinayat Discriminates Against Women (Victims of Rape) in Aceh, Indonesia' (2018) 2 *Journal of Southeast Asian Human Rights* 448; Dina Afrianty, 'Agents for Change: Local Women's Organizations and Domestic Violence in Indonesia' (2018) 174 *Bijdragen tot de taal-, land- en volkenkunde / Journal of the Humanities and Social Sciences of Southeast Asia* 24 <[https://brill.com/view/journals/bki/174/1/article-p24\\_2.xml](https://brill.com/view/journals/bki/174/1/article-p24_2.xml)>. John Bowen and Arskal Salim, *Women and Property Rights in Indonesian Islamic Legal Contexts* (Brill 2018) <<https://brill.com/view/title/39374>>.



The Golkar (*Golongan Karya* Party) official added “We practice religion because of *ittaquallah* (piety to God), not because of *ittaqulummat* (piety to fellow human beings). If we pray and fast by order of the Regent. If I do not pay zakah (the compulsory charity) and then I am imprisoned, I will be very offended. I pay zakah not because of *ittaqulbupati* (piety to the Regent) but because of *ittaquallah*. Thus, we do not need to exaggerate or reduce Sharia. We practice according to our rights. We run it. We do not need to ask the assistance of *Hansip* (civil defense) to implement Sharia. Such action reduces the Sharia.”

The proponents of the Sharia regional regulations also have some convincing argument. For example, KH Ma’ruf Amin argued that the Sharia regional regulations are valid, functional and significant in the context of developing the national law and in general, developing this country facing many problems. Amin invited people to understand the emergence of “Sharia regulations” in various regions as an expression of the will of the people in the related region. It was established as an “agreement”. He added that if an agreement was not reached, surely it is impossible for similar regulation to emerge and implement. As long as the agreement does not contradict the Constitution or higher law in this country, the Sharia regional regulations are certainly legal and permissible. Moreover, many of them are the efforts to solve social problems, a common concern of all citizens. If such conditions are not fulfilled, the provisions remain as values that should not be enforced as positive law. Amin criticized the substantialists who consider that religion should sufficiently remain values, especially in public affairs. They believed that the important issue is that Sharia goals are achieved, without having to apply positive laws derived directly from Islamic teachings. For Amin, the *maqasid* as Sharia is indeed good and naturally, he agreed. However, that is “not yet sound”, because it is only a goal. Thus, the legal instruments must be formulated and implemented so that the objectives are achieved. Therefore, Amin places these values lower under the law. Through this logic, the Sharia regional regulations become necessary.

A practical argument was conveyed by the “warrior” Sharia regional regulations, the former Regent of Bulukumba, Andi Partabai Pobokori. In the case in Bulukumba, South Sulawesi, the Sharia-nuanced regional regulations are also supported by non-Muslims because it brings them peace. He reported that since the implementation of Sharia-nuanced regional regulations in Bulukumba in 2001, the crime rate has fallen by 85 percent. There are no more food stalls selling liquor and student fights. The previously high rates of murder and rape have now dropped dramatically.<sup>7</sup>

Based on the description, it can be seen that the pros and cons of the Sharia regional regulations are inseparable and can be traced back to the debates between formalists and substantialists concerning the implementation of religious teachings in public life. Formalists are more inclined to fight for the implementation of religious teachings (including its laws) structurally, while substantialists are more comfortable with struggling culturally. This struggle will never end and always be a treasure of the dynamics of Islamic thinking. As it is still “ongoing process”, this struggle may present great wisdom. Both the proponents and opponents of the Sharia regional regulations can mutually verify and learn from each other to discover effective and functional formulas to build the foundations of common life, without having to deny each other.

7 Moh Yasir Alimi, ‘Rethinking Anthropology of Shari’a: Contestation over the Meanings and Uses of Shari’a in South Sulawesi, Indonesia’ [2018] *Contemporary Islam*. Kathryn Robinson, ‘Sawerigading vs. Sharia: Identities and Political Contestation in Decentralised Indonesia’ (2011) 39 *Asian Journal of Social Science* 219.

### **Bulukumba: Experimentation of Sharia Regional Regulations**

The enactment of Sharia became an important issue after the reformation.<sup>8</sup> The special autonomy granted to the Province of Aceh was an important moment for the realization of the idea of the Sharia implementation through legislation. Various regional regulations and *Qanun* emerged. Some other regions that may be inspired by the spirit of Aceh also proposed and implemented the idea of implementing Sharia through several regional regulations.<sup>9</sup> One of the areas considered to be the pioneers of the Sharia regional regulations is the Bulukumba Regency, South Sulawesi. Until 2003, at least four Sharia regulations were successfully released, including (1) Perda Number 3 of 2002 concerning prohibition, supervision, control and sale of alcoholic beverages; (2) Perda Number 2 of 2003 regarding the professional management of *Zakat*, *Infraq*, and *Sadaqah*; (3) Perda Number 6 of 2003 about the Quran reading ability; (4) Perda Number 5 of 2003 On The Male And Female Muslim Dressing.

The Sharia experiment in Bulukumba has even implemented in the lowest government: the village. A total of 12 villages in Bulukumba Regency were selected to become Muslim Village pilot projects since early 2005. This village will be a benchmark for the success of Bulukumba Regency as one of the pioneers in the emergence of similar regional regulations that are now imitated by many other regions. These villages have become a special area for the full implementation of the Sharia regional regulations implemented in Bulukumba Regency. Later, the implementation of Sharia in the pilot project villages has outperformed the regulations of the District and Province. Some villages apply the *hudud* criminal act. Padang village, Gantarang sub-district, For example, stipulates "Village Regulation" consisting of rules regarding adultery (100 times canning), *qadzaf* or accusing adultery (80 times canning or delegated to the police), liquor (40 times canning), and criminal *qishas* (equal retaliation) for the acts of physical torture or killing.

The measures that were taken by the Bulukumba Regency attract other regencies in South Sulawesi, such as Pangkep, Gowa, Wajo. These regions seemed to compete in establishing Sharia regional regulations. Later, South Sulawesi, with its famous figure 'Kahar Muzakar' is no longer leading in this phenomenon. Similar trends also developed in the provinces of Banten and Riau and several cities/regency, such as Cianjur, Tasikmalaya, Pamekasan, Mataram, and Dompu.

### **The experiments of Sharia regional regulations in Bulukumba also faced some challenges**

- 8 Chris Chaplin, 'Islam, Politics and Change. The Indonesian Experience after the Fall of Suharto, Edited by Kees van Dijk and Nico J.G. Kaptein' (2016) 172 *Bijdragen tot de taal-, land- en volkenkunde / Journal of the Humanities and Social Sciences of Southeast Asia* 387.
- 9 Nyak Fadlullah, 'Metode Perumusan Qanun Jinayah Aceh : Kajian Terhadap Pasal 33 Tentang Zina' (2017) 7 in *Right (Jurnal Agama dan Hak Azazi Manusia )* 16; Rusjdi Ali muhammad, 'The Role of Wilayat Al-Hisbah In the Implementation of Islamic Shariah in Aceh' (2017) 2 *Petita : Jurnal Kajian Ilmu Hukum dan Syariah*; Michael Buehler, 'Shari'a and Social Engineering: The Implementation of Islamic Law in Contemporary Aceh, Indonesia by R. Michael Feener' [2014] *Indonesia*; Ratno Lukito, 'Shariah And The Politics Of Pluralism In Indonesia: Understanding State's Rational Approach To Adat And Islamic Law' (2019) Volume 4 *Petita : Jurnal Kajian Ilmu Hukum dan Syariah*; A Hami Sarong, 'The Child Rights in Islamic Law with a Special Focus on Aceh' (2019) 4 *Petita : Jurnal Kajian Ilmu Hukum dan Syariah* 31; Azmi, 'Sekularisme Hukum Dalam Frame Timur Dan Barat' (2017) 2 *Petita : Jurnal Kajian Ilmu Hukum dan Syariah*. known also as sharia police in Aceh, plays important roles in implementing Islamic law in Aceh - Indonesia. In one hand they must act professionally based on Islamic principles, unfortunately their future career is still unclear. In national level there are no clear regulations mentioning the WH career path. This consequence lead to the professionalism of WH. Most of them will switch their career to another career, having clear future career. For the time being, in WH office will hard to get higher position. In national level, the career of WH does not have a stepping stone. Thus, most of government officer will chase other positions after five years. This fact have affected the implementation sharia law in Aceh Indonesia, caused by lack of WH officer in every years. Abstrak: Wilayat al-Hisbah (WH)

because some of these regulations tend to be “too far” and is difficult to track its normative roots in Sharia. For example, regional regulations regulating the obligations to be able to read and write the Quran as a prerequisite condition for marriage. This regional regulation certainly has no basis in any *fiqh* (Islamic jurisprudence). The Quran, hadith, and *fiqh* books never require this. It seems that negative impacts of this regulation are not taken into account, such as couples are forced to postpone marriage due to the wait for passing the Quran reading course. Another example is eloping for marriage in the other village or districts. Moreover, if the morality of the Sharia enforcement personnel is uneven, it will turn out that the morality of the existing personnel remains the same as the current ones. Fraud cases will likely rise, such as a fake Quran reading certificate, selling-buying license, and a bribery transaction involving the public and the authorities.

Aceh's experience can be a valuable lesson for both the proponents and opponents of the Sharia. To date, in Aceh, there are some dissatisfaction and disappointment over the enactment of various *Qanun* concerning the implementation of Sharia.<sup>10</sup> Generally, the dissatisfaction comes from intellectuals. They regret that the resulting Qanun deals more with pure *ubudiyah* (*mahdhah*), such as Friday prayers, headscarves, reading the Quran and the like.

### **Sharia Regional Regulations: Further Step of the Positivation of Sharia**

The phenomenon of the Sharia regional regulations is a further development of the positivation of Sharia. This effort is reasonable or even necessary. The majority of Indonesian Muslims can use the legitimacy of collective rights to self-determination with their Islamic identity, including in terms of applying Sharia as long as it does not violate the legitimacy of individual rights and collective rights of others, both within and outside the Islamic community. However, the principle of *resiprositas universal* must be maintained. This principle requires a person or a community to treat another person as he wants to be treated. Hence, in claiming and using individual and collective rights in the institutionalization of Islamic law (read: Positivation), Muslims must recognize and guarantee the same rights for others.<sup>11</sup>

Positivation of Islamic law through Sharia legislation of private or family laws as manifested in Law Number 1 of 1974, Law Number 7 of 1989 and Presidential Instruction Number 1 of 1991 (KHI), can successfully be pursued because these legal sectors relatively do not interfere with individual and collective rights of other parties. It will certainly be a different scenario if the positivation efforts involve the public law, for example, concerning constitutionalism, criminal law, international relations and human rights. The positivation of Islamic law in these areas will certainly lead to more complex consequences and problems because they are always directly related to individual and collective rights of other parties (non-Muslims).

The survey results conducted by *Pusat Pengkajian Islam dan Masyarakat* (PPIM) or the Center for Islamic and Community Studies of UIN Jakarta, that was reported by Tempo magazine on December 29, 2002, are interesting to observe. Based on a survey conducted

10 Muhammad Siddiq Armia, 'Public Caning: Should It Be Maintained or Eliminated? (A Reflection of Implementation Sharia Law in Indonesia)' [2019] Qudus International Journal of Islamic Studies; Jajat Burhanudin, 'History, Authority, And Power: A Case of Religious Violence in Aceh' (2014) 8 Journal Of Indonesian Islam 112 <<http://jiis.uinsby.ac.id/index.php/JIIs/article/view/146>>.

11 Ratno Lukito (n 6); Clark B Lombardi and others, '*Islamic Law and Islamic Legal Professionals in Southeast Asia*' [2018] SSRN Electronic Journal; Ratno Lukito, *Legal Pluralism in Indonesia: Bridging the Unbridgeable* (Routledge 2013); Khaled Abou El Fadl, Ahmad Atif Ahmad and Said Fares Hassan, *Routledge Handbook of Islamic Law* (2019); Jasser Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law* (International Institute of Islamic Thought 2008) <<http://www.jstor.org/stable/10.2307/j.ctvkc67tg>>.

in 2001, 57.8% of respondents stated that a Sharia-based government is the best for Indonesia. In 2002, the survey results increased, where 67% of respondents a Sharia-based government is the best for Indonesia. Besides, 61.4% of respondents agreed to the government requiring the implementation of Sharia in the 2001 survey and 71% in the 2002 survey. These figures indicate that the enormous support and commitment of the Islamic community towards Sharia. At this point, the sociological justification for the idea of applying Sharia is very apparent.

However, in the case of the implementation of the cutting off hands law, the results of the 2001 survey showed that only 28.9% of the respondents agreed, while only 33% of respondents agreed in 2002 survey. Based on these data, we can conclude that the crucial problem is not whether Indonesian Muslim communities commit Sharia. This commitment has become a “shared sentiment” (borrowing the term of An-Na’im) the majority of Muslims.<sup>12</sup> So, the problem is rather how to demonstrate and implement that commitment in real policy in our national legal scheme. As in the case of the Islamic political system, Michael C. Hudson concluded that the question is not the dichotomy of “Is Islam compatible with political developments?”, but rather “to what extent and what kind of Islam is appropriate to (or treated for) political developments in the Islamic world nowadays?”<sup>13</sup>. In line with this, in the case of the Islamic law implementation, the crucial problem is not in agreeing or not with the implementation of Islamic law, but what kind of Islamic law will be applied. If the Islamic law in question is the one formulated in classic and regressive oriented *fiqh* books, such as the application of the cutting off hands law, the support will be very limited. Is the formulation of Sharia to be positivated is the one as offered by Ulil Abshar, or the one proposed by KH. Athian Ali (FUUI) who easily issues death penalty fatwas due to the different opinions in understanding Islam?. Is the Sharia to be positivated is the one believed by activists of the Liberal Islamic Network (JIL), or the one by the *Lasykar Jihad* activists, *Majlis Mujahidin* Indonesia or other “fundamentalist” Islamic groups?. Or is it the one that has experienced the process of indigenization (the term used by Gus Dur) and re-actualization (the term used by Munawir Sadzali) or is the one originated from the Arabian Peninsula fourteen centuries ago?. These questions are crucial problems.

Regarding this issue, Mahathir Mohammad presented an interesting note at the International Seminar on the Administration of Islamic Law. He argued that Islamic law to be enacted must reflect the value of justice and equality. The persistence of fanatically holding on the legal formulation of the products by past jurists can only be justified if the formulation can realize the principle of real justice. If a certain penalty or punishment are seen as unfair, it cannot be defended by saying “even though it seems unfair, in reality, that is what is considered fair in Islam”. If the product does not reflect a sense of community justice, it should be reviewed based on the Quran and *Sunnah* (the way of the prophet). All the flexibility offered by the Quran must be explored to seek for justice because the foundation of all Islamic law and teachings is to realize justice.

If Islamic law will be applied, the interpretation of the principle of justice and sanctions as well as the procedural formulation must be tested thoroughly. It is obligatory to return to the Quran and *Sunnah*. However, changes in the formulation of Islamic law, especially on criminal law, based on new perceptions about the principle of justice and new social

12 Abdullahi An-Naim, ‘The Politics of Religion and the Morality of Globalization’ in Mark Juergensmeyer (ed), *Religion in Global Civil Society* (Oxford University Press 2005).

13 Michael C Hudson, ‘Islam and Political Development’ in John L. Esposito (ed), *Islam and Development: Religion and Sociopolitical Change* (Syracuse University Press 1980), 7.



problems cannot be ignored.<sup>14</sup> This means that the positivation of Islamic law always involves choices of approach, especially in the formulation and re-embodiment of Islamic law from its main sources, i.e. Quran and *Sunnah*. Several countries applying Sharia using a formalistic, textual, monolithic and regressive legal approach, such as Afghanistan, have failed. Learning from these experiences, we need to enrich the approaches to be more morally substantive, transformative, contextual and progressive in the context of national law development. Hence, progressive new approaches of contemporary thinkers in reformulating Islamic law, such as Fazlur Rahman, Abdullahi Ahmed An-Na'im, Nashr Abu Zayd, should be considered as alternatives.

One of the major concerns of the Sharia regional regulations opponents, including non-Muslims, is the possibility of its ultimate goal, namely the establishment of an Islamic State. Arskal Salim<sup>15</sup>, a PhD candidate of Islamic law from the University of Melbourne, Australia, has designed the five levels of Sharia implementation before reaching the agenda of the Islamic state. First, family law (marriage, divorce, and inheritance). Second, economic and financial problems, such as Islamic banking and *zakat*. Third, the practice of religious rituals, such as the headscarf obligation, and the prohibition of alcohol and gambling. Fourth, Islamic criminal law, especially the implementation of the canning, cutting off hands and stoning. And fifth, the use of Islam as the basis of the state. The five levels are hierarchical from the lowest to the highest. Arskal argued that the demand for the five levels of Islamic law implementation implies the formation of an Islamic state. It means that the higher the level of demand, the closer it is to an Islamic state and vice versa.

In Indonesian context, the elements of the first to fourth levels have now been absorbed in national legislation. Family law, since 1974, has been manifested in Law Number 1 of 1974 and Presidential Instruction Number 1 of 1991 concerning Compilation of Islamic Law (KHI). Islamic banking has had a legal umbrella since 1992. Furthermore, Religious rituals, such as pilgrimage, *zakat*, *wakaf* (endowment), and Islamic dressing have included in law and regional regulations. Whereas, Islamic crimes have been adopted in some *Qanun* in Aceh and village regulations in Bulukumba. Only the fifth level failed during the 1995 Constituent Assembly. Does this mean that the realization of an Islamic state is just one step away? Arskal argued that it is not. He considered that the fourth level of Sharia application has not been successful yet because the principles of *hudud* and *qishash* in the *Quran* and *Hadith* have not been practiced. The thieves should have punished by cutting off hands, and adulterers and drunks should be canned 100 and 80 times respectively. In reality, Arskal argued that if an adulterer is only fined or imprisoned, it is not classified as *hudud*, but *ta'zir* (sanctions are made by the authorities for coaching purposes). As long as *hudud* and *qishash* have not been embodied in the law and more *ta'zir* are applied; it means the transition from the third to the fourth level. In other words, the Islamic state is

14 'Mahathir Mohamad, "Pidato Perdana Menteri" at the International Seminar On the Administration of Islamic Laws, Kuala Lumpur: IKIM, 23 July, Pp.15-17'; Mark Bratton, 'Shari'a Law and Modern Muslim Ethics' [2018] *Journal of Contemporary Religion*; Mohd.Hisham Mohd.Kamal, 'Human Rights Perspectives on Issues in the Implementation of Islamic Criminal Law In Malaysia' (2019) vol 4 *Petita : Jurnal Kajian Ilmu Hukum dan Syariah* 69; Farid Sufian Shuaib, 'Administration of Islamic Law and Human Rights: The Basis and Its Trajectory in Malaysia' (2018) 56 *Al-Jami'ah*; Tamir Moustafa, 'The Secular Roots of Islamic Law in Malaysia', *Constituting Religion* (Cambridge University Press 2018); Clark B Lombardi and others, 'Islamic Law and Islamic Legal Professionals in Southeast Asia' [2018] *SSRN Electronic Journal*.

15 'Http://Www.Gatra.Com/Versi\_cetak.Php?Id=94078'; Arskal Salim, *Contemporary Islamic Law in Indonesia: Sharia and Legal Pluralism* (2015); Bowen and Salim (n 4). Azyumardi Azra, *Indonesia Islam and Democracy: Dynamics in a Global Context* (The Asia Foundation, Solstice, dan ICIP 2006); John R Bowen, 'The Transformation of an Indonesian Property System: Adat, Islam, and Social Change in the Gayo Highlands' (1988) 15 *American Ethnologist* 274 <<http://doi.wiley.com/10.1525/ae.1988.15.2.02a00050>>.

still quite far away.<sup>16</sup>

Do we agree with Arskal?. What will happen to the Sharia regional regulations? Who will win the political and ideological struggle around the Sharia law?. Only time will prove. Certainly, I see that both the Muslim proponents and opponents of the Sharia regional have a similar argument, that is to elevate the "Sharia dignity", even though, in different means. We agree that in religion, we are required to realize certain values in life. The embodiment of these values can be achieved in many ways. Not necessarily by *fiqh*, even though *fiqh* may be one of the "springs that never dry" to be drained in realizing these needs. However, it should be emphasized that it is not the only method, because often the strictness upon legal formalism actually destroys the values to be realized.

### Conclusion

The characters of religious values are varying, including sharia law. Some may need needs to be formulated as positive law. Some do not, but they are enough to be internalized as an inner guideline, or a kind of social ethics held together that the fidelity of their application is left entirely to the awareness of the person concerned. Whereas, the corrections of their violations are handled by others in a social mechanism (relatives, neighbors, community), instead of a legal mechanism. I agree with this last perspective. However, I believe that the process of determining which religious values should be formalized in normative legalistic rules will also trigger a new "debate" that may be more exciting! Allah knows best.

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